THE

ALL INDIA REPORTER

1924

DONATED
BY
SHRI AMAR NATH RAINA
(1910-1990)
Former Advocate General,
Jammu and Kashmir.

ALLAHABAD SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS
OF THE ALLAHABAD HIGH COURT REPORTED IN

(1) I. L. R. 46 ALLAHABAD
(2) 22 ALLAHABAD LAW JOURNAL
(3) 5 LAW REPORTER, ALLAHABAD
(4) 75 to 82 INDIAN CASES.

WITH

MANY MORE EXTRA JUDGMENTS

CITATION : 1924 ALLAHABAD

PUBLISHED BY
V. V. CHITALE, B.A., LL.B.,
AT THE ALL INDIA REPORTER OFFICE,
NAGPUR, C. P.
1924

(*All Rights reserved.*)

PRINTED AT THE ALL INDIA REPORTER PRESS, NAGPUR, C. P.

To

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

[illegible]ERSITY
lo[illegible]
Acc. No. 177106
Dated 14-11-80

ALLAHABAD HIGH COURT

1924

Chief Justice :

The Hon'ble Sir Edward Grimwood Mears, Kt., Bar-at-Law.
" Mr. Cecil Henry Walsh, K.C., Bar-at-Law, M.A. (Oxon) J.P. (*Acting.*)

Puisne Judges :

The Hon'ble Sir Theodore Caro Piggott, Kt., J.P., I.C.S.
" Mr. Cecil Henry Walsh, K.C., Bar-at-Law, M.A., (Oxon.) J.P.
" " Alfred Edward Ryves, B.A., Bar-at-Law.
" " Benjamin Lindsay, J.P., I.C.S.
" " Louis Stuart, C.I.E., J.P., I.C.S.
" Dr. Shah Muhammad Sulaiman, M.A., LL.D., Bar-at-Law.
" Mr. Kanhaiya Lal, M.A., LL.B., (Rai Bahadur).
" " Lal Gopal Mukherji, B.A., B.L.
" " Sydney Reginald Daniels, B.A., Bar-at-Law, I.C.S. (*Offg.*)
" " Barjor Jamshedji Dalal, I.C.S. (*Offg.*)
" " Guy Ponsonby Boys, Bar-at-Law, (*Offg.*)
" " Everard Reginald Neave, I.C.S. (*Offg.*)

EDITORIAL COMMITTEE

DEWAN BAHADUR G. S. RAO, *Ex-Judge, High Court, Bombay.*
DR. SUDISH CHANDRA ROY, M.A., LL.B., Ph.D., *Bar-at-Law, Calcutta.*
MR. V. C. SESHACHARI, B.A., B.L., *High Court Vakil, Madras.*
RAO BAHADUR V. R. PANDIT, *Bar-at-Law, Nagpur.*
MR. V. V. CHITALE, B.A., LL.B., *High Court Pleader, Nagpur.*

EDITORIAL STAFF

MR. S. G. GADGIL, B.A., LL.B., *High Court Vakil, Bombay.*
MR. G. B. JOSHI, B.A., LL.B., *Pleader, Nagpur.*
MR. D. D. DATAR, B. Sc., LL.B., *Nagpur.*
MR. S. APPU RAO, B.A., B.L., *Nagpur.*

REPORTERS

Privy Council

(1) Dr. A. Majid, LL. D., *Bar-at-Law, London.*

Allahabad

(2) Saila Nath Mukerji, B.A., B.L., *Vakil, High Court, Allahabad.*

Bombay

(3) B. K. Desai, M.A., LL.B., *Advocate, High Court, Bombay.*
(4) S. C. Joshi, M.A., LL.B., *Advocate, High Court, Bombay.*
(5) B. D. Mehta, B.A., LL.B., *Vakil, High Court, Bombay.*

Calcutta

(6) Dr. Pramatha Nath Banerjee, M.A., B.L., Ph.D., *Vakil, High Court, Calcutta.*
(7) Narain Chandra Kar, B.L., *Vakil, High Court, Calcutta.*

Lahore

(8) Amolak Ram Kapur, B.A. (Hons.), LL.B., *Vakil, High Court, Lahore.*
(9) Kedar Nath Chopra, B.Sc., LL.B., *Vakil, High Court, Lahore.*

Madras

(10) P. R. Srinivasa Aiyangar, M.A., B.L., *Vakil, High Court, Madras.*
(11) N. Srinivasa Iyengar, M.A., B.L., *Vakil, High Court, Madras.*

Nagpur

(12) M. Bhawani Shankar Niyogi, M.A., LL.M., *High Court Pleader, Nagpur.*
(13) K. V. Deoskar, B.A., B.L., *High Court Pleader, Nagpur.*

Oudh

(14) Surendra Nath Roy, M.A., LL.B., *Vakil, Lucknow.*

Patna

(15) Subal Chandra Muzumdar, M.A., B.L., *Vakil, High Court, Patna.*
(16) Laxmidhar Mahanty, B.A., B.L., *Vakil, Circuit Court, Cuttack.*

Rangoon

(17) A. J. Robertson, *Bar-at-Law, Rangoon.*

Sind

(18) P. K. Vaswani, LL.B., *Bar-at-Law, Karachi.*
(19) Kishinchand Wadhumal, B.A., LL.B., *Pleader, Karachi.*

THE ALL INDIA REPORTER

1924

ALLAHABAD HIGH COURT

NOMINAL INDEX.

Absence of Star denotes Cases of Provincial or Small Importance.

** Indicates Cases of Great Importance.*

oo Indicates Cases of Very Great Importance.

FULL BENCH.

*Alkhu Rai v. Lachhman Upadhiya 324
*Atma Ram v. Emperor 338
*Dwarka Prasad Mithal, *In the matter of* 253
oo Gajadhar v. Jagannath 551
*Govind Ram v. Kunj Behari Lal 341
oo Majju v. Lachman Prasad 535
ooMubaraq Husain v. Ahmad 328
Muhammad Jan v. Shiam Lal 218
*Randhir Singh v. Rajpal Misir 321
*Sardara v. Emperor 220
*Sheo Ghulam v. Salik Ram 481
ooSobha Ram v. Tursi Ram 495

OTHER CASES.

A

*Abbul Hasan v. Fida Husain 473
Abdul Gafoor Khan v. Akram Hasan 747
oo Abdullah v. Emperor 233
oo Abdullah Beg v. Ramzan Khan 173
Abdul Rahim v. Abdul Rahim 851
*Abdul Rahman Khan v. Md. Ayyub Khan 806
*Abdul Rashid Khan v. Nisar Mahomed Khan 143
*Abdul Shakur v. Muhammad Matin 307
*Abdul Wahid Khan v. Abdullah Khan 1
Abdur Rashid v. Qudrat-un-nissa Bibi 713
Adya Saran v. Jagannath 561
Aftab Begam v. Abdul Majid Khan 800
*Aftab Begam v. Mahomed Ayub 65
*Ahmadullah v. Abdul Rahim 26
Aidal Singh v. Gyan Singh 615
*Aisha Bibi v. Chhajju Mal 148
oo Aisha Bibi v. Mahfuz-un-nissa 362
*Akhey Ram v. Basant Lal 860
Ali Ahmad v. Kishan Prasad 303
Ali Ahmad Khan v. Emperor 214
*Ali Husain v. Mazahir Husain 477
Alim-ud-din v. Emperor 569
*Allah Dia v. Rahimuddin 520
*Altafan, Mt. v. Ibrahim 116
*Ambika Prasad Singh v. Ram Kishen Barnawar 923
*Amla Nand v. Nandu 318
Amrit Bibi, Mt. v. Mustafa Hussain 20
*Anandi, Mt. v. Nand Lal 575
*Anantoo Kalwar v. Ram Prasad 465
Angnoo v. Emperor 188
Anis Beg v. Emperor 215
Ata Hussain v. Ramman Lal 710
Auseri Lal v. Mullhan 557
*Aziz Ahmad v. Budhu Khan 183

B

*Babban Panday v Lachhman Chaudhri 371
Babu Lal v. Municipal Board, Farrukhabad 157
*Babu Ram v. Mt. Kokla 391
Babu Ram v. Yasin 880
Badlu Shah v. Emperor 454
Bageshar Rai v. Mt. Mahadei 461

*Baij Nath v. Panna Lal 706
Baijnath v. Ram Bilas 738
*Baijnath Rai v. Gokul Rai 37
Baijnath Singh v. Chandrapal Singh 795
Bajrangi Singh v. Sheo Barat 841
Bakshi v. Emperor 187
*Baldeo Misir v. Ramlagan Shukul 82
*Baldeo Prasad v. Fateh Singh 933
Baldeo Prasad v. Ram Autar 865
*Balgobind Pandit v. Sheo Kumar 818
Balkaran Lal v. Malik Namdar 873
Ballo, Mt. v. Ram Kishan 49
Balwant Singh v. Laiqa Begam 273
Balwant Singh v. Mare Singh 52
oo Bandhu v. Emperor 662
*Bansi v. Lakshmi Das 76
Bansidhar v. Babu Lal 12
Bansolochan Rai v. Jagarnath Lal 838
Baru Mal v. Sunder Lal 10
Basanti, Mt. v. Maqsud Ali Khan 528
Basdeo Pande v. Mohan Pande 865
*Basdeo Rai v. Jhagru Rai 400
Basu v. Mt. Nanhi 920
Batka, Mt. v. Mt. Sitman 527
Behari v. Emperor 670
Behari Lal v. Amin Chand 918
*Behari Lal v. James Maclean 392
*Behari Lal v. Shib Lal 591
Behari Lal v. Shiv Narain 884
*Behari Singh v. Emperor 676
Benaik Rao v. Putain Singh 929
Bengal North Western Ry. v. Munna Lal Bishambhar Nath 760
Beni Madho Tewari v. Ram Sunder 859
Beni Prasad v. Sheodin 425
*Bhagelu v. Mt. Dharma 79
Bhagwan Das v. Mt. Mahmud Bano 183
*Bhagwan Das v. Sukhdeo Korie 812
Bhagwati Shukul v. Ram Jatan Tewari 23
*Bhairo Tewari v. Ramnath Rai 60
Bharos Ahir v. Emperor 192
Bhaun Pratap Singh v. Bhagwan Singh 922
*Bhawani Prosad Misir v. Ram Sunder 911
Bhawani Singh v. Makhan Lal 791
*Bhim Singh v. Ram Singh 309
Bholai Pandey v. Khiali Pandey 456
Bhullan Singh v. Khushi Ram 229
Bidiya Misir v. Daryai Kuar 678
*Bijadhar Bhagat v. Jeat Chamar 518
Bijai Bahadur v. Parmeshwari Ram 834
oo Bindeshwari Prasad v. Hanuman Prasad 445
*Bindhiachal Rai v. Sita Ram Misir 292
oo Bisal Singh v. Roshan Lal 373
* Bishambhar Nath v. Md. Ubaidullah 559
Bishunath Ojha v. Sheo Pragash 842
Bishun Narain v. Mt. Ramji 127
Bombay Baroda and Central India Railway Co. v. Budh Sen Pushp Chand 180
*Bose, S. M. v. Emperor 314
* Brij Ballabh Das v. Mahabir Prasad 529
Brij Behari Lal v. Emperor 209
Brij Bhushan Lal v. Municipal Board of Kanauj 567
Bu Ali Khan v. Sujan Koer 66
*Buddhoo v. Sheo Charan 875

C

Chambi, Mt. v. Tara Chand 892
Champa Kunwar v. Tulsi Ram 921
*Chandar Sahai v. Durga Prasad 682
*Chandradip Tewari v. Jadunandan Singh 573
*Chandrika Ram Tewari v. Narain Prasad 745
oo Chandrika Singh v. Bhagwat Singh 170
Chandu Lal v. Emperor 186
Cheda Singh v. Emperor 766
Chedda v. Achha Singh 572
Chedi v. Ram Lal 224
*Chetan Singh v. Sartaj Singh 908
Chet Ram v. Sita Ram 678
Chhajju v. Jhabba 293
Chhammu Lal v. Bhajan Lal 47
Chhiddu v. Desraj 294
*Chhote Lal v. Kedar Nath 703
Chhuttan v. Jwala Prasad 64
Chiranji Lal v. Syed Ilias Ali 751
Chiraunji Lal v. Ganga Sahai 811
Chob Singh v. Daryai Singh 915
*Chunni Lal v. Baldeo 84

D

*Dalganjan v. Emperor 696
Damri v. Emperor 676
Darbari Lal v. Gobind Saran 902
*Darbari Singh v. Emperor 451
*Day, W. S , Vakil, Agra, *In the matter of* 565
Daya Ram v. Thakuri 668
*Debi Prasad v. Emperor 674
Debi Prasad v. Kamta Prasad 793
*Debi Ram v. Emperor 675
Devi Prasad v. Secretary of State 68
Dhannu Hajam v. Mt. Piari 836
Dhanraj Misir v. Rameshwar Misir 227
*Dhanraj Rai v. Ram Naresh Rai 912
*Dildar v. Shukr-ullah 444
Dukhi v. Emperor 141
Durga Kunwar v. Chunna Kunwar 862
oo Durga Prasad Sahu v. Tameshar Prasad 897
*Durga Prosad v. Lachmi Narain 394
Dwarka Das v. Shah Durga Prasad 752

Dwarka Das-Ajodhya Prasad v. Lachmi Narain-Girdhari Lal 129
*Dwarka Dhish Prasad v. Kesho Prasad 398

E

East Indian Ry. Co. v. Firm Gope Krishna Kashi Prasad 8
*East Indian Ry. Co. v. Firm Kishin Lal Tirkhamal 7
*East Indian Ry. Co. v. Janki Prasad 605
*East Indian Ry. Co. v. Sri Ram-Mahadeo 177
Emperor v. Aladin 215
Emperor v. Baldeo Prasad 770
ooEmperor v. Banarsi 381
Emperor v. Bidha 319
Emperor v. Chatter Singh 267
*Emperor v. Kishen Lal 645
Emperor v. Mukhtara 783
Emperor v. Panna Lal 411
Emperor v. Ram Jatan 185
Emperor v. Ram Narain 675
Emperor v. Sheo Baran Singh 438

F

Faiz Bibi v. Qudrat Ullah 935
*Fakirchand v. Nanug Ram 277
Fateh Chand v. Murari Lal 906
*Fatima Bibi v. Abdul Ghaffar Khan 743

G

*Gadodia & Co. v. G.I.P. Ry. Co. 254
*Gajraj Singh v. Sri Radha Ramji 260
*Gajraj Tewari v. Bhagirathi Pande 95
Ganesh v. Emperor 776
Ganesh Das v. Suraj Pal Singh 537
Ganesh Din v. Lachman Singh 147
*Ganeshji Maharaj v. Lalta Prasad 801
Ganesh Singh v. Jai Mangal Singh 723
Ganga Dei, Mt. v. Sukhdeo Prasad 612
*Ganga Prasad v. Ganeshi Lal 161
Ganga Sahai v. Emperor 763
Ganpat Lal v. Emperor 664
Gat Ashram Narainji v. Jaishth Madho 504
Gauri Shankar v. Manki Kunwar 17
*Gauri Shankar v. Mithai 750
Gauri Shankar v. Sheo Nandan 543
Gayan Singh v. Babu Lal 86
*Gaya Pande v. Amar Deo Pande 787
*Gaya Singh v. Surajbali Singh 832
*Ghanram Rai v. Emperor 453
ooGhariba v. Emperor 269
Ghasi Ram v. Bhola Nath 153
Ghulam Hussain v. Emperor 78
*Girdhar Das v. Emperor 77
Girwar Singh v. Ram Piari Kuer 909
Gobind Ram v. Emperor 558
*Gobind Ram v. Mt. Ram Koer 522
Gobind Singh v. Bhirgunath Singh 788
*Gokul v. Emperor 667
Gopal Das v. Gauri Shanker 122
*Gopal Rai-Phul Chand v. G. I. P. Railway 621
Govind Prasad v. Kundan 112
*Govind Prasad v. Ram Das Dusadh 666
Govind Ram, *In re* 618
*Govind Ram v. Naubat 762
Gulab v. Bhagwan Das 229
Gupta Nand v. Bihari Lal 100
*Gur Prasad Mukerji v. Bishunlal 816

H

Habib Khan v. Fida Hussain Khan 270
Habibul Razak v. Emperor 197
*Hanuman Prasad v. Raghunath Prasad 715
Happoo Mal v. Emperor 568
Harbans v. Emperor 778
Hardial v. Alam 459
Hargobind Singh v. Hukum Chand 94
*Harpal Kurmi v. Mohan Kurmi 844
Har Prasad v. Raghubar Dayal 62
*Har Prasad v. Ram Sarup-Radha Kishen 872
Har Sarup v. Brijnandan Lal 479
Hawal Rai v. Har Prasad Rai 57
*Himanchal Singh v. Jatwar Singh 570
Hira Lal v. Emperor 765
Hira Lal v. Hoti Lal 720
ooHira Lal v. Khairati Lal 360
ooHunter, H. v. Damodar Das 772
Husain Bhai v. Beltu Shah Gilam 808

I

*Iftikhar Ullah v. Banke Lal 104
Iman Ali v. Emperor 435
*Inayat Elahi v. Hardeo Sahai 29
*Ish Dat Tewari v. Tameshar 916
*Ishdat Tiwari v. Tameshwar Tiwari 175
Ish Narain Upadhia v. Rameshar Lohar 433
Islam Fatima v. Tamiz Ali 938
Ismail Hasan v. Mahdi Hasan 881

J

Jadubir v. Gajadhar 169
Jafar Husain v. Emperor 306
*Jagannath Prasad v. East Indian Ry. Co. 521
Jageshwar Pande v. Deo Dat Pande 51
Jagmohan Prasad v. Brijendra Bahadur 523
*Jamaluddin v. Emperor 164
Jamna Prasad v. Emperor 128
Jan Bibi v. Batulan Bibi 729
Jarbhandhan v. Badri Narain 80

*Jaswant Singh v. Emperor 317
ooJawahir Lal v. Jaran Lal 350
*Jhandoo Singh v. Emperor 142
Jhari Koeri v. Bijai Singh 109
Joti Prasad v. Durga Prasad 461
Jwala Prasad v. Emperor 101
*Jwala Prasad v. Hoti Lal 711

K

*Kali Charan v. Mt. Peare 740
Kallu v. Ganga Ram 508
*Kallu Shah v. Raheem Baksh 825
Kamlapat Dubey v. Ram Raj 103
Kamla Pati v. Emperor 539
*Kandhaiya Ojha v. Mt. Jagrani Kuer 597
*Kanhai Lal v. Emperor 578
Kanhaiya v. Kanhaiya Lal 376
ooKanhaiya Lal v. Mt. Azmatunnisa 840
Kanhaiya Lal v. Narain Singh 422
ooKanhiya Lal v. Ashraf Khan 355
*Kapur Chand v. Kanhaiya Lal 34
Karamat v. Wazir Hussain 542
Karan Singh v. Dal Chand 159
Karim Baksh v. Wahaj-ud-din 427
*Kashi Nath v. Emperor 69
ooKashi Ram v. Emperor 779
Kashmiri Lal v. Kishen Dei 563
Kedar Nath v. Jagannath Singh 879
ooKedar Nath v. Shankar Lal 514
*Kedar Nath-Durga Prasad v. Bishwanath Lakshmi Chand 510
Keshab Deo v. Emperor 320
Kesho Dass v. Hanuman Panday 53
*Kesri Singh v. Channo 837
Khairuddin v. Sahu Gulab Das 102
Khalbal v. Mahomed Yusuf 616
Khanjan v. Emperor 781
Khatoon Bibi v. Nazir 815
Khub Chand v. Todar Mal 813
Khub Singh v. Mohan Singh 476
*Khudaijatul Kubra, Mt. v. Mt. Amina Khatun 388
*Kidar Nath v. Nanak 162
Kirpa Kishen Kishori v. Babu Lal 225
ooKishori Ramanji v. Duley Ram 474
Kishun Dayal Sahi v. Ravi Pratap Narain Singh 908
Kishun Singh v. Emperor 455
Krishna Misir v. Dwarka Pandey 876
Kundan Lal v. Basant Rai 935
*Kundan Lal v. Jagat Ram 927
*Kundan Lal v. Makundi Kunwar 150
Kundan Lal v. Parshadi 744
Kunj Behari Lal v. Abdul Hadi 613
*Kunti, Mt. v. Gajraj Tewari 826

L

Lachhman v. Emperor 413
Lachman v. Emperor 212
Lachman Pande v. Tribeni Sahu 719
*Lachmi Narain v. Mt. Brij Rani 794
Lagan Rai v. Raja Rai 507
*Lakhan v. Emperor 511
Lakhi, Mt. v. Murat Tiwari 843
Lakshmi Narain v. Sumarni Kuar 731
Lalchand v. Ram Chand 753
*Lalla Mal Hardeo Das Cotton Spinning Mills Co., *In the matter of* 137
Lallu Mal v. Reoti Ram 70
Lallu Ram v. Emperor 194
Lalsa Rai v. Udit Rai 717
*Lalta Prasad v. Darshan Singh 149

M

Madho Singh v. Mangal Singh 536
*Mahabir v. Manohar Singh 540
Mahabir Prasad v. Kanhaiya Lal 99
ooMahabir Prosad v. Amla Prasad Rai 379
Mahabir Singh v. Matabadal Singh 735
Mahadei, Mt. v. Jagannath Das 313
Mahadeo Prasad v. Emperor 131
Mahadeo Rai v. Emperor 201
*Mahalakshimi Bai v. Badan Singh 105
*Maharaj Prasad v. Emperor 83
Mahomed Afzal v. Maulvi Muhammad 28
Mahomed Ali v. Sultan Ahmad 123
ooMahomed Ashiq Ali v. Mt. Hajra Bibi 690
Mahomed Baksh v. Abdul Baqi Khan 135
Mahomed Ismail v. Emperor 195
Mahomed Nazeer v. Mahomed Sulaiman 603
Mahomed Said v. Bishambhar Nath 156
*Mahomed Shafi v. Bindeshri Saran 443
Mahomed Yaqub Ali v. Emperor 130
Mahomed Zain Khan v. Nurul Hassan Khan 113
*Mahrana Kunwar v. E. V. David 40
Mahtab Kuer v. Mt. Birhmo 176
*Makhan Lal v. Bihari Lal 571
Mangan Lal v. G. I. P. Ry. Co. 849
Manni v. Emperor 764
Manni Lal v. Mt. Rani 534
Man Singh v. Madho Singh 430
*Man Singh v. Ram Nath 828
Maqsud Hussain v. Emperor 9
Mata Ghulam v. Sheo Mangal 460
Mathura Prasad v. Anandi Kunwar 63
*Mathura Prasad v. B. B. & C. I. Ry. Co. 691
Mathura Ram v. Baldeo Ram 800
ooMeghraj v. Krishna Chandra 365
Megi Mal v. Hira Lal 761
ooMehi Lal v. Ramji Das 792
*Mirza Mahomed Jan v. Shaikh Fazl Uddin 657

*Mithu Lal v. Sri Lal 126
Moazzam Ali v. Raza Ali 818
*Mohan v. Bishambhar Sahai 450
*Mohan Lal v. Emperor 665
*Mohan Lal v. Prasadi Lal 11
*Moti Lal v. Agent, O R. Railway 617
Moti Ram v. Kunwar Mahammad 414
*Mubarak-un-nissa v. Md. Raza Khan 384
*Muhammad Nuh v. Brij Behari Lal 939
Muiz-ud-din v. Mahomed Ikhlaq 59
Mukarram Ali v. Mt. Anjuman-un-nissa 228
Mukat Singh v. Misra Paras Ram 726
ooMukerji, A. C. v. Municipal Board, Benares 467
*Mukhtar Ahmad v. Kabir Ahmad 856
ooMulani, Mt. v. Maula Baksh 370
Multan Singh v. Pudhan Man Singh 854
*Munesher Lal v. Amar Nath 493
*Munesbur Tewari v. Mahesha Koeri 165
*Municipal Board of Bareilly v. Hafiz Ala Baksh 669
*Musa v. Emperor 666
*Mushtaq Husain v. Emperor 673
Mutsaddi Lal v. Kharag Bahadur Singh 925

N

Nageshar Prasad v. Ram Haragh Pande 541
Naini Mal v. Emperor 189
Nandan Singh v. Guptar Singh 424
Nannhu v. Roshan Singh 121
ooNarain v. Ram Saran Das 871
*Narain Das v. Behari Kahar 724
*Narain Singh v. Chiranji Lal 730
Nasir Khan v. Itwari 144
Nathu v. Tulsi Ram 434
Nazir Ahmad v. Mahomed Sharif 682
Niamat Ullah v. Mt. Safutunnisa 160
Nihal Mahomed v. Emperor 200
Nohar Ahir v. Partab Ahir 231

O

Onkar v. Emperor 213

P

Padam Singh v. Umrao Singh 48
Palati Rai v. Emperor 564
Panna Lal v. Bohra Panna Lal 50
*Panna Lal v. Hussain Beg 167
*Parbhu Dayal v. Murli Dhar 867
Parbhu Lal v. Sheo Diyal Mal-Ram Saran Das 457
*Parshottam Saran v. Brahma Nand 297
Pateshwari Prasad v. Shaker Dayal 217
*Peare Lal-Gopi Nath v. E. I. Ry. Co. 574
ooPhulwanti Kunwar v. Janeshar Das 625
*Pitambar Lal v. Dodee Singh 503
*Piyare Lal v. Bed Ram 814
Prag Narain v. Mathura Prasad 740
Prashadi Lal v. Laiq Singh 107
Puran Singh v. Dat Ram 447
Putti Kunwar v. Janki Das 850
Puttoo Lal v. Emperor 316

Q

Qadir Baksh v. Abdul Haq 509
Qalandar Singh v. Mahomed Raza Khan 624

R

ooRadhakishan v. Kedar Nath 845
*Radhey Lal v. Mulchand 905
Radhika Nath Saha v. Jotish Chandra Sahu 71
Raghubar Dayal v. Secy. of State 415
*Raghunandan Prasad v. Ghulam Alauddin 689
*Raghunandan Ram Gopi Ram v. G.I.P. Ry. Co. 692
Raghunandan Singh v. Tulshi Singh 315
Raghunath v. Bindeshwari Nandan 526
Rajpatti v. Emperor 784
Rajroop Kuar v. Kandhya 785
*Ramachari v. Sadho Saran Tewari 869
*Ram Adhar Singh v. Ram Manohar 114
Ram Adhin v. Emperor 230
Ram Bharosay v. Sohan Lal 707
*Ram Chand v. Maula Baksh 178
*Ram Chander v. Mt. Bhagwati 937
*Ram Charan v. Bulaqi 854
*Ram Charan Lal v. Dharam Singh 444
Ram Das Rai v. Abdul Ghafur 146
Ram Dayal v. Emperor 214
Ram Din v. Emperor 437
*Rameshra, Mt. v. Kalpoo Rai 538
Ram Gobind Singh v. Lallu Singh 203
Ram Govind Pande v. Panna Lal 305
Ram Karan Singh v. Raja Ram 877
*Ram Kishen Rai v. Sheo Sagar Pandey 304
Ram Lal Singh v. Behari Singh 761
*Ram Narain v. Emperor 566
*Ram Naresh Singh v. Jagar Nath Singh 759
*Ram Nath v. Emperor 684
*Ram Prasad v. Mahabir 310
*Ram Sakhi Kuar v. Lachmi Narain 802
*Ram Sarup v. Hardeo 396
*Ram Sarup v. Mohan Lal 833
ooRam Sia v. Bua 790
Ram Sri, Mt. v. Sri Kishun 777
Rani v. Aidal Singh 431
*Rati Ram v. Burhmajit 302
Ravi Pratab Narain Singh v. Ram Prasad 125

ooRaza Khan v. Md. Askari Khan 599
*Rekha Chamar v. Emperor 664
Roshan Singh v. Emperor 592
Ruhul Amin v. Shankar Lal 54
*Rukka v. Chhiddu 464

S

ooSaheb Singh v. Girdhari Lal 24
Saheb Singh v. Indar Kumar 730
Sajid-un-nissa Bibi v. Hidayat Hussain 748
*Samar Bahadur v. Jit Lal 390
*Sankat Narayan v. Ram Bharos 677
*Sanmukh Pande v. Jagannath Pande 708
Santi Lal v. Raj Narain 119
ooSanti Lal v. Raj Narain 804
*Sanwal Das v. Collector of Etah 700
*Sarab Sukh Das v. Ram Prosad 357
Sarda Saran v. Emperor 209
Sarjo Kuar v. Sheikh Enait 271
Sarju Prasad v. Emperor 190
Sartaji, Mt. v. Ramjas 166
Satdhar v. Ramchandra 261
*Sat Narain v. Ram Autar 709
*Sat Narayan v. Sarju 265
*Satraj Singh v. Emperor 533
Secy. of State v. Radhey Lal 692
Shafi v. Emperor 211
Shahzad Singh v. Hanuman Rai 704
Shaikh Mudi v. Mohib Ali 746
*Sham Behari Lal v. Mt. Ram Kali 15
Shambhu Dayal v. Lallu Mal 256
*Shanker Lal v. Kirari Mal 81
Sharif Ahmad Alvee v. Muhammad 375
*Sheo Den Singh v. Habbi Ullah Khan 721
Sheo Kumar Pandey v. Nandan Dube 928
Sheo Nandan v. Balgobind 91
ooSheo Prakas v. Ala-ud-Din 579
Sheo Prasad v. Emperor 202
Sheo Prasad Dube v. Sarjee Mahto 449
Sheo Prasad Singh v. Mahangoo Nania 694
Sheo Ratan Singh v. Karan Singh 857
Sher Mahomed Khan v. Parbhu Lal 274
*Shib Prakash Joshi v. Jhinguria 446
Shiu Prasad Singh v. Muneshwar Dube 924
Siddiq Ali Khan v. Anwarul Hasan 98
Sidhari Ram v. Gargi Din 458
Sidh Nath Raut v. Jharbandhan Prasad 688
Sita Ram v. Emperor 186
ooSita Ram v. Govindi 593
*Sita Ram Singh v. Cheddi Singh 798
*Sitla Prasad v. Mt. Chameli 111
Sobhadhi Lal v. Gobind Singh 742
Sobha Ram v. Ram Prasad 910
Sohan Ahir v. Emperor 492
Sri Kantoo Singh v. Imdad Ali 944
*Sri Ram v. Mani Ram 97
Subedar v. Emperor 207
Subedar v. Jagat Narain 848
Sukhdeo Rai v. Ram Chander Rai 622
Sultan Baksh v. Abdul Hamed 134
Sultan Hussain v. Jwala 831
Sunder Lal v. Bhup Singh 466
*Superior Bank, Muzaffarnagar v. Budh Singh 698
Surajman Chaube v. Anjore Shukul 263
Suraj Narain v. Jang Bahadur 132
Surjan Singh v. Umari Singh 609

T

Taqi Husain Khan v. Dori 723
*Tara v. Emperor 72
*Tara Chand v. Jugul Kishore 686
*Tara Chand v. Mt. Champa 718
Tara Chand v. Murtaza Hussain 696
*Tarsu Beg v. Md. Yar Khan 296
Teja v. Tika Ram 225
*Tika Ram v. Daulat Ram 530
*Todar Mal v. Kishan Lal 919
Tolai Misir v. Munesbar Koeri 737
Tota v. Jaggu 163
*Tota Ram v. Gauri Shankar 480
*Tota Ram v. Panna Lal 668
Tula Ram v. Emperor 205
*Tulshi Das v. Emperor 768

U

*Udairaj Singh v. Secy. of State 652
Udal v. Ch. Gulab Rai 727
*Uman Shankar v. Aisha Khatun 88
*Uma Sankar v. Govind Narain 855
*Umed Singh v. Emperor 299
ooUmed Singh v. Emperor 694
Ummed v. Emperor 145
Umrao v. Emperor 441
ooUmrao v. Lachhman 448
Umrao Singh v. Lal Singh 796
*Uttam Chand Singh v. Emperor 695

W

Wali Mahomed v. Emperor 193

Y

*Yamin v. Emperor 701
Yaqub Ali v. Dhan Singh 429
Yasin Bibi v. Munawar Husain 799

Z

*Zaitun, Mt. v. Sh. Kommal 870
*Zamani Begam v. Khan Muhammad 251

THE ALL INDIA REPORTER
1924

ALLAHABAD HIGH COURT

SUBJECT INDEX.

Absence of Star denotes Cases of Provincial or Small Importance.
** Indicates Cases of Great Importance.*
oo Indicates Cases of Very Great Importance.

A

Abadi—

——Transfer—A sale to another tenant is just an much an infringement of the Zamindar's right as a sale to a person residing outside the village, unless the *Wajib-ul-arz* expressly permits such a transfer 921

Accounts—

*——Suit for—In a suit for accounts a decree can, if necessary, be given in favour of the defendant on payment of the necessary Court-fees 854

Admission—

——*See* EVIDENCE ACT, S. 17.

Adverse Possession—

——Is interrupted by delivery of actual possession under a decree 844

*——Mortgagor and mortgagee—Mere continuance in possession of the mortgagee after the mortgage money is paid out of the usufruct or by the mortgagor, does not make that possession of the mortgagee adverse to the mortgagor 522

Agra Tenancy Act (II of 1901)—

——Mortgage of occupancy holding executed before Agra Tenancy Act is valid 877

——Suit for rent—Landholder can't sue tenant in same suit in respect of different holdings 720

Agra Tenancy Act—

——S. 4—Land let for planting grove is not holding and rights are transferable 229

——S. 4—Land turned into grove ceases to be agricultural 53

——S. 4—Persons who obtained land from the landholder on payment of lump sum as premium without agreement to pay rent for the express purpose of planting trees are not tenants 795

——S. 4 (2)—Definition of land—Land on which a grove stands is not 'land' as defined in S. 4, cl. (2) of the Tenancy Act 795

——S. 9—Applies even to disputes to which landlord is not a party—Presumption under S. 9 can be displaced by subsequent events 91

—— S. 20—Limitation—After lapse of period of limitation prescribed by S. 31, transfer cannot be challenged but landholder has as against transferee all rights possessed by transferor in case latter dies without leaving any heirs 841

——S. 20—Occupancy holding cannot be mortgaged 710

——S. 20—Transfer does not include will 508

——S. 31—After lapse of period of limitation prescribed by S. 31 transfer cannot be challenged, but landholder has as against transferee all

Agra Tenancy Act—

rights possessed by transferor in case latter dies without leaving any heirs 841

——S 32 does not apply to a suit to recover a fractional share in a holding against a person in lawful possession 304

——S. 36—Landlord going to grove himself and taking mangoes—Suit lies in Small Cause Court and not Revenue Court 125

——Ss. 43 to 46—Recorded rent must be decreed by Civil Court except in cases of clerical error 429

——S. 51—The word 'tenant' in S. 51 covers a thekadar or lessee 906

——S. 57—Turning into grove creates liability to ejectment within a year 430

——S. 58—Ejectment—Burden is on tenant to prove his tenure 915

——S. 63—Co-sharer who can collect rent can also sue in ejectment 165

——S 63—Muafidars and sub-tenants —Non-payment of rent and non-assertion of title justify ejectment 293

——S. 79—Applies only to forcible ejectment and not to ejectment by mutual consent 834

——S. 79 applies where tenant has been constructively ejected 678

——S. 79—A tenant in an undivided mahal can sue in a Civil Court when dispossessed by one co-owner 572

——S. 79—Dispossession by fractional landlord is not dispossession 507

——S. 79—Ejectment by landlord means ejectment by all co-sharers 431

——S. 79—Illegitimate son in possession of ex-proprietary holding after tenant's death—Suit for recovery of possession by deceased tenant's brother is covered by the section 615

——S. 79—Rent free grantee's suit for possession lies in Civil Court only 479

——S. 79—Tenant dispossessed by subsequent registered lease-holder—S. 79 does not apply—Suit for possession is cognisable by Civil Court 678

——S. 142—Civil Court has no jurisdiction but only Revenue Court 828

——Ss. 163 and 164—Subject to not getting twice, share in gross rental as well as actual realisation can be claimed by co-sharer if claim is not barred—Cause of action for share of arrears collected in a subsequent year arises on 1st August following the year of collection 481

——S. 165—Lambardar can sue other co-sharers of village, who hold *sir* or Khudkasht land, for refund of whole of profit which they may have received in excess of their share and not only to the extent of the share of the lambardar in such excess. S. 165 of the A T. Act does not exclude the general authority of a lambardar to represent his co-sharers in such litigation 935

——S. 167—Dispute between rival claimants once decided by Revenue Court cannot be re opened in a Civil Court 609

——S 167—Revenue Courts decision can't be touched even indirectly 744

——S. 167—Scope—Where real objections to obtain a declaration against zemindar also suit lies in a Revenue Court only 102

——S. 167—Suit between rival claimants is cognizable by Civil Court 609

*——S. 173 (*g*)—In a suit under the Act defendant's unsatisfied decree against plaintiff's vendor can't be set off 341

——S. 177—*Bona fide* plea of jurisdiction—It is the business of the trial Court to decide whether the plea is *bona fide* or not. If, however, the Court chooses to treat it seriously it is not for the Court of appeal to treat it as *mala fide* when nobody in the trial Court or in the appellate Court ever suggested it to be so 476

*——Ss. 193 (*a*), 167—Suit for profits against lambardar by transferee of co-sharer—Insolvency of co-sharer can be pleaded before transfer 341

——S. 198—Suit by landlord for rent —Payment to third person pleaded —Third person made party—Decision against third party does not bar civil suit by the third party 270

——S. 201 (3)—Usufructuary mortgagee of mortgagor lambardar can sue for profits 719

Allahabad High Court—

——Fees of counsel—Higher scale fees are usually awarded—Fanciful valuation is therefore to be avoided 652

Allahabad High Court Rules—

——Chap. III, r. 3—Even after admission to hearing of an appeal without certificate, a matter covered by r. 2 cannot be argued 433

Ancient Document—

——*See* EVIDENCE ACT, S. 90

Appeal—

——*See also* C. P. C., S. 96

——An order which is either conditional or provisional and does not result in a final decree is not appealable 376

——Abatement—*See* C. P. C., O. 22

——Decision wrong as being under S. 144—Appeal lies on ground that the case was not covered by S. 144 64

*——Right to, depends on actual order—The right of appeal does not depend on what the Court ought to have done but on what it actually did 144

——Second, *See* C. P. C., S. 100.

——Second appeal lies from lower appellate Court's decree, entertaining first appeal without jurisdiction 183

Acquiescence—

——Extinction of right—If a man has been neglectful of his rights in certain cases that does not mean that he should be compelled to forego his remaining property 477

Arbitration—

——Court has no jurisdiction to delete anything from an award of arbitrators 800

——Decree passed in accordance with award after dismissing objections is not appealable — Entertaining appeal can be revised 688

——Rights awarded under arbitration cannot be denied by defendant on the pretext that property is public trust property 818

Arms Act (XI of 1878)—

——S. 4—Empty cartridges are ammunition 215

Army Regulation—

——Vol. II, App. IV—The rules in App. IV of Vol. II have no force as law, but where a person takes a grant of cantonment land subject to those rules he would be bound by them 415

Attestation—

——Proof. *See* EVIDENCE ACT, S. 71.

Award—

——Revision—On objection that arbitrators had made secret enquiries —Court's decision apart from award is not revisable 761

B

Benami Transactions—

*——Suit against benamidar binds real owner but plaintiff cannot defeat benamidar where a real owner if made a party cannot be defeated 802

Bench Magistrates—

——One Bench Magistrate being competent to try, absence of others during trial does not vitiate trial 674

Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887)—

——Appeal lies from Hony. Munsif appointed under S. 9 of Act II of 1896, to Sub-Judge, though the case may have been transferred to the Munsif from a Court of Small Causes 761

Bundelkhand Encumbered Estates Act (I of 1903)—

——S. 12 — Validity —Proceedings with next friend as agent of opposite parties are irregular 294

Burden of Proof—

——*See* EVIDENCE ACT, S. 101

C

Cantonment—

——Regulation allowing sale to Civilians with sanction of military authorities creates licenses in favour of grantees—Transfer without consent justifies a suit for declaration 415

Civil Procedure Code (V of 1908)—

——S. 2 and O. 21, R. 26—Order granting stay of execution is not appealable as decree under S. 47 808

——S. 2 (11)—Intermeddler—Decree against, is not binding on the true heirs 717

*——S. 11—A decision under O. 21, R. 66 is not *res judicata* in a later suit 480

*——S. 11—Principle of *res judicata* does not apply to a suit for partition of joint property 905

Civ. Pro. Code—

——S. 11—Where the defendant Railway Company failed to deliver certain parcels consigned by the plaintiff and the plaintiff filed suits for damages for non-delivery which suits failed a subsequent suit for delivery of goods is barred 849

——S. 11—Agra Tenancy Act (II of 1901), S. 198—Suit by landlord for rent—Payment to third person pleaded—Third person made party—Decision against third party does not bar civil suit by third party 270

*——S. 11—Assignee before suit is not barred by decision against assignor 474

*——S. 11—Co-defendants—Principle applies if there is mutual conflict 310

——S. 11—Combined judgment in two appeals—Appeal to High Court filed only against one of them but parties to the other were impleaded—Appeal is maintainable 834

*——S. 11—Conflicting decisions—Out of inconsistent and contradictory judgments *inter partes*, the later judgment must prevail. Prior decree becomes unenforceable after later decree, but where later decree does not cancel prior decree, the fruits got in execution of prior decree are not restored to the judgment-debtor in the prior decree, who was held entitled to prevent further execution only by a still later decision in his favour, on his filing a suit for the purpose 310

——S. 11—Court competent to try—A decision of an Assistant Collector of the second class about a certain Khudkhasht being owned by one party does not bar a suit in the Court of an Assistant Collector of the First Class 466

*——S. 11—Cross objections dismissed as being filed after dismissal of appeal and without going into merits—Appeal on the same points is not barred 867

——S. 11—Decision by Revenue Court—A decision, by a Court recovering thakkavi arrears, that rent was not paid by the sub-tenant to the tenant, in proceedings for sale of the tenure to recover thakkavi

Civ. Pro. Code—

paid to the tenant is not *res judicata* in a subsequent suit by the purchaser against the sub-tenant for the recovery of the rent payable by the sub-tenant 910

——S. 11—Decision by Revenue Court—A decision by the Revenue Court that defendant was not plaintiff's tenant does not bar a plea that a party was a rent-free grantee 479

*——S. 11—Decision in previous suit is *res judicata* though property is different where title is identical 10

——S. 11—Decision that A is tenant does not preclude the plea that B sowed the land 163

——S. 11—Different capacities render section inapplicable, though cause of action is the same 355

*——S. 11—Different jurisdiction of Courts—Where the value of the present suit is beyond the jurisdiction of the Court which tried the previous suit nevertheless the principle of *res judicata* applies, if the increase in value is only due to the joining together of the subject-matter of the previous suits. 849

*——S. 11—Dispute between rival claimants once decided by Revenue Court cannot be re-opened in a Civil Court 609

——S. 11—Execution proceedings—Fresh objection to an application in execution proceedings is not barred where the application has been remitted by superior Court overruling former objection 804

——S. 11—Mere opinion of Court not arising out of issues before it for decision is not binding 884

*——S. 11—Might and ought—Prior mortgagee omitting one of his several mortgages on the property in the written statement in a suit by puisne mortgagee without his priority being recognised—Right to enforce the mortgage as against the puisne mortgagee is barred 927

*——S. 11—Parties and representatives—Suit by one trustee on behalf of the trust, against co-trustees for protection of the trust property or accounts binds all interested in the trust. 504

——S. 11—*Res judicata* against 3rd parties—Where in a previous suit

Civ. Pro. Code—
between the husband and wife it was decided that there was no divorce, in the husband's suit for restitution of conjugal rights against his wife and father-in-law, the question of divorce is *res judicata* and the father-in-law cannot be permitted to agitate it again. Though S. 11, C P.C., has no application when the question is raised by the father-in-law yet that section is not exhaustive and rules of justice should not be interpreted so as to operate against the course of justice 815
*——S. 11—Respondent can't take cross-objection which he has already taken by way of appeal and which has been decided against him 867
——S. 11—Subject-matter being different—Where the groves in later suit are different from the grove which formed the subject of the previous litigation it cannot be said that the matter in issue in later suit between the parties was directly and substantially in issue between them in the former litigation, and S. 11 does not apply 922
*——S. 11 and O. 23, R. 1—Appellate Court can pass order under O. 23, R. 1—Fresh suit between the same parties is not barred even where appellate Court permits withdrawal 260
*——S. 11, Expl. 6—Though persons suing in public right in the prior suit are different from persons, suing in public right in the latter suit but the suits relate to the same subject the parties are same and not different 178
*——S. 13 (c)—Foreign Court following another Limitation Law and passing judgment on that basis—British India Court cannot question its judgment—Appearance of defendants implies waiver of plea of want of jurisdiction 161
——S. 20—Pukka Adhatia as an agent has to render account at the place where business is transacted and not at the place where principal resides 530
——S. 20—Residence of a trader means place where he carries on business and earns living and does his daily work 669

Civ. Pro. Code—
——S. 33—Decree should conform to judgment 818
——S 35—Decision not appealable but bad on merits—Costs not allowed 808
——S. 42—Court transferring decree can't decide questions under S. 47, C.P.C. 700
——S. 47—Where mortgage decree against two persons is set aside against one in appeal, objection by successful defendant that judgment-debtor had no interest in property sought to be sold must be tried in execution proceedings 313
——S. 47—Application by decree-holder auction-purchaser to set aside sale as being nullity is covered by S. 47 698
——S. 47—Dispute between judgment-debtor's representatives and auction-purchasers—Remedy is not under S. 47, Civ. Pro. Code 856
——S. 47—Order granting stay of execution is not appealable as decree under S. 47 808
——S. 47—Order of stay of proceedings and of cost is not a decree 794
——S. 47—Parties—Prior mortgagee impleaded in subsequent mortgagee's suit is a party 752
*——Ss. 47 and 151—Order as to costs of a Commissioner—Proceedings to execute such order is not a proceeding between parties in execution can be executed under S. 151 122
——S. 47 and O. 21, R. 58—Objection by legal representative that he holds property as Mutwalli to be tried under R. 58 and not under S. 47 183
——S. 48 (a)—Date of decree means the date when the decree becomes executable 263
——S. 53—Mortgage by member of joint family—Mortgagor's death without issue after mortgage decree—His brother made party to proceeding for final decree—He can plead that he should not be joined as party 873
——S. 55 (4)—Bar of arrest under Civ. Pro. Code, S. 55 (4) does not suspend complete execution 707
——S. 60—An agriculturist can make a valid mortgage of his house in execution of a decree in which the house may be sold. If the agriculturist fails to raise the point in the

Civ. Pro. Code—

suit itself he cannot raise it in the execution 323

——S 60—Provident Funds Act (IX of 1897)—The fund does not become attachable till paid 68

——S. 68—Civil Court has no power after transfer—Collector alone can resell for realising price 704

——S. 80—Notice should be given if act was done in official capacity whether or not in good faith 851

*——S. 80—To an Official Receiver in Insolvency proceedings—Notice is necessary 40

——S. 86—Suit against ruling chief in his capacity as co-sharer in respect of property in British India is governed by S. 86 422

*——S 91—Section is merely procedural 599

*——S. 91—Special damage—Very great inconvenience constitutes special damage 599

——S. 92—*Semble*—*Per* Dalal, J.—Suit lies against trustees *de son tort* 884

——S. 92—*Semble*—The section applies to trustees *de son tort* 884

——S. 92—Suit lies, by some members of the public for demolition of constructions raised on *wakf* property 850

——S. 96—No appeal lies from an order refusing to restore an application in the Execution Department 794

——S. 96—Generally no appeal lies from an order as to costs 794

——S. 100—As a general rule inadmissibility of evidence should not be raised in second appeal 845

——S. 100—Whether arrears of rent accrued owing to default of usufructuary mortgagee is a question of law and fact 877

*——S. 100—Custom—It is always open to the High Court in second appeal to see whether an opinion on custom which has been pronounced was based or not on sufficient evidence 477

——S. 100—Finding as to joint tenancy is one of fact 231

*——S. 100—Finding based on opinion of expert is not always a finding of fact 116

——S. 100—Finding of fact based on mistake of fact is not binding 270

——S. 100—Misconception in lower Court—A finding on an issue of a

Civ. Pro. Code—

lower appellate Court which is based on a misconception of what the evidence is cannot be accepted in second appeal as a legal finding on it. 848

——S. 100—Presentation is a question of fact requiring no formality 799

——S. 100—Question of Lambardar's negligence is one of fact and law 613

——S. 100—Questions of law dealing with admissibility and legal effect of evidence will not as general rule be entertained in second appeal if they have not been taken at least in first appeal 709

——S. 100—Sufficiency of rebutting evidence is a question of fact 146

——S. 102—No second appeal lies in Small Cause Suit of less than Rs. 500 263

——S. 104—No appeal lies from a conditional or provisional order which does not result in a decree 376

——S. 105—Plea—Order setting aside *ex parte* decree cannot be challenged in appeal from the decree in the suit 929

*——S. 109—Final order—Order of remand deciding all vital matters and leaving only inquiry into details is final 119

*——S. 110—Substantial question of law—The interpretation of documents involving a substantial question of law and of general interest only justifies grant of leave 559

——S. 110—Substantial question of law—Whether there was abatement of prior suit by plff.'s predecessor is not substantial question of law—Whether adopting widow entitled by agreement to management can continue suit after adoption is not substantial question of law 66

——S. 115—Allowing application to set aside sale as being illegal under R. 90 without substantial injury to applicant owing to irregularity is revisable 398

——S. 115—Gross errors of law are not revisable under S. 115, Civ. Pro. Code, though they are revisable under S. 25 Sm. C.C. Act 691

——S. 115—Order under O. 23, R. 1—Order though admittedly wrong still revision lies if Court applied its mind but decided wrongly 121

——S. 115—Refusal to hear objection to award justifies interference 788

Civ. Pro Code—
——S. 115—Revision was allowed owing to erroneous decision prejudicing one party 263
——S. 135—Protection extends only for going and returning directly—A few yards out of the way is immaterial deviation 676
——S. 141—Does not apply to Succession Certificate Act except so far as Ss. 19 and 26 make it applicable 376
——S. 141—No appeal lies against order dismissing application for restoration of application to set aside *ex parte* decree 682
——S. 144—Applies only when decree is set aside in appeal or otherwise 64
——S. 144—Court has inherent power of restitution 718
——S. 144—Does not apply if auction-purchaser is not the decree-holder 273
——S. 145—Court cannot call on Supuratdar to produce property in a different suit 64
*——S. 145—Enforcement of security is not limited to personal liability 105
——S. 148—Extension of time—Court can extend time fixed by the Court for doing any act 818
——S. 151—The Court can interfere for correcting miscarriage of justice appearing on face of proceedings 818
——S. 151—Court has inherent power of restitution 718
——S. 151—Order as to costs of a Commissioner can be executed under S. 151 122
——S. 151—Where specific procedure is provided in the Code which the party neglected to avail himself of S. 151 cannot be invoked in his aid 446
——S. 151—Where the previous suit had failed for want of a lawful guardian, the proceedings in it including the decision are a nullity from the point when the improper appointment of the guardian was made 225
——S. 151—Abortive proceeding in lower Court—High Court has power not merely to set aside abortive proceeding in lower Court but to pass such order as the Court ought to have passed itself, and can if the matter be referred back, still pass 818
*——S. 151—Allegations of fraud in connection with petition of compromise accepted by Court neither justify review nor revision, under S. 151 398
——S. 151—Court has no inherent power against express provisions of law 668
——S. 151—Executing Court cannot go behind the decree 62
——S. 152—Decree can be amended to correct material but palpable mistakes 690
*——S. 152—Lower Court can effect amendment though appeal pending 127
*——S. 152—Mistake in final form of order due to original mistake in party's application can be corrected 520
——S. 153—Court should allow parties to supply by way of amendment, signature to application 804
——O. 1, R. 10—Suit against adult members alone of Hindu joint family is deemed as one against whole family 908
——O. 2, R. 2—First suit against minor and her father for ejectment does not bar suit for dower debt against minor's father and minor wherein joint decree is claimed along with minor, though some facts to be proved in both cases are the same 713
——O. 2, R. 2—Reversioner under Hindu Law can bring single suit against different alienees from widow 902
*——O. 2, R. 2—Suit for mesne profits.—A suit for recovery of mesne profits from the date of the decree up to the date of getting possession does not lie after a suit for redemption 909
——O. 2, R. 2—Two reliefs on same cause of action.—Where it was open to the plaintiff to ask for two reliefs on the same cause of action and he chose only to ask one for he cannot bring a fresh suit for the other relief 849
——O. 2, R. 6—Does not apply to rent suits under the Agra Tenancy Act 720
——O. 4, R. 1—Plaintiff a major—Plaint signed by a person as next friend is not valid 54
——O. 6—Plaint—Particulars of fraud alleged should be insisted on 17

Civ. Pro. Code—

——O. 6, R. 6—Court should allow parties to supply by way of amendment, signature to application. 804

——O. 8, R. 5—Matter said to be not "admitted" is denied by implication 180

——O. 8, R. 6—Claim of a definite balance shown in account books is not claim for accounts and set off can be claimed 872

——O. 8, R. 6—Ascertained sum—Sum can be "ascertained sum" though neither admitted by plff. nor decreed by Court 872

——O. 8, R. 6—Claim for accounts can't be made by deft., but only clain for set off can be made 872

*——O. 9, R. 3—Court passing an *ex parte* decree as against some defendants can entertain application to set it aside during pendency of appeal by contesting defendants though non-contesting defendants applying under R. 13 were *pro forma* respondents to the appeal 173

*——O. 9, R. 9—Application to set aside *ex parte* decree being dismissed for default—Fresh application lies only within 30 days of decree 503

——O. 9, R. 13—No appeal lies against order dismissing application for restoration of application to set aside *ex parte* decree 682

——O. 9, R. 13—Summons is not duly served if it has no relevance to real proceeding which is contemplated 818

*——O. 11, R. 18—Absence of denial by the other party taken along with absence of proper affidavit does not justify penal action—Affidavit is generally conclusive—Notice under R. 18 to other side is necessary. 510

——O. 20, R. 6—Decree should conform to judgment 818

——O. 20, R. 14—Deposit made on reopening day the Court being closed on the day of deposit, is valid—Limitation Act, S. 4 218

——O. 21—Applicability—O. 21 does not apply to a Court recovering thakkavi arrears 910

*——O. 21, R. 2—Mortgage decree—Partial satisfaction can be pleaded in execution 297

——O. 21, R. 2—Statement by decree-holder is no certificate—Application by decree-holder within reasonable time and Court's order are necessary 706

Civ. Pro. Code—

——O. 21, R. 15—Joint decree-holders—Purchase by one decree-holder in execution enures for the benefit of all 813

——O. 21, R. 33 (1)—High Court will ordinarily refuse to interfere with lower Court's discretion in passing an order under R. 33 836

——O. 21, R. 35—Adverse possession is interrupted by delivery of actual possession under a decree 844

——O. 21, R. 46—Mortgage-bond—Simple-mortgage-bond is moveable property for the purpose of procedure for attachment 796

——O. 21, R. 54 (2)—Due service of notice under O. 21, R. 54 should be presumed when record of Court on the point is not available 747

——O. 21, R. 57—Does not apply to attachment before judgment 860

——O. 21, R. 57—Attachment before judgment—Attachment before judgment continues till decree-holder's remedy becomes completely barred and it does not cease on dismissal for execution 860

——O. 21, R. 58—Objection by legal representative that he holds property as Mutwalli is to be tried under R. 58 and not under S. 47 183

*——O. 21, R 63—A judgment-debtor who is not in fact a party to the claim proceedings does not become such by reason solely of his being the judgment-debtor 302

*——O. 21, R. 63—Suit for refund of sale consideration and not for possession of the property is not governed by one year's rule of limitation 302

*——O. 21, R. 66—Decision under, is not *res judicata* in a later suit 480

——O. 21, R. 79—Mortgage bond—Simple mortgage bond is moveable property for the purpose of sale 796

——O. 21, R. 89—Mortgage-bond—Simple mortgage bond is moveable property for the purpose of setting aside sale and R. 89 has no application to it 796

——O. 21, R. 90—Application by decree-holder auction-purchaser to set aside sale as being a nullity is covered by S. 47, C. P. C. 698

——O.21, R. 90—Revision—Allowing application to set aside sale as being

Civ. Pro. Code—

illegal under R. 90 without substantial injury to applicant owing to irregularity is revisable 698

——O. 21, R. 95—Application under R. 95 can be made even before resistance while one under R. 97 can't be made before resistance 495

——O. 21, Rr. 95 and 97—Order under R. 95 is not one under R. 97 and therefore, R. 103 does not apply 495

——O. 21, R. 97—Application under R. 95 can be made even before resistance while one under R. 97 can't be made before resistance 495

——O. 21, R. 103—Order under R. 95 is not one under R. 97 and therefore, R. 103 does not apply 495

*——O. 22, R 4—Joint decree against respondents—Failure to bring on record representative of a deceased respondent—Whole appeal fails 95

——O. 22, R. 6—Defendant dying after hearing but representative brought on record before decree—R. 6 does not apply 892

*——O. 23, R. 1—Appellate court can pass order under the rule 260

——O. 23, R. 1—Revision. *See* C.P.C., S. 115

*——O. 23, R. 3—Lawful adjustment—Statement by parties that a certain Vakil should hear the dispute and that they would accept his statement amounts to an adjustment 570

——O. 23, R. 3—Oath is conclusive of the particular matter and is not an adjustment under O. 23, R. 3 911

*——O. 32, R. 2—Guardian for appeal is the guardian in the suit 79

——O. 32, R. 3—Decree against unrepresented minor defendant is nullity though prejudice is not alleged 892

——O. 32, R. 3—Improper appointment of guardian *ad litem* invalidates suit and decree 225

——O. 32, R. 3—Major wrongly described as minor is not a material defect 94

*——O. 32, R. 7—Decree against minor without sanction is merely voidable against minor—Suit must be within 3 years of majority of minor. 625

Civ. Pro. Code—

*——O. 34, R. 1—Non-joinder—Non-joinder of necessary parties is not fatal to the suit 928

——O. 34, R. 1—Puisne mortgagee not joined in a suit for sale—Suit should not be dismissed 107

*——O. 34, Rr. 2, 4, 10—Personal liability to pay costs does not exist before final decree 104

*——O. 34, R. 3—Non-service on minor renders decree invalid 573

——O. 34, R. 6—Application need not be written or signed by decree-holder 804

*——O. 34, R. 6—Order passed on application under, is not one in execution and *ad valorem* Court-fee is to be charged on appeal from such order 292

——O. 34, R. 6—Right to personal decree is different from the right given by covenant in deed to recover money by sale 877

——O. 38, R 7—Scope—R. 7, O. 38 clearly refers to the mode of attachment and not to the way in which attachment ceases 860

——O. 41, R. 4—Combined judgment in two appeals—Appeal to High Court filed only against one of them but parties to the other were impleaded—Appeal is maintainable 834

——O. 41, R. 4—Common decree against two defendants—Appeal by one defendant making other a Respondent on grounds common to both—Court may transfer deft.-respondent as appellant 605

——O. 41, R. 4—Plffs. in Court of first instance included several persons—Only one appealed on behalf of all in lower Court—Other plffs. were not impleaded as respondents—Other plffs. have no *locus standi* to appeal to High Court 873

——O. 41, R. 5—Effect.—Stay order by appellate Court on condition of security comes into effect when security is given 698

——O. 41, R. 17—No dismissal on merits is allowed.—Under O. 41, R. 17 Court should not dismiss the appeal on the merits 144

——O. 41, R. 22—Cross-objections filed after dismissal of appeal should also be dismissed 867

Civ. Pro. Code—

——O. 41, R. 22—One can file an appeal from one part of decree and cross-objection about another part from which a cross-appeal has been filed by the other side 840

*——O.41, R. 22—Respondent cannot take cross-objection which he has already taken by way of appeal and which has been decided against him 867

——O. 41, R. 27—Additional evidence not tendered in lower appellate Court though possible, cannot be admitted in High Court in second appeal 231

*——O. 41, R. 27—That evidence was necessary to pronounce judgment is not sufficient reason to admit additional evidence 303

——O. 41, R. 31—Judgment—Points for decision and reasons must be given 100

*——O. 46, R. 1—Receiver in Insolvency has estate vested in him and no leave to sue him is necessary but this is not so with receiver under O. 40 40

*——O. 47, R 1—Allegations of fraud in connection with petition of compromise accepted by a Court do not justify either review or revision under S. 151, Civ. Pro. Code 398

*——O. 47, R. 7—Non-compliance with the requirements of the rule does not justify granting review for other sufficient cause 759

——Sch. II, Para. 1—Acceptance of submission by conduct is enough 457

*——Sch. II, Para. 1—Oral consent and statement to refer recorded by Court is an agreement in writing 540

——Sch. II, Para. 15—Objectors to award must prove the objection 788

——Sch. II, Para. 16—Where application to set aside award is refused a decree must be passed in accordance with it 788

Companies Act (VI of 1882).

——S. 4—Person.—A person figuring in a different capacity in the constitution of a company is to be treated as one member 414

——S. 156 (4)—Share-holders holding fully paid up shares at the time of liquidation are not contributories 772

*——S. 282—Contravention.—Though registrar could have detected wrong statement before permitting commencement of business, accused comes within S. 282 if he states falsely that directors have paid share money 314

Contract Act (IX of 1872).

*—— S. 2 (*d*)—Money received during minority can form consideration for contract made after majority 730

*—— S. 11—Minor vendor representing himself major—No compensation to purchaser can be awarded on the sale being set aside, if he has made no proper enquiry 156

——S. 23—Illegal mortgage of occupancy holding will not be recognised even collaterally under T.P. Act, S. 68 668

——S. 23—Contract of pre-emption is not against public policy—Case-law discussed 400

——S. 24—Money paid under agreement which is void can be recovered back 80

——S. 25—New contract, Statement of pleader does not give rise to 12

——S. 29—Contract is not void for indefiniteness of period for performance 657

——S. 29—Where the father and grandfather had apparently signed the Zamima Khewat and thereby assented to a contract of pre-emption, *held*, that their intention was obviously to enter into a contract for the period of settlement 400

oo——S. 65—Co-tenant of a mortgagor can't get back possession from mortgagee without paying the mortgage amount though mortgage is void 746

——S. 73—Interest by way of damages can only be claimed under Contract Act, S 73 881

——S. 74—Does not apply to decree of Court 689

——S. 186—Mere writing letters on behalf of principal is no proof of due authority to acknowledge liability 855

*——S.253 (10)—Partnership consisting of members of joint Hindu family—Presumption is that partnership is not dissolved on the death of any one partner 277

Contribution—

——Decree for mesne profits against joint defendants would give rise to right of contribution as among them unless the conduct of the claimant for contribution stands too much in the way 857

——Right to—Joint tort-feasors.—In cases of joint tort-feasors what Court has to see is whether there is anything in the circumstances of each case which would deprive the plaintiff of his right according to general equity 857

Co-sharers—

——Abandonment by tenant followed by joint cultivation by co-sharers—Plaintiff subsequently dispossessed—Suit for joint possession lies in Civil Court 865

——Adverse possession—Mere non-payment of profits by Lambardar is not ouster 719

——On abandonment of occupancy holding, land enures for the benefit of all co-sharers 865

——Ouster, non-sharing of profits may amount to ouster 920

——Partition — Private partition is valid 57

——Possession—Decree for joint possession may be refused in proper cases 923

——Sale of specific plots—Purchaser from co-sharer in undivided Mahal, where the purchaser has never been in actual possession cannot resist a suit for declaration of title by the other co-sharers to those plots 880

Costs—

——Of litigation—See C. P. C., S. 35.

Court Fee—

——On appeal from order on application under O. 34, R. 6, *ad valorem* Court-fee is leviable 292

Court Fees Act (VII of 1870)—

——S. 7 (iv) (*c*)—Suit for declaration with consequential relief though frameable as a suit for possession falls not within S. 7 (v) but within S. 7 (iv) (*c*) 612

*——S. 7 (v), Sch. I, Art. 1—Court-fee for condition of payment being removed is *ad valorem* on the amount 175

Court Fees Act—

——Sch. I, Art. 1—Court-fee for condition of payment being removed is *ad volarem* on the amount 175

Criminal Procedure Code (V of 1898)—

——S. 4 (*h*)—Report by a Subordinate Magistrate to his superior, stating facts and his opinion thereon, is a complaint 190

——S. 16—One Bench Magistrate being competent to try, absence of others during trial does not vitiate trial 674

——S. 17—Application for revision—On application for revision against order of Asst. Collector instead of against that of Collector who was responsible for that of the Asst. Collector, High Court's inherent power could be exercised under S. 561 (*a*) 777

——S. 106—Conviction for assault under certain circumstances may justify order under S. 106 306

——S. 106—Order under, must be passed at the time of passing sentence 230

*——S. 106—Order under this section should be passed by the same Magistrate who tried the accused for the principal offence and not by another Magistrate 141

——S. 107—Costs cannot be awarded to complainant in proceedings under S. 107 694

oo——S. 107—Order without evidence but on the admission of accused, is good 269

——S. 107—The accused must have been members of one gang to justify joint trial—In a joint trial evidence against each accused must be considered separately 195

——S. 107—Trying case as warrant case vitiates proceedings 695

*——S. 109 (*a*)—Neither refusal to give names, nor giving false name first and true name afterwards, nor a desire to conceal business amount to concealing presence 202

*——S. 110—Private knowledge of Magistrate is not substantive evidence but is check or test to weigh evidence 451

*——S. 110—Release by police for want of evidence regarding taking part in a dacoity is not sufficient 142

Crim. Pro. Code—

——S. 110—Revision—Grounds of—Revision though not ordinarily allowed, prosecution evidence must show necessity of sending the person to prison or demanding security 569

——S 112—Proceedings must strictly conform to provisions in S. 112 695

*——S. 133—Civil dispute involved—Magistrate has jurisdiction to refuse to interfere—Public way—Dedication to public must be proved 1

*——S. 133—Danger must be at the time of inquiry and not at future indefinite time 667

——S. 133—15½ feet high branch is not obstruction in a village road 667

——S. 146—Order of Revenue Court in mutation proceedings is order of competent Court determining the person entitled to possession 777

——S. 154—Admission of guilt is not first information 207

*——S. 161—Evidence — Conviction based on first information report is illegal 164

*——Ss. 179 and 185—Accused charged with two offences—Court having jurisdiction to try one only shall try that alone 77

——S. 181 (4)—Offences in the two sections, Ss. 366 and 368 of the Penal Code are not the same 454

——S. 195—Delay may under certain circumstances be almost a sufficient ground in itself but in other cases it may not be a ground at all for setting aside order for prosecution 770

*——S. 195—Compliant not requiring sanction, though combined with one requiring it, must be enquired into 296

——S. 195—Passages under complaint not given in the order but given in application for sanction are sufficient 563

——S. 195—Penal Code, S. 182—Sanction not necessary where false report is made to the police though subsequently same complaint is also made to the Court 187

——S. 195—Sanction to prosecute refused under old Act—Sanction given under new Act on appeal is valid 563

——S. 200—District Magistrate to whom case is sent for being transferred can legally dismiss it 666

Crim. Pro. Code—

——S. 200—Order directing inquiry before examining complainant and directing his prosecution on report of police are illegal 664

*——S. 208—Refusal of Magistrate to examine defence witnesses vitiates committal 317

——S. 209—Magistrate must discharge if there are no sufficient grounds for committing 664

*——S. 231—Alteration of charge after defence without further opportunity is illegal 665

——S. 233—Theft and beating after an interval, to prevent complainant from lodging complaint, are distinct offences 211

——Ss. 234 and 239—Joint trial of offences under Ss. 324 and 342, I.P.C., is illegal 316

*——S. 237—Alteration of charge—Where the accused was specifically charged that he caused such bodily injury to R as resulted in the man's death and thereby committed an offence punishable under S. 325, I.P.C., in appeal the charge cannot be altered to another one for which the evidence is ample 766

oo——S. 239—Joint trial for murder committed by members of an unlawful assembly is legal 233

oc——S. 239—Sessions Judge must look to the charges themselves to see if they could be jointly tried—Result of trial need not be considered 233

——S. 250—Appellate Court cannot act under this section 224

——S. 256—Refusal to examine any defence witnesses precludes exercise of right at later stage 673

——S. 307—Verdict should be interfered with only when it is perverse or when it is manifestly wrong 411

*——S. 337—Statements previous to tender of pardon are admissible against the approver 220

——S. 338—No appeal by Government against acquittal—Reference by Sessions Judge is not entertainable 624

——S. 339—Expression of ignorance by accused prior to tender shows non-acceptance of pardon 564

*——S. 342—Omission to examine accused—Omission to examine

Crim. Pro. Code—

accused at end of trial is only irregularity not amounting to illegality vitiating trial unless accused was prejudiced thereby 763

*——S. 345—Court can acquit accused on representation, of an agent who had filed complaint on another's behalf, that he desired to compound the offence, without enquiring into the agent's authority to compound 778

*——S. 403—Acquittal due to fraud—Acquittal of accused brought about by fraud established against third person in proceedings to which the accused were not parties is valid unless set aside by independent proceedings 778

——S. 414—Appeal to Sessions Judge—Appeal lies to the Sessions Judge from the order of a Magistrate under S. 562 765

*——Ss. 423 and 32—Power to vary sentence is measured by trial Court's powers 130

——S. 435—District Magistrate must not refer directly 770

——S. 436—Proceedings under S. 107 are not included in the provisions of S. 436, Cr. P. C. 592

——S. 439—Acquittal is not generally revised 674

*——S. 439—Findings of fact if perverse or contrary to law can be upset 299

——S. 439—Order of acquittal.--Ordinarily High Court will not interfere in revision against order of acquittal 778

——S. 439—Proceedings under S. 195—High Court will only interfere to prevent gross injustice 461

*——S. 476—Court passing order under, must apply its own mind to the merits of the case 453

——S. 476 — Jurisdiction — The offence must be one which appears to have been committed in or in relation to a proceeding in the Court which passes the order under S. 476 770

——S. 476—Notice is highly desirable before action 435

——S. 488—Weight of decree varies with circumstances 784

*——Ss. 492 and 495—Prosecuting Inspector not appearing for prosecution, cannot withdraw the case 203

——S. 510—Report of chemical examiner cannot be admitted in appeal for the first time especially when it is not formally tendered in evidence 193

——S. 515—Order of restoration without notice to custodian and without enquiry as to his title is bad 189

——S. 517—Conviction for importing opium—Where currency notes on the convict's person raise no irresistible inference that they represent payment of imported opium, they should not be confiscated 618

——S. 517--Order could be cancelled in appeal or revision—Order on acquittal can't be set aside by Dt. Magistrate 675

——S. 520—Appellate Court cannot direct restoration, where trial Court has not 213

*——S. 522—Appellate Court cannot pass order under, if trial Court has passed none—But under new Code, High Court can 212

*——S. 522—Conviction under S. 447, I. P. C.—No criminal force or even show of criminal force being present section does not apply 84

*——S. 522—Court of appeal or revision cannot make an order under S. 522 183

——S. 522—Vagueness of finding as to trespass being committed on the day mentioned by complainant vitiates application for possession 762

*——S. 526—Applies to enquiries under Workmen's Breach of Contract Act (XIII of 1859) 76

*——S. 526—Court must postpone a case on an accused's intention to apply for transfer being indicated to it. 533

*——S. 526—Letters Patent (Allahabad), S. 22—High Court cannot transfer Criminal Proceedings pending before village panchayat 265

*——S. 526—Strong opinion already formed is good ground for transfer 533

——S. 526—Transfer of case pending in another province is not within power of High Court nor can it declare that a Court subordinate to it has jurisdiction to try the case 71

——S. 537—Illegality in the conduct of search does not vitiate trial 214

Crim. Pro. Code—

——S. 545—Costs can't be awarded to complainant under Criminal Procedure Code, S. 107 694

——S. 556—Magistrate being a witness to the identification proceedings is no ground for commitment—He should move the District Magistrate 185

——S. 561 (*a*)—On application for revision against order of Asst. Collector instead of against that of Collector who was responsible for that of the Asst. Collector, High Court's inherent power could be exercised under S. 561 (*a*) 777

——S. 562—Appeal lies to Sessions Judge from the order of a Magistrate under S. 562 765

——Sch. 2—Offence. — An offence under S. 2 of the Workmen's Breach of Contract Act is triable by a Second Class Magistrate 616

Crim. Pro. Code (1923)—

——S. 345 (5-A) — Compounding of offence is allowed in revision 209

Criminal Trespass—

See PENAL CODE, S. 441.

Criminal Trial—

——Identification must be immediate, otherwise loses value 645

——In cases involving question of intention, if the facts are such as would cause a man of ordinary prudence and ability to infer a guilty intent the accused should rebut such inference 764

——Order to accused to be ready with defence, before prosecution evidence is over, is improper 320

oo——Right of private defence can be found though not pleaded 645

——Rule against minimising offences applies only where the object is to gain jurisdiction where originally there is none—Accused can't object to trial under S. 182 where offence falls under S. 211 of Penal Code 763

——Successor in Court is same Court as his predecessor 770

——Abatement — Prosecution under S. 323 of the Penal Code does not abate by death of person injured 666

*——Accused's conduct may affect his credibility but can't affect his right to compel prosecution to prove its case 299

Criminal Trial—

*——Agency—Court can acquit accused on the representation of an agent, who had filed complaint on another's behalf, that he desired to compound the offence, without enquiring into the agent's authority to compound 778

——Benefit of doubt—Benefit of doubt means benefit of a real and reasonable doubt in the mind of the Court 511

——Concurrent sentences. — The phrase "I pass sentence under Ss. 326—148" or whatever the sections may be must be interpreted to mean that the Magistrate intended to pass concurrent sentences 492

——Conviction—Fine should not be inflicted vindictively in technical offences 200

*——Conviction—Severity of sentence should be lessened because of service to Crown as approver 220

*——Evidence—Conviction based on first information report alone, is illegal 164

*——Opinion of Judge.—The personal view of the Judge is the ultimate view that is to prevail until law makes the verdict of the Jury or the opinion of the Assessors final and conclusive 511

——Possession.—Where cocaine was found in certain pots containing grain in a Bania's shop where the accused who were brothers were serving they must have been daily handling the pots in question and therefore the finding that both of them must have been aware of the existence of the cocaine in the pot is justifiable 776

——Remanding on amended charge—It would be undesirable to remit a case for retrial on an amended charge, after acquitting the accused on the original charge owing to the Court holding the prosecution evidence to be false, because it would mean the re-entertaining of the evidence of the same witnesses by the lower Court 766

——Setting fire—Setting fire to a thatch must be seriously viewed 781

D

Damages—

*——Special damage—Very great inconvenience constitutes 596

Decree—

——Amendment of. *See* CIVIL PROCEDURE CODE, S. 152

*——In suit for accounts a decree can, if necessary, be given in favour of defendant on payment of necessary Court-fees 854

——Setting aside—Decree wrong but not challenged by the party concerned cannot be challenged for him by any one else 225

——Setting aside—Remedy to set aside voidable decree is review or suit—Limitation Act, Art. 120 applies—Time runs from decree 625

Deed—

——Construction of.—Where among other terms, the award of arbitration between D and K declares that K should be in possession of property in dispute but should not alienate it, that he should pay maintenance to D and that so long as he does so, D cannot have the arrangement set aside and where K alienates in spite of the award, D's cause of action arises only after K's death 862

*——Construction of identical document under identical circumstances is only useful as guide (F.B.) 324

——Execution—*Semble.*—Mere name of firm in the heading of letter is good signature 855

Defamation—

*——Malice—Statement must have been false to the knowledge of the defendant in order to give rise to the presumption of malice 848

——Offence of. *See* PENAL CODE, S. 499.

*——Official duty—Statements in the course of his official duty as to certain rumours against the plaintiff, do not create liability 848

——Suit for damages — Judicial proceedings are absolutely privileged but not report to police which is *prima facie* privileged—In case of qualified privilege accused must prove honest exercise of privilege, *i.e.* reasonable grounds for belief—Where defendant pleads truth, qualified privilege can't be logically pleaded (F.B.) 535

Deposit—

——Delay—Limitation Act, S. 4—Deposit made on reopening day—The Court being closed on the day of deposit is valid (F B.) 218

E

Easement—

——Agreement not to block window—Effect is only to create an ancient light and not to preclude the servient owner from putting up any building which in the slightest degree would diminish the free ingress of light and air 816

——Constructing cattle troughs on another's land and using them for 12 years precludes owner from ejecting troughs 103

——Prescription—Origin of user being permissive no easement can be created 50

Easements Act (V of 1882)—

*——S. 5—Rain water flow is continuous easement but not latrine water 748

——S. 13 (*f*), (*h*)—Clause (*h*) does not modify section 748

——S. 15—60 years' user is necessary in case of Govt. land even where private person is in occupation 724

*——S. 15, Ex. 2—Enjoyment can be without user 97

*——S. 28—Scope—Extent of an easement other than an easement of necessity as also the mode of its enjoyment must be fixed with reference to the purpose for which the right was acquired 394

*——Ss. 33 and 35—No damage is substantial unless value is materially diminished and physical comforts or business are materially interfered with 394

——S. 56—The becoming irrevocable of a license does not make it transferable 825

——S. 60—Construction of a house by licensee acting on license makes license irrevocable 825

——S. 60—Kachcha thatched house may be a work of a permanent character 750

——S. 60—Permanent constructions make license irrevocable 434

Ejectment—

*—— Cause of action — Original possession permissive—Subsequent alterations of the premises cannot give rise to cause of action 727

——Suit for—No separate suit for declaration that defendant's title is void is necessary even in Revenue Court 785

English Law—

——English principles of equity are applicable generally but are subject to exceptions 857

Estoppel—

——*See* EVIDENCE ACT, S. 115.

Evidence—

——Admissibility—Where a document is admitted without objection in the trial Court, it cannot be objected to afterwards 918

——Admissibility and credibility—Admissibility is a question of law and credibility of evidence is one of fact 792

——Local inspection by Judge can be relied upon by him to decide the truth or falsity of witnesses 153

Evidence Act (I of 1872)—

*——Widow—Admission as to inheriting as heir to her husband is not conclusive 88

*——S. 11—Old documents mentioning persons who built certain very old houses may be admitted in evidence under S. 11, cl. 2 and S. 13, cl. (*b*) where direct evidence about the construction may not be easily available 526

*——S. 13—Old documents mentioning persons who built certain very old houses may be admitted in evidence under S. 11, cl. 2 and S. 13, cl. (*b*) where direct evidence about the construction may not be easily available 526

oo——S. 13—Statements in a judgment in a case in which the parties were different are not relevant 625

——S. 17—Vague admission is no admission 193

——S. 18—Customary easement of any nature can exist against landlord 159

Evidence Act—

*——S. 20—Statement by a common representative of both parties is an admission 570

*——S. 21—Recital in deed —Recital in deed executed by Hindu widow is admissible as evidence of legal necessity 902

*——S. 24—Inducement being offered —Confession is inadmissible 72

*——S. 30—Admissibility — Merely because a confession is not complete and detailed up to the hilt it does not become inadmissible against a co-accused 511

*——S. 31—Statement by a common representative of both parties is an admission 570

*——S. 32 (6)—Bahis of Ganga basis are admissible 575

oo——S. 33—Conditions imposed by S. 33 may be dispensed with by consent of parties 845

——S. 63 (5)—"Seen it", meaning of —Mere fact of having seen the document is enough; the witness need not have read it or have been able to do so, in order to make his evidence admissible 792

——S. 65—In absence of original account books, summary of result of examination, as given by person who had examined them for a pleader is admissible 625

——S. 68—Note by attestor, that he attested at executant's request implies that he did not see executant sign 256

——S. 71—Attesting witnesses being won over by the other side—Evidence of writer is sufficient 217

*——S. 71—Execution, Proof of presence of attesting witnesses is not necessary 149

——S. 90—Mortgage deed more than fifty years old and produced from proper custody was presumed to be genuine and authority to make mark was presumed 869

——S. 90—Presumption—Document duly registered by executants and over thirty years old is admissible where there is no reason to doubt its genuineness 832

Evidence Act—

——S. 91—Agreement not required by law to be in writing or to be registered need not be proved by production of written document but one the terms of which are reduced into writing should be proved only by the written document and not oral evidence 842

——S. 92—Proviso No. 2—Want of consideration for pro-note could be proved 70

——S. 92—Vendee can give oral evidence in a pre-emption suit to explain the character of the sale-deed 229

——S. 92—Want of consideration may be proved as against a written agreement 865

——S. 101—Objectors to award must prove the objection 788

——S. 101—Plaintiff attempting to prove that part of consideration was reduction of deft.'s liability cannot succeed on mere recital of cash consideration 256

——S. 101—The execution and registration of the document being admitted if the defendant alleges that the document was purely fictitious the burden of proof rests upon him 294

——S. 101—Where evidence is given by both parties, the question of the initial onus loses its importance 924

——S. 105—Penal Code, S. 84—Plea of insanity is to be proved by the accused 186

——S. 114—Conviction for importing opium—Where currency notes on convict's person raise no irresistible inference that they represent payment of imported opium they should not be confiscated 618

——S. 114—Insuring cover for a certain amount does not raise any presumption of contents 205

*——S. 114—Theft—Mere fact that articles were discovered in accused's possession soon after theft does not raise presumption that accused was thief himself 701

——S. 114—Where cocaine was found in certain pots containing grain in a Bania's shop where the accused who were brothers were habitually serving, they must have been daily handling the pots in question and therefore the finding that both of them must have been aware of the existence of the cocaine is justifiable 776

——S. 114 (*e*)—Due service of notice under Civil Procedure Code, O. 21, R. 54 (2) should be presumed when record of Court on the point is not available 747

——S. 115—Change of allegation—Where the plaint allegation was that the position of K under a certain award was that of a trustee for the plff. but in appeal, the plff.'s counsel urges that K had only life interest in the property but the other allegations are stuck to, the plff. does not change her case so completely as to be estopped from urging what were the positions of the respective parties under the award 862

——S. 115—Consignor's agent—Representation to Railway and getting reduced rate thereby creates estoppel 692

——S. 115—Deliberate act causing change in status creates estoppel 63

——S. 115—Estoppel by conduct—Where a person is entitled to resist being made a party to a final decree in a suit but, allows himself to be so impleaded, he can't sue to set aside the decree 873

——S. 115—Execution sale—Objection to — Judgment-debtor who might have objected to sale of property in execution cannot afterwards object 726

——S. 115—No estoppel arises in favour of one who knew all the facts of the case 787

*——S. 115 — Silence —Non-intervention in mortgage suit between third parties regarding property which, subsequent to the mortgage, was allotted in partition to the plff. does not estop him from recovering the property when it has been sold in execution of mortgage decree 871

——S. 115—There is no estoppel against litigant arising out of wrongful acts of Court 818

——S. 132—Compulsion under the section is a question of fact. It by no means follows that the witness is compelled to answer every question put by Counsel 381

Evidence Act—

*——S. 155—Evidence—Conviction based on first information report alone is illegal 164

Excise Act (XII of 1896).

——S. 3 (2)—Sub-Inspector of Police invested with powers under S. 10, is an excise officer within the Act 267

Executing Court.

——Can't go behind decree 62

Execution—

*—— Collector can't decide as to how much was due to decree-holder and how much of decree was satisfied 307

——Executing Court can't go behind decree or question its legality 689

——Sale—Sale certificate having two irreconcilable descriptions — Court can determine which description governs the case, by looking at decree in suit 856

——Sale—Sale of property not saleable under special law, is void 261

——Sale—Setting aside—Stranger to suit is justified in believing that the Court had authority to sell 726

*——Successive applications for execution can be made against all partners in the venture out of which decree has arisen; but once there is a decision about a person or property which though liable to be upset is not attempted to be upset, the decision is final in subsequent proceedings 34

Executor—

——Probate does not create title but from death title vests in executor 365

F

Forest Act (VII of 1878)—

——Ss. 29 and 32—Protected forests turned into reserve forests—Same subsequently declared to have ceased to be reserve—They become protected forests 539

Fraud—

——Party to illegal transaction can't recover his payment thereunder 668

G

General Clauses Act (X of 1897)—

——S. 3 (25) and (34)—Simple mortgage bond is moveable property for the purpose of procedure for attachment under civil process 796

General Clauses Act—

——S. 6 (*e*)—"Enactment", meaning of — Construction — The word "enactment" in S. 6 (*e*) includes not only an entire law but any section or provision of law 563

Government of India Act, 1915—

——S. 107—Error of law or fact is not revisable under S. 107 561

Guardians and Wards Act (VIII of 1890)—

*——The Act should not be narrowly construed 593

*——S. 19—Father cannot be appointed guardian 622

——S. 20 — Creditor can rely on Court's sanction as evidence that the Court has satisfied itself as to the propriety of the transaction 875

*——S. 25—Father cannot be deprived of the society of the child because of quarrel with his wife or distrust in her moral character or because of his handing the child to female relatives during infancy, nor because of his immorality 622

oo——S. 30—Failure of transferee to see that conditions are complied with, invalidates transfer 474

——S. 30—Mortgage in contravention of order of District Judge is voidable by minor. Minor is not also affected by a decree on the mortgage against him with a guardian whose interest is adverse. Sanction for usufructuary mortgage does not include one for simple mortgage 751

——S. 31—Creditor can rely on Court's sanction as evidence that the Court has satisfied itself as to the propriety of the transaction 875

——S. 31 (2)—Omission to recite the necessity in the order does not make sanction illegal 875

*——S. 34 (*c*) and (*d*)—Interpretation of—"Account" used in connection with S. 34 (*c*) and (*d*) must mean a just and true account. Where the amount is a liquidated sum and clearly earmarked for a purpose, the Court can amend the accounts by striking out the objectionable amount or it may reject the accounts on the ground that it is an untrue account of the guardian's liability and direct the guardian to submit a fresh account within limited time.

Guardians and Wards Act—

But it is the duty of the Court to decide what is the balance due and the guardian's version is not final 593

*——Ss. 35 and 36—Remedies by suit are not inconsistent with other remedies provided for by S. 45 593

*——S. 45 (*b*)—Failure of guardian to pay balance makes him liable under S. 45 593

*——S. 47—Appeal—No appeal lies against an order refusing to take action under S. 45 593

H

Highway—

——English principles should be applied to cases of highways 599

——Private right of access to highway from adjoining property if infringed, causes special damage to justify action 715

oo——Public way can't be acquired by prescription—Where trace of origin can't be found, dedication or lost grant is usually presumed 599

Hindu Law—

*——Alienation— Antecedent debt—Need not necessarily be simple debt but may be mortgage debt 708

——Alienation by father as manager—Reversioner has no power to challenge voidable deed not challenged by the son 51

——Alienation by father—Auction-purchaser under a decree against father cannot be dispossessed unless the sons prove the debt to be immoral or illegal 169

——Alienation by father—Burden of proof of necessity on purchaser—Necessity being proved for a portion—Sale was set aside 170

oo——Alienation by father only where property is sold in execution or voluntarily for antecedent debt burden is on son to prove illegality or immorality—In any other case alienee must prove legal necessity 24

*——Alienation — Legal necessity—After lapse of many years, recitals coupled with circumstances at the time recitals were made may be sufficient evidence to support the deed of alienation 939

——Alienation —Legal necessity—Expenses for marriage of daughter of a separate co-parcener are not necessary 929

——Alienation—Legal necessity.—In the case of old transactions full and detailed evidence is not to be expected and it is permissible to fill in the details by reasonable presumptions 916

——Alienation — Legal necessity—Sale is set aside where no legal necessity is proved for considerable portion 708

*——Alienation— Legal necessity—The support of dependent relations in the family would be a part of the family necessity 902

*——Alienation —Legal necessity—Where the deed is executed by the representatives of all branches of the family and by all the adult male members of the family living at the time, each of these circumstances separately is sufficient to raise a presumption of legal necessity 912

——Alienation by widow—Gift as a dowry in marriage of her daughter to the daughter amounts to acceleration 166

*——Alienation by widow — Legal necessity—Arrears of revenue is necessity 149

——Commentaries — The commentaries on Hindu Law are only commentaries; they do not enact, they explain and are evidence of the congeries of customs which form the law 350

——Custom—Adoption of daughter's son is allowed among Agarwala Vaishyas 49

*——Debt—Antecedent debt merely means debt antecedent in fact and in time is not a part of the transaction impeached 543

——Debts—Necessity— Proof—Subsequent admission of validity of an old transaction is strong evidence of necessity 29

*——Debts—Pious obligation—Doctrine of—Payment by father of time-barred debt is not immoral 543

——Debts—Pious obligation of sons and grandsons can be enforced during father's life-time 543

——Debts—Son suing to set aside alienation by father—Necessity to be proved by defendant transferee

Hindu Law—

where there was no antecedent sale or execution sale 37

*——Family settlement — A clause providing for devolution of property of signatories on each other's survivor or survivors is good, but one providing for a rule of inheritance in derogation of rules of Hindu Law is bad 461

oo——Female heirs — Undivided brother's widow holding adversely can acquire full ownership 740

——Female heirs—Woman's property got by succession from male and female is limited 731

——Gift by widow should be set aside at the instance of the reversioners indemnifying the donee to the extent to which he has suffered at the hands of reversioners 315

——Gift—Construction—Where one of the legatees was given an absolute estate and the two daughters of testator also were given estates which were antagonistic to the interest of his wife, nature of estate given to wife was also same 731

*——Joint family—Alienation by father, in satisfaction of earlier mortgage and mortgage decree is for antecedent debt 309

——Joint family—Alienation—A coparcener not born on date of alienation by his father and uncle and who separated before suit can't set aside the alienation 916

*——Joint family—Alienation—Alienation otherwise invalid cannot be enforced even against the father's own share in the joint family property in U. P. 493

*——Joint family—Alienation by father as manager for antecedent debt binds sons but not other coparceners 465

oo——Joint family—Alienation by father for d ebt barred at date of alienation binds sons F. B. 551

*——Joint family—Alienation by father—Sons cannot recover unless they prove illegality or immorality 111

——Joint family—Alienation by manager — Co-parcener ratifying, can't dispute alienation 721

*——Joint family—Alienation— Coparcener's existence on date of alienation entitles after-born coparcener to sue but only within the period within which the former coparcener could sue—The right does not devolve as property 912

*——Joint family—Alienation—Legal necessity—Re-purchase of property sold by separated brother is not legal necessity 721

*——Joint family—Alienation—Sone must prove illegality or immorality only in case of antecedent debt or execution sale 493

*——Joint family — Alienation — Subsequently born son has no fresh start for limitation though he can question alienation which was invalid at the time it is made 798

oo——Joint family—Antecedent debt — Pre-emption money — Money payable by the successful plaintiff in a pre-emption suit is not antecedent debt for supporting alienation of the family property.—It does not follow from this that payment of pre-emption decree might not be binding on family on ground of legal necessity or benefit to estate 721

oo——Joint family—Debts by father —Damages for breach of civil duty are not illegal or immoral debt 745

*——Joint family—Family business —Manager can contract debts for business which is not ancestral but which is for the benefit of the family 379

oo——Joint family—Manager can give receipts binding on family 738

*——Joint family—Mortgage by father for legal necessity—Decree in mortgage suit during plff.'s minority not binding on him for want of his being properly represented—But mortgage is binding on joint family property 573

oo——Joint family—Property got by collateral succession is self-acquired unless acquired with joint funds or thrown into common stock 625

——Joint family—Suit against adult members alone is deemed as one against whole family 908

oo——Joint family property—Alienation—Paternal uncle acting as manager cannot sell nephew's share to discharge debt incurred by his own father 538

Hindu Law—

*——Joint family property—Alienation.—Though more than three years before the suit, the plff.'s elder brother attained majority and presumably became the manager of the family and capable of giving valid discharge, yet plff. can sue to set aside alienation of joint family property made by his father 916

*——Joint family property—Alienation—When on partition, certain property is allotted wholly to one co-parcener he can recover it when it is sold in execution of mortgage decree in respect of a mortgage on the property created by another co-parcener prior to the partition 871

——Limited estate—*See* HINDU LAW—FEMALE HEIRS

——Migration—Does not alter law unless it is renounced 350

*——Partition—Entry of name in Revenue record does not prove separation 88

*——Partition—Separation of one co-parcener raises no presumption that others remain united or separate *inter se* or reunite 730

*——Partnership of members of family is not presumed to be disallowed on the death of one member 277

*——Property in widow's name is not presumed to belong to her husband 40

*——Religious endowment—Decree against idol.—A decree for mesne profits passed against an idol is recoverable from endowed property and not from the manager personally 801

——Religious endowment—Dedication.—A valid dedication can occur without the idol's being installed in a temple or even in the absence of a temple 357

*——Religious endowment—Position of shebaits—Suit by one co-trustee against another for excess realised by the other is maintainable 504

——Reversioner has a right to bring single suit against different alienees from widow 902

*——Reversioner—Gift by widow to two daughters with mutual consent precludes either of them from challenging the gift to the other 527

——Reversioner—Where reversioner is himself the alienee, his consent raises no presumption of legal necessity 919

——Stridhan — Succession — Second marriage—The second marriage of a Hindu woman of the Mali caste does not affect the rights of the collaterals of her first husband to succeed to her stridhan property 464

——Succession—Hindu texts applicable to the disinheritance of ascetics do not apply to Sudras unless some usage or custom to the contrary is proved 742

*——Succession—Heritable Bandhus—The counting for fixing on heritable bandhus should be not from the propositus but from the common ancestor 790

——Succession—Stridhan—Daughter inheriting stridhan takes a limited estate—Benares School 15

——Succession — Vadnagar Nagar Brahmans are governed by Mayukha 350

——Widow—Alienation—All alienations by widow need not be challenged in one and the same suit 838

——Widow—Alienation by reversioners may challenge only one out of several alienations 838

——Widow—Alienation—Consent of only male reversioners raises presumption of legal necessity 939

——Widow—Alienation with reversioner's consent raises presumption of necessity 902

——Widow—Execution sale of entire estate against, is equivalent to private alienation 109

*——Widow—Gift to son-in-law of entire property to induce him to marry her blind and crippled daughter—Gift of whole property of small value is valid even after her lifetime 23

*——Widow — Gift — Widow has greater powers of disposal for religious purposes than for worldly ones and small portion can be gifted for religious purposes 933

*——Widow — Surrender — Relinquishment by widow in favour of one out of several reversioners invalid 740

*——Widow—Surrender — Provision for maintenance does not vitiate surrender 114

——Widow's estate—*See* HINDU LAW—FEMALE HEIRS

Hindu Law—

——Will—Construction—Where one of the legatees was given an absolute estate and the two daughters of testator also were given estates which were antagonistic to the interest of his wife, nature of estate given to wife was also same 731

Husband and Wife—

——Suit for restitution of conjugal rights—Where in a suit by the husband for restitution of conjugal rights the father-in-law is also made a deft. along with the wife and where the father-in-law pleads that there is no cause of action against him, his words and conduct showing his unwillingness to let his daughter live with plff. are ground for cause of action against him 815

I

Income Tax Act (XI of 1922)—

*——S. 2 (14)—Firm must apply for registration prior to the date due for return of income 137

*——S. 66—Whether there is *bona fide* advance by partner to firm is a question of fact 137

Inherent Power—

——Of Civil Court—*See* CIVIL PROCEDURE CODE, S. 151.

—— Of High Court in criminal cases —*See* CRIMINAL PROCEDURE CODE, S. 561-A.

Insolvency—

——Before discharge insolvent is not incompetent to contract and deal with after-acquired property 703

Insolvent Debtor's Act (11 and 12 Vic., Ch. 12)—

*——Ss. 7, 26 and 27—Before discharge insolvent is not incompetent to contract and deal with after-acquired property 703

Interest.

——Damages—Interest by way of damages can only be claimed under Contract Act, S. 73 881

—— When claimable—Interest could ordinarily be allowed either under the Interest Act or where there is a stipulation—Interest cannot be claimed simply because some money is due 881

Interest Act (XXXII of 1839)—

——No interest is allowable unless there is contract or notice in writing or any law 711

Interpretation of Statutes—

——Per *Walsh, J.*—Where a section of an Act is capable of two interpretations the purpose of the enactment must be looked into (F.B.) 328

—— "The" is frequently used in legislation in the same sense as the Greek "tis" 684

——The safest course is to hold fast to the exact language in its ordinary interpretation 792

——Comparison with old law is permitted in case of doubt (F.B.) 328

——Illustration— Doubtful section justifies reference to illustration which otherwise must give way to section 748

J

Judgment—

——Essentials of appellate judgment —*See* CIVIL PROCEDURE CODE, O. 41, R. 31

Jurisdiction—

*——A Civil Court can't grant declaration "that plaintiff is entitled to hold certain estate for all time as revenue free and untaxable domain in perpetual succession" 652

——Civil and Revenue Court—Abandonment by tenant followed by joint cultivation by co-sharers—Plaintiff subsequently dispossessed —Suit for joint possession lies in Civil Court 865

——Civil and Revenue Court—Partition.—Civil Court can be allowed to partition the buildings before the Revenue Courts have first partitioned the sites on which they stand though the Revenue Courts alone can partition the sites 854

——Civil or Revenue Court—Substance and not form of plaint determines jurisdiction 652

——Civil or Revenue Court—Suit for declaration of joint tenancy lies in Civil Court 231

*——Plaintiff's valuation determines jurisdiction; at least where defendant does not object Court can't be said to be acting without jurisdiction 388

Jurisdiction—

oo——Validity of tax can be decided by Civil Court 652

L

Lambardar—

——Can grant lease of Zamindari land 459

——Powers—A lambardar is not liable for rents realised by an unauthorised person. He should, in a suit for profits, be given credit for sums spent by him in ejecting certain tenants 613

Lambardar and Co-sharer—

*——Liability of lambardar arises on date of ascertaining the amount due except in case of any legal provision—He is also liable for negligence or wilful mischief F.B. 481

Landlord and Tenant—

——Abadi—A custom of transfer of the sites of the houses by ryots can be recognised only when there is absolutely clear evidence to that effect 477

——Abadi—Tenant cannot raise building on open land in abadi without landlord's consent 723

——Ejectment—Plaintiff's acquiescence in construction disentitles him from ejectment 433

——Mortgagee of occupancy tenan does not become tenant even by payment of rent to the landlord 908

——Permission by landlord to plant grove—Effect is to convert the tenant into a grove-holder with transferable rights 831

——Transfer of house sites in towns by tenants is valid 112

Land Tenures—

——Occupancy holding—On abandonment of occupancy holding land enures for the benefit of all co-sharers 865

Lease—

——*See* T. P. ACT, S. 105.

Legal Practitioner—

——Making admission cannot be deemed to contract under S. 25 of Contract Act 12

*——During hearing of suit counsel can examine documentary evidence summoned by him from witness or party, before tendering it in evidence 625

Legal Practitioner—

*——Making serious allegations against Court, is liable to be punished F.B. 253

*——Misconduct—In affidavit in support of appeal or revision practitioner must take scrupulous care not to conceal or distort facts—Charge of impropriety or inattention against Judge is not to be lightly made 565

*——Must protect client from liability to pay excessive fees 652

Legal Practitioners Act (XVIII of 1879)—

*——S. 36—High Court can revise order under S. 36—Decision of Dist. Judge against the weight of evidence is no ground for interference 69

Legal Representative—

——*See* CIVIL PRO. CODE, S. 2 (11).

Letters Patent—Allahabad—

——S. 22—High Court cannot transfer criminal proceedings pending before village panchayat 265

Limitation Act (IX of 1908)—

——Execution case, limitation denied on ground of affidavit being filed on certain date that there were no incumbrances on property. But no written application then and on date fixed for disposing of matter. But on back of affidavit, endorsement of Court directing that it should be filed. No oral application should be held to be made on the date, asking for sale, and limitation is not saved 811

——Though creditor's remedy may be barred his right is not 543

——S. 4—C. P. Code, O. 20, R. 14—Deposit made on re-opening day, the Court being closed on the day of deposit, is valid F.B. 218

——S. 5—*Bona fide* impression of a Court which entertained the appeal though wrongly filed in his Court justifies extension 915

oo——S. 5—Mistake—The fact of the plaintiff having made a mistake of law does not necessarily preclude him from obtaining the benefit of the section 867

*——S. 5—Negligence of client's agent is not sufficient cause 176

*——S. 5—Review—The time spent in prosecuting with due diligence

Limitation Act—

a proper application for review of judgment can be deducted under S. 5 867

*——S. 6.—Subsequently born son in Hindu joint family has no fresh start for limitation though he can question alienation which was invalid at the time it is made 798

*——Ss. 6 and 7—Existence of co-parcener on date of alienation of joint family property, entitles after-born co-parcener to sue but only within the period within which the former co-parcener could sue. The right does not devolve as property 912

oo——S. 7—Managing member of a joint Hindu family can give good receipts on behalf of the family, which will bind the family 738

*——S. 7—Though the plaintiff's elder brother attained majority and presumably became the manager of the family and capable of giving valid discharge more than three years before suit, plaintiff can challenge alienation of joint family property made by his father 916

*——S. 10—Applies only to express trust and not to trustees *de son tort* 884

——S. 10—Trustees—There is no limitation for suits for recovery of property from trustees 884

*——S. 12—Time for copies of judgment and decree taken separately was excluded 162

*——S. 14—The time spent in prosecuting with due diligence a proper application for review of judgment can be deducted under S. 5 867

——S. 15—Bar of arrest under C.P. C., S. 55 (4), does not suspend complete execution 707

——S. 19 — Acknowledgment of mortgagee's right is sufficient proof of subsisting mortgage 458

*——S. 19—Admission as to third party's right in plaint in one's suit is acknowledgment of such right within the section 876

*——S. 19—Admission of execution of pro-note is not acknowledgment 70

——S. 19, Expl. II—Mere writing letters on behalf of principal is no proof of due authority to acknowledge liability 855

——S. 22—Suit against adult members alone of Hindu joint family is deemed as one against whole family 908

Limitation Act—

——Sch. I, Art. 29—"Legal process", meaning of—Distraint under Agra Tenancy Act is seizure of moveable property under legal process 828

*——Art. 32—Does not apply to suit for removal of increase of burden on servient tenement due to resting more beams on wall 450

*——Arts. 62 and 127—Hindu joint family—Partition—Certain money bonds remaining joint—One of them realised by defendants five years before plaintiff's suit for share therein—Plaintiff's suit is barred by limitation—Art. 127 does not apply to a family which has separated prior to suit 812

*——Art. 90— A suit by municipality against its executive officer for loss sustained by it owing to disregard of directions amounting to negligence or over-confidence in the honesty of others is governed by Art. 90 467

*——Art. 91—Starting point—Art. 91 provides a period of three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him 370

——Art. 91—Without delivery of possession, gift under Mah. Law is void *ab initio* and there is no limitation to set it aside but time runs when possession is got by donee 370

——Art. 99—Applies to suit for contribution among co-defts. 843

oo——Art. 120—Applies to suit for setting aside voidable decree 625

——Art. 120—Article should never be invoked if there is any other article capable of covering the suit. 828

——Art. 120 — Defendant building construction on his occupancy land without plaintiff's permission—No allegation of dispossession—Suit by plaintiff for demolition of constructions and injunction—Art. 120 only applies to the case 814

*——Art. 120—Trustee *de son tort*. Art. 120 applies to a suit for accounts against a trustee *de son tort* 884

——Art. 126—Special article applies though general articles exist—Right is extinguished after 12 years 677

Limitation Act—

——Art. 127—Hindu joint family—Partition—Certain money bonds remaining joint—One of them realised by defendants five years before plaintiff's suit for share therein—Plaintiff's suit is barred by limitation—Art. 127 does not apply to a family which has separated prior to suit 812

*——Art. 144—Burden of proof—Where the title is shown to be with the plaintiffs, it is for the defendants to prove their adverse possession 924

——Art. 144—Heirs of a Mohamadan are co-heirs and unless express ouster is proved, to the knowledge of the other party, no limitation starts against the other party 384

——Art. 148—Has no application to a suit for recovery of property from a person who without any right of redemption pays the money due on a mortgage and gets into possession of the property 834

*——Art. 181—Starting point for application for final decree is date of the appellate decree as against those defts. who are respondents in the appeal 99

——Arts. 181, 182 and Civ. Pro. Code, S. 48 (*a*)—Date of decree means the date when the decree becomes executable 263

——Art. 182—Date of decree means the date when the decree becomes executable 263

Lurking House Trespass.

——*See* PENAL CODE, S. 456.

M

Mahomedan Law.

——Death illness—Carbuncle resulting in death in case of person of eighty is death illness 935

*——Dower—Widow's lien—Widow in possession—Each separate heir cannot recover possession by paying proportionate part of dower 729

——Gift—Without delivery of possession gift is void *ab initio* and there is no limitation to set it aside but limitation starts when possession is got by donee 370

——Heirs—Heirs of a Mahomedan are co-sharers and unless express ouster is proved to the knowledge of the other party no limitation starts against the other party 384

*——Marriage—Consummation—Unruptured hymen—Creates presumption of virginity 116

*——Marriage—Dissolution on the ground of impotency—Procedure is to wait for a year and then if the wife is a virgin marriage is dissolved but not otherwise 116

*——Marriage—Impotency with respect to wife due to any cause is impotency 116

——Marz-ul-maut—Carbuncle resulting in death, in case of person of eighty is 935

oo——Pre-emption—Fresh demands—The plaintiff pre-emptor need not make fresh demands when the vendee, to whom he had already made the demands required by law, transferred the property to another person 806

——Pre-emption—Mortgagee in possession is not a co-sharer 48

*——Pre-emption—Right arises even on complete irrevocable contract of sale 251

*——Pre-emption—Second demand to vendor is sufficient where possession has not passed to vendee 251

——Shia Law—Marriage—Authorities are conflicting as to age of consent—Attainment of puberty is the test of attainment of majority for consenting to marriage 870

*——Shia Law—Marriage with consent of girl's grandfather but without her consent, she not having attained puberty at time of marriage—Marriage is valid 870

——Succession—One S.K. left three grandsons by a pre-deceased son who were defendants 1 to 3, two daughters and a brother M. K. *Held*, that the daughters got two-thirds share and defendants 1 to 3 got one-third share 384

——Waqf—Construction—Mere use of the word wakf does not turn a real gift into a wakf 28

——Waqf—Provision for maintenance of relatives and dependents does not invalidate wakf 223

——Waqf—Reservation of life interest to settlor and his wife is valid 113

Mahomedan Law—

——Waqf—There being no proper nomination of mutwalli—Mutwalli *de facto* was allowed to take charge 59

——Will—Shia Law—Will of life estate in entire property is equivalent to will of entire property 20

Majority Act (IX of 1875)—

——S. 3—Person cannot be major with respect to one and minor with respect to another property 892

Malicious Prosecution—

*——Acquittal in appeal is no bar to suit for prosecution 536

——Complaint *bona fide* to a proper officer only is privileged 445

oo——Prosecution need not have been instituted on the defts.' complaint but he is liable if he has taken an active part in the prosecution 845

Master and Servant—

oo——Negligence—Servant is liable for negligence in non-observance of instructions which resulted in embezzlement 467

Merger—

*——Purchase of fractional share by tenant does not determine tenancy 460

Minor—

——*See also* (1) CIVIL P. C., O. 32.
(2) CONTRACT ACT, S. 11

——Burden of proof of minority of executant at the time of executing pronote is on party asserting minority 730

——Decree against unrepresented minor deft. is nullity though prejudice is not alleged 892

——Decree—Setting aside decree against minor on the ground of want of due representation is not commencement of suit or rehearing or restoring. It is reviving the original suit 225

*——*De facto* trustee, investment of minor's money by—Suit to recover by *de facto* trustee—Continuation of suit by minor after majority does not amount to ratification 277

——Plaint—*See* CIV. PRO. CODE, O.4, R. 1.

Mortgage—

See also T. P. ACT, S. 58.

oo——By joint owner—Substitution on partition is allowed to the extent of mortgagor's interest in joint property 579

Mortgage—

——Construction—Payment of arrears of revenue does not include time-barred rent decrees 153

*——Interest runs in absence of contrary contract 929

*——Of future crops is enforceable as an executory agreement and creates valid equitable charge—But is unavailing against a *bona fide* purchaser without notice of prior charge 833

*——One of the mortgagees becoming a part owner does not break integrity of mortgage but suing for half amount of principal will disentitle mortgagee to sell whole mortgaged property 11

——Usufructuary mortgage—Mortgagee agreeing to pay malikhana is liable for non-payment in suit for redemption 591

Mortgagee—

——Lease—Mortgagee leasing mortgaged property and not suing to recover it back is still not dispossessed mortgagee 719

N

Negotiable Instruments Act (XXVI of 1881)—

——S. 7—Oral acceptance—Special custom must be set up and proved 129

——S. 118—Recital of cash payment—Plaintiff attempting to prove that part of consideration consisted of reduction of defendant's liability but failing to prove it, cannot get a decree on the recital 256

Non-joinder—

——*See* CIV. PRO. CODE, O. 34, R. 1

Nuisance—

——Discomfort must be substantial and must be to any person irrespective of age, health or status 392

O

Oaths Act (X of 1873)—

——Ss. 8 and 9—Decree passed on oath—Order of remand by appellate Court is a material irregularity 126

——S. 9—Oath is conclusive of the particular matter and is not an adjustment under Civ. P.C., O. 23, R. 3 911

Occupancy Holding—

——Contract Act, S. 24—Agreement to allow creditor to enter into

Occupancy Holding—

possession of occupancy holding is void but money can be recovered back 80

——Grove planted even with acquiescence of landlord is transferable by tenant 430

Opium Act (I of 1878).

——S. 9—Smuggling opium in maize. —Where a person under a pretended name consigned from Kotab, a Native State, into Cawnpore in British India bags of maize containing a considerable quantity of opium which was detected at Cawnpore and searched in his presence, the offence under S. 9 was held to be committed 558

P

Pardanashin Lady—

oo——Where the language used by the Registering Officer indicated that the document had been read out to the lady but there was nothing expressly indicating that he explained the document to the lady, *held* there was no satisfactory evidence of explanation and understanding which the law requires 362

Partition—

*——A private partition can be effected without any written document 304

——House and site—Partition of buildings is possible while the sites on which they stand remain joint 854

Partition Proceedings—

——Revenue Court.—Where applicant was allowed to withdraw but another co-sharer was allowed to continue the proceedings, *held*, that there was no cessation of the proceedings and the order on petition to withdraw amounted in effect to a cancellation of the sanction to withdraw 427

Partnership—

——Nature of law of partnership is a branch of the law of agency like that of master and servant 101

Part-performance—

——Applicability—Principle is that where there is executory contract like compromise by unregistered deed transferring property it can't be enforced, but mutual arrangement carried out must be enforced 826

——Deed acted upon but not registered, is binding on parties acting up to it 772

Penal Code (XLV of 1860)—

——Ss. 37, 302 and 325—In joint attack all are equally guilty 78

——S. 73—Solitary confinement can not be ordered under Criminal Tribes Act 319

——S. 84—Knowledge that an act is wrong along with unsound mind is not covered by S. 84. 413

——S. 84—Plea of insanity should be proved by the accused 186

*——S. 97—Right exists to defend even another's property 696

*——S. 99 — Right exists against public officer where offender does not know and has no reason to believe that he was dealing with public servant 645

——S. 102—An offence is excused only so far as the right of private defence is rightly exercised 441

oo——S. 141 (3)—Common object to obstruct police in discharge of duty comes within 3rd clause 233

——S. 147—Conviction of four out of many is not illegal 230

oo——S. 147—Intention to attack police in certain eventualities being clear, on attempt by police to disperse assembly by force, if attack on police and murder follows, every member is liable unless his separation is proved 233

——S. 149—Covers two classes of cases—One is act done for common object and other is act known by accused as likely to be caused in prosecuting common object 670

——S. 193—Retracted statements—Immediate retraction on fresh thought is no perjury 83

——S. 211 — Lodging complaint against a person is offence though in subsequent proceedings that person is omitted from the charge 779

——S. 211—Meaning of "charge"—Merely stating facts and suspicions is not "charge" but alleging belief in guilt of particular person and desiring he should be proceeded against is charge. Causing police search to be made and identifying

Penal Code—

property as being unlawfully in complainant's possession and indicating to the police that the complainant was guilty amounts to charge within the meaning of S. 211 779

oo——S. 215—Where a bullock was stolen and the accused took money in order to bring back the animal which he knew to be stolen and where he took no steps to bring the thieves to justice he was guilty though he might be himself the thief 783

oo——S. 216-B—Lending a pony to the dacoits merely to facilitate them in removing the loot is no offence under S. 216-B 676

——S. 268 — Nuisance — Public nuisance—Annoyance even to one person is sufficient 194

——S. 272—Mixing pig's fat in ghee for sale is no offence under this section 214

——S. 290—Person responsible for the crowd is more guilty than persons forming crowd 568

——S. 297 — Trespass—Meaning—Having sexual connection in a mosque is an offence 9

——S. 302 — Murder by ignorant peasants who are misled by misrepresentations and promise of millenium justifies sentence of transportation for life 233

——S. 302—Prosecution must prove actual death of the murdered person 662

——Ss. 302 and 34—Beating by persons— Death being the natural result all are guilty 145

——S. 304—Accused's ignorance of consequence—Where the accused were not likely to know that the deceased or any one was within a *chaupal* to which they set fire in a riot, a conviction under S. 304 was wrong 781

——S. 304—Death caused a month and a half after injuries but not due to the injury does not justify conviction 441

——S. 323—Prosecution does not abate by death of person injured 666

——S. 328—Administering Dhatura to cause a girl to fall in love with accused is an offence where delirium was caused 215

Penal Code—

*——S. 332—Knowledge of complainant being public servant is necessary 645

——S. 335—Attack on police attempting to arrest on suspicion of cognizable offence amounts to offence, though police were not in uniforms 201

——Ss. 366 and 368—Offences in the two sections are not same 454

——S. 376—Evidence.—In no cases is it more difficult to arrive at a confident verdict whether evidence is false or true than in cases in which women allege that they have been outraged or that an outrage has been attempted on them 411

——S. 379—Water in pipes can be subject of theft 131

——S. 384—Threat to omit to do some act which accused is not legally bound to do is not covered by the section 197

——S. 395—For robbery in a house, inmates being scared away after (not before) accused's entering the house is not necessary 701

——S. 411—Mere discovery of stolen article in a roofless room of accused's house does not render him guilty 192

——S. 417—Sending Khilafat notes is no offence 205

——S. 420—Getting money without a request or inducement to that effect, is no offence 209

——S. 436—Proof that the building destroyed came within one of the classes mentioned in the section is necessary 781

——S. 436—Sentence of 10 years' imprisonment is disproportionate to the crime from a moral point of view if that part of the accused's misconduct namely the setting of fire is reasonably included in and taken to aggravate the general lawless conduct of which the accused have been convicted under Ss. 147 and 325 781

——S. 441—Plea of not having given up actual possession though legally ejected and though formal possession was given, is no defence 762

——S. 456—Mere non-production of owner or person in actual possession of house does not vitiate conviction under S. 456 764

*——S. 499—Defamation—Intention to cause harm to reputation is

Penal Code—

sufficient for offence—Whether harm is actually caused is immaterial 566

*——S. 499—Public good—Declaration of real outcasting to the brotherhood is for public good 299

——S. 499, 10th Exception—Informing of ex-communication to caste fellows is no offence 694

Picketting—

oo——Picketting may be an offence where agreement to stop sale of intoxicants in a bazar constituting criminal conspiracy is arrived at 233

Plea—

*——Subsequent transferee can plead want of necessity for earlier transfer 29

Pleadings—

——Alternative prayer cannot be converted into an additional prayer 271

——Variation between pleading and proof is not always fatal to suit or defence 831

Post Office Act (VI of 1898)—

——Ss. 6 and 34—Non-tracing sender or addressee is not loss or mis-delivery 692

Practice—

——Appeal—Judgment of lower Court containing unnecessary passage—Only way of interference is to order expunging it 724

——Court's object is to decide parties' rights and is not to punish them for mistakes in procedure by deciding against their rights 818

*——English law—Applicability of.—It is sometimes dangerous to try to ascertain Indian law by discussing English cases. But where, in legislation like the U. P. Municipalities Act, following closely upon English Local Government legislation, the legislature has left the matter at large, without following it up by codifying the general law on a topic such as highways, Indian Courts must apply English principles—Precedent—English cases 599

*——Inconsistent claims do not justify dismissal such as claims of ownership and of easement 97

——Inconsistent plea — Order setting aside *ex parte* decree can't be challenged in appeal from decree in suit 929

Practice—

——Judgment—Ambiguity in judgment of lower Court is a good ground for attacking it but ambiguity may be explained 729

*——Judgment — Erroneous statement by counsel or misunderstanding by a Judge can be corrected only by a review and not by appeal 518

——Judgment — Second appeal — Facts stated by counsel cannot be ordinarily challenged by the party at later stages 518

——Misguidance by Judicial Officer vitiates proceedings 818

*——Pleadings — Inconsistent findings against co-defendants cannot be given 150

——Pleas—Particulars of claim and defence should be insisted on to expedite justice 17

——Points of law with regard to admissibility and legal effect of evidence will not as general rule be entertained in second appeal if they have not been taken at least in first appeal 709

Precedent—

——Authority.—A case is an authority only for what it decided and is no authority for what may seem to follow from the reasonings adopted in the case 897

——Distinguishing — If a case is distinguished it is unnecessary to express any opinion as to its correctness.— It is notorious that cases are sometimes distinguished on very slender grounds to avoid the responsibility of appearing to overrule them 851

Pre-emption—

——A person purchasing a plot of land situated within a share in a village is a co-sharer in the village though his name did not appear in the revenue papers 305

——The fact that *wajib-ul-arz* contains many provisions relating to matters of contract does not prevent its being treated also as a record of custom 274

——In the U.P. there are two kinds of custom of pre-emption:— (1) Where it can be claimed even on sale to one of the co-sharers, by a co-sharer of a nearer class;

Pre-emption—

(2) Where it can be claimed by the co-sharers in a certain order of priority in case of sale to stranger 753

——The existence of common *khata* as joint property of all co-sharers does not render a person belonging in other respects to one category, joint co-sharer with another belonging to a different category as regards separate interest sold by latter person 753

——There is no difference in principle between clause in *wajib-ul-arz* prescribing order of persons to whom vendor is to offer property and clause giving order of classes entitled to pre-empt in case of sale 753

*——Basis—Right must rest in contract, custom or statute--Custom can be deduced from decisions—Variation in rule deduced from previous judgments is not permissible 318

——Burden of proof is on plaintiff to establish not a general custom but a particular one entitling him to decree against defendant vendee 753

——By contract — Plaintiffs not parties to it—They cannot enforce 449

——Custom of --A custom of pre-emption of which there is *prima facie* evidence in the entry in the *wajib-ul-arz* is not necessarily negatived by three instances of sales to strangers 791

——Custom of, is not abrogated by partition of a village nor by its becoming incapable of being applied in full to altered conditions effected by partition 603

——Custom—A mere resident can pre-empt if *wajib-ul-arz* so provides 86

——Custom —Gorakhpur District—About the *Zamima Khewhat* of 1885 of Gorakhpur it must be assumed that the proprietors must be other than Mahomedans and expressly desired to have the custom of pre-emption recorded and must have adduced proof before the Settlement Officer, conclusive to show that the custom existed 424

——Custom in Kumaun—Sharer in *laga* village cannot pre-empt sale in *asl* village 318

——Custom lapses if property vests in one individual only 371

Pre-emption—

——Custom—Mahomedan Law.—In absence of inconsistent particulars right of pre-emption is according to Mahomedan Law 523

——Custom—Sales are not necessary to establish custom 523

——Custom of—*Wajib-ul-arz*.--A custom of pre-emption is negatived by entry in *wajib-ul-arz* showing that all co-sharers agreed that there would, since the time of such agreement, be no custom of pre-emption in vogue 793

——Custom — *Wajib-ul-arz* — The presumption raised by the entry in a *wajib-ul-arz* is not rebutted by the circumstances that more than 100 years ago the villages were owned by a single proprietor 859

——Events subsequent to first Court's decree cannot be considered 448

——Evidence should not be ambiguous 753

——Exchange—Exchange is not sale and consequently where sale alone gives the right of pre-emption there is no such right in case of exchange 390

——Hissedar karibi — Meaning depends upon context 456

——Incidents of—A claim to a right of pre-emption does not necessarily connote a suit; it may be enforced either by private treaty or by suit. It implies an assertion of a right which may be asserted before a transfer is effected or after it is effected. The right arises from a sale if the order of preference laid down by the *wajib-ul-arz* is disregarded by the vendor 753

*——Perpetual lease — Premium, almost equal to value, and small rent do not constitute sale 60

*——Right by contract continues against representatives and assigns with notice 657

*——Right to sue—Right to pre-empt must exist on date of sale, date of suit, and date of first Court's decree 82

——Subject-matter—A mere option of re-purchase cannot be pre-empted 743

——Subject-matter—The interest of an owner in *sir* plots is a proprietary interest and the transfer of the *sir* plots is in fact a transfer of his proprietary interest 447

Pre-emption—

*——Suit for—Strangers being joined in respect of a portion of the property claim in respect of whole fails 81

——Wajib-ul-arz is good evidence unless otherwise rebutted 52

——Wajib-ul-arz—Absence of actual transfer in accordance with custom recorded in wajib-ul-arz in a pre-emption does not rebut presumption raised by wajib-ul-arz 723

——Wajib-ul-arz — An ambiguous wajib-ul-arz is insufficient to prove the custom of pre-emption which plaintiff is bound to prove in a suit for pre-emption 541

——Wajib-ul-arz — Custom — Presumption of a custom raised by 1882 wajib-ul-arz is not rebutted by entry of a sole proprietor in 1840 146

——Wajib-ul-arz on construction preference was held to exist among co-sharers *inter se* 227

——Wajib-ul-arz.—Owing to special instructions given to settlement officers in the wajib-ul-arzes of 1885 in Basti and Gorakhpur Districts the record of custom of pre-emption raises a very strong presumption 371

——Wajib-ul-arz—Wajib-ul-arz prepared at partition does not abrogate old customs 425

——Wajib-ul-arz.—The mere fact that the *wajib-ul-arz* records a right of pre-emption in favour of owners of contiguous villages does not by itself render the *wajib-ul-arz* useless as evidence of custom 925

——Wajib-ul-arz—Where a wajib-ul-arz contained a clause, in matters recording rights of pre-emption, to the effect that if a stranger has inherited property from an issueless co-sharer he would not be entitled to the right of pre-emption, the existence of the right of pre-emption was held to be a matter of contract and not of custom 542

——Wajib-ul-arz—Where the wajib-ul-arz of 1884 gives a right of pre-emption to Zamindars but that of 1863 does not show such right, the presumption created by the wajib-ul-arz of 1884 is destroyed by that of 1863 925

——Who can pre-empt—Hissadar Karibi.—A co-sharer by belonging to the same Hindu family as the vendor and by becoming member of the family by marriage is a Hissadar Karibi 534

——Who can pre-empt—Mohtamims have a kind of proprietary interest and are entitled to pre-emption 735

Principal and Agent—

*——Pukka Adhatia as an agent has to render account at the place where business is transacted and not at the place where principal resides 530

Private Defence—

——*See* PENAL CODE, S. 99.

Provincial Insolvency Act (V of 1920)—

*——S. 4 (2)—Claims by strangers to property can be gone into by Civil Courts 40

——S. 10—The finding as to the Judge not being satisfied as to the debtor's inability to pay his debts must be arrived at like any other finding of fact 800

*——S. 25—Petition is to be dismissed only after considering all the issues mentioned in the section—"Sufficient cause" for not making order must be made clear 686

——S. 25—The finding as to judge not being satisfied as to the debtor's inability to pay his debts must be arrived at like any other finding of fact 800

*——S. 28 (2)—Leave is not necessary for a suit against Official Receiver except in case of claims of creditors 40

*——S. 68—'May' does not mean 'must'—Jurisdiction of Civil Court is not barred 40

Provincial Small Cause Courts Act (IX of 1887)—

——S. 25—Gross errors of law are not revisable under S. 115, Civ. Pro. Code, though they are revisable under S. 25, Sm. C. C. Act 691

——Sch. II, Art. 8—Grazing dues—Suit for recovery of rent of a grazing area is excluded under clause 8 557

*——Sch. II, Art. 35 (ii)—Suit for return of thing lent but not returned in time is not excluded 571

——Sch. II, Art. 35 (ii)—Suit for damages for trees belonging to plaintiff and cut by defendants is outside the cognizance of a Court of Small Causes 537

Provincial Small Cause Courts Act—

——Sch. II, Art. 35 (j)—Suit for damages—Suit by way of damages arising out of the unlawful attachment and sale in execution of the plaintiff's property is not cognizable by a Court of Small Causes 537

——Sch. II, Art. 42—Mere signing mortgage deed as joint executant does not make one joint mortgagor where only one mortgaged his property and the other mortgaged none 737

Public Gambling Act (III of 1867)—

——S. 3—Amended Act I of 1917, S. 2—Balls of paper used in Satta betting being so manipulated as to leave no chance of loss to the owner are instruments of gaming and offence is committed F. B. 338

——S. 6—Direct evidence of taking commission is not necessary 186

——S. 6—Legality of warrant—Presumption as to league and indefinite warrant is not legal 128

——Amended by U.P. Act (I of 1917)—

——S. 13—Public place includes place where public are invited to gamble though owned by private individual 768

R

Railways Act (IX of 1890)—

——S. 47—Rules under R. 59—Rule does not authorise Railway to alter contract already made 180

*——S. 72—Company may limit its liability as bailee by special contract 605

*——S. 72—Consignment at ordinary rate—Railway liable for damage to goods 254

——S. 72—Delay in transmission.—If risk note does not specially protect Railway against delay, notwithstanding risk note, Railway is liable for unreasonable delay in transmission of goods which it cannot explain 760

*——S. 72—Endorsee can sue for short delivery 574

——S. 72—Liability as bailee continues till date of delivery of goods to consignee 605

——S. 72—Requires risk note in writing—Signing blank form does not constitute agreement — No witnesses are required 692

* ——S. 72—Risk Note B—Proof of wilful neglect was held sufficient from circumstances 177

Railways Act—

——S. 72—Risk note B—"Robbery" is synonymous with "theft"—Claim based on wilful neglect fails on proof of theft from running train 621

*——S. 72—Risk Note form B—Damages for delay are not exempted 8

*——S. 72—Risk Note form B—'Loss'—Burden of proof is on Railway where there is short delivery 7

——S. 72—Risk Note form B—No loss of complete packages—Company is not liable for damages to package though due to its wilful neglect 605

*——S. 77—Delivery not given for more than 6 months—Section applies 617

*——S. 77—Risk Note form B.—The Railway Company is protected by Risk Note form B, even where the loss is due to their negligence unless the loss is of a complete consignment or of one or more complete packages 521

——S. 101—Omitting to see that the points are set right is negligent omission endangering human safety 438

Record of Rights—

——Entries in record of rights prepared in Basti and Gorakhpur settlements—Special weight to be given but they are not conclusive 449

Redemption—

——Right of—*See* T. P. Act, S. 91.

Registration—

oo——Due registration.—When consideration money in deed is a little over stated, to safeguard purchaser from pre-emption with the result that vendor refuses to affix her thumb impression below the registration endorsement but the document has been presented for registration by the purchaser who has signed below the registration endorsement as required by S. 52 of the Registration Act, the document is duly registered and passes good title to purchaser 938

Registration Act (III of 1877)—

oo——S. 2, Cl. 7—Kabuliat is treated as lease only for registration—It is not a lease for all purposes 514

Registration Act (XVI of 1908)—
——S. 17—Unregistered deed though not capable of passing title is yet admissible for collateral purposes 837
——S. 17—Where petition of compromise filed in Court is the only evidence of title to property worth more than Rs. 100, registration is necessary 842
——S. 17—Where there is executory contract like compromise by unregistered deed transferring property it can't be enforced but mutual arrangement carried out must be enforced 826
*——S. 17 (1)—Will reciting a sum of money more than Rs. 100 to have been written off in consideration of transfer of immoveable property is compulsorily registrable 277
*——S. 28—Actual real title of mortgagor does not affect the question of validity—Intention of parties to defraud is necessary 473
——S. 28—Fraud on registration.—Obiter—The inclusion in sale-deed of item of property merely for the sake of registration does not amount to fraud on registration where the transferor is entitled to transfer it 897
——S. 28—Fraud on registration—The inclusion in sale-deed of property which the parties intended to be transferred but of which possession was not taken by vendee does not amount to fraud on registration and does not render it invalid simply because the deed which includes other items of property is registered in the office of the Sub-Registrar having jurisdiction over the place in which the former item of property is situated 897
oo——S. 28—Non-existence of any property within the jurisdiction of the Sub-Registrar invalidates registration even in absence of fraud by mortgagee 373
*——S. 32—General power to execute document includes power to present for registration 148
——S. 32—Presentation is a question of fact requiring no formality 799
——Ss. 32, 33—Handing over the deed to Sub-Registrar by husband and asking the Sub-Registrar to go to pardanashin lady's house does not amount to presentation 799

Registration Act—
*——S. 49—An unregistered compromise of an offence compounded with the permission of the Criminal Court by which some rooms belonging to the accused were treated as belonging to the complainant and were given in exchange for the rooms belonging to the accused, does not pass title to the complainant 396
——S. 49—Deed acted upon but not registered is binding on parties acting up to it 772
*——S. 49—Document useful as admission—Requires no registration 304
——S. 49—Petition of compromise filed in court being the only evidence of title to property worth more than Rs. 100, registration is necessary 842
——S. 49—Unregistered deed though not capable of passing title is yet admissible for collateral purposes 837
——S. 49—Where there is executory contract like compromise by unregistered deed transferring property it can't be enforced but mutual arrangement carried out must be enforced 826

Res judicata—
——*See* CIV. PRO. CODE, S. 11.

Restitution of Conjugal Rights—
——Cruelty—Where an order for maintenance had to be executed by imprisonment of the husband who had alleged wife's unchastity. *Held* there is reasonable apprehension of bodily injury if she returns to her husband 391

Revision—
——Civil—*See* CIV. PRO. CODE, S. 115.
——Criminal—*See* CRIM. PRO. CODE, S. 439.

Risk Note—
*——Form B—Company may limit its liability as bailee by special contract 605

S

Salt Tax Act (XII of 1882)—
——Ss. 15, 18 and 118—S. 15 applies in the case of authorised place—S. 18 in the case of an unauthorised place—Non-compliance with S. 118 renders search irregular 437

Second Appeal—
——*See* CIV. PRO. CODE, S. 100.

Secondary Evidence of Documents—

——*See* EVIDENCE ACT, S. 63.

Sentence—

oo——In cases of murder by ignorant peasants who are misled by misrepresentations and promise of millennium sentence of transportation for life is sufficient 233

Set off—

——Claim for—*See* CIV. PRO. CODE, O. 8, R. 6

Sir Land—

——Ex-proprietary tenant can abandon ex-proprietary rights after their accrual 737

——Sale, effect of.—A vendor holding *sir* land becomes an ex-proprietary tenant of the entire proprietary body and not merely of his vendee 507

Specific Performance—

oo——If valuer through fraud or mistake undervalues property agreed to be sold at his valuation, no decree can be passed 360

*——Vendor having no title to sell—Specific performance cannot be granted 167

Specific Relief Act (I of 1877)—

*——S. 12—Presumption.— S. 12 raises a presumption that compensation would not be adequate and the party alleging that it is adequate must make out a case to that effect 529

——S. 21—"Adequate."—In S. 21 the word "adequate" means adequate appearing to the Court for some reason found as a fact and stated by the Court in spite of the plaintiff's opinion that it is inadequate 529

*——S. 27—Contract of pre-emption can be enforced against representatives—Case-law discussed 400

*——S. 42—Further relief of refund or perpetual injunction not being claimed, suit is not tenable 652

——S. 52—Injunction is in Court's discretion 724

Spes Successionis—

——*See* T. P. ACT, S. 6 (*a*).

Stamp Act (II of 1899)—

*——Art. 53—Definition—Receiving back one's own money which was recovered from one by the Police and returned by the Magistrate does not require a stamp 578

Subrogation—

——*See also* T. P. ACT, S. 101.

——A person who is not entitled so redeem but who pays the mortgage money and gets into possession of the property does not thereby acquire the rights and liabilities of the mortgagee 834

Substituted Security—

*——Doctrine does not apply in favour of strangers 65

Succession Certificate Act (VII of 1889)—

——Ss. 19, 26—Civil P. C., S. 141 does not apply to the Act except so far as Ss. 19 and 26 make it applicable 376

Suit—

——Valuation should be fair—Defendant, when first excessive valuation came to his notice, should at once, before drafting any written statement apply for order on plaintiff to deliver particulars in writing of valuation 652

Suits Valuation Act (VII of 1887)—

*——S. 8—Declaratory suit.— The relief claimed is that the plaintiff should be held to have a right and a perpetual injunction should be granted. The plaint states that for purposes of jurisdiction the suit is valued at Rs. 3,038-7 and that a Court-fee of Rs. 10 is paid and that relief for issue of injunction is valued at Rs. 10 and that Court-fee of As. 12-0 is paid on it. The suit is either for injunction or for declaratory decree with consequential relief. In either case the Court-fee payable is to be calculated according to the amount at which the relief sought is valued. Plaintiff in this case, by his own statement, has valued the suit and the relief at Rs. 3,038-7 and Rs. 10 and is liable for Court-fee according to this amount. Under S. 8 of Suits Valuation Act, there must be the same valuation for purposes of jurisdiction as for Court-fee 597

T

Tort—

——Contribution.—In cases of joint tort-feasors what Court has to see is whether there is anything in the circumstances of each case which

Tort—

would deprive the plff. of his right according to general equity 857

——Joint feasors—Suit for contribution between tort-feasors is not always bad 857

Transfer of Property Act (IV of 1882)—

oo——S. 3 (*c*)—Machinery is not immoveable property unless it is attached to the building for permanent beneficial enjoyment of the building itself 365

——S. 6—Interest of a person's holding on which he has planted grove is transferable 795

oo——S. 6 (*a*)—Contingent interest can be transferred 625

*——S. 6 (*d*)—Void and voidable—Option to avoid cannot be transferred, therefore transferee of a person who can avoid cannot avoid 29

——S. 14—Contract of pre-emption being already recognised does not offend against the rule in S. 14—Case-law discussed 400

*——S. 28—Performance of condition subsequent which was a defeasance clause being impossible, estate becomes absolute 625

——S. 40—Contract of pre-emption is enforceable against heirs of transferee with notice—Case-law discussed 400

*——S. 40—Contractual right of pre-emption continues against representatives and assigns with notice 657

*——S. 41 — Certain heirs being recorded as full owners a transferee is entitled to presume that they are sole heirs 384

——S. 41 — Revenue records are sufficient data for inquiry 63

*——S. 43—Scope—Where the husband executed a mortgage on behalf of his wife but the authority was not proved, a decree could be passed against the estate that he got as heir to his wife 362

——S. 51—Deed prior to the Act—In case of mortgage-deed executed prior to the coming into force of the Transfer of Property Act no question of attestation can arise 929

*——S. 54—Contract of sale does not create interest in immoveable property 396

Transfer of Property Act—

——S. 54—Deed acted upon but not registered is binding on parties acting up to 772

——S. 54—Unregistered deed though not capable of passing title is yet admissible for collateral purposes 837

*——S. 54—Vendee under an unregistered deed in possession cannot be ousted by vendor without paying the vendee the price thereof 396

oo——S. 55—Registration Act, S. 52—Passing of title—Consideration money inflated.—When the consideration money in the sale-deed is a little over-stated, to safeguard the purchaser from pre-emption, with the result that the vendor refuses to affix her thumb-impression below the registration endorsement, but the document has been presented for registration by the purchaser who has signed below the registration endorsement as required by S. 52, Registration Act, the document is duly registered and it passes a good title to the purchaser 938

——S. 55 (1) (*j*)—Express contract excludes statutory contract 937

——S. 58—Mere signing mortgage-deed as joint executant does not make one a joint-mortgagor where only one mortgaged his property and other mortgaged none 787

*——S. 58—Mortgage of future crops is enforceable an executory agreement and creates valid equitable charge—But is unavailing against a *bona fide* purchaser without notice of prior charge 833

——S. 58 (*c*)—Sale and agreement to reconvey within a certain period entered into simultaneously constitute mortgage by conditional sale 444

oo——S. 58 (*c*)—Sale consideration being full value of property and agreement to reconvey being in favour of one of the vendors no mortgage by conditional sale is created 743

——S. 59—Illiterate mortgagor—Personally signing by illiterate mortgagor is not necessary in case of mortgage executed prior to T.P. Act 832

——S. 59—Note by attestor that he attested at executant's request implies that he did not see executant sign 256

Transfer of Property Act—

——S. 59—Unregistered deed though not capable of passing title is yet admissible for collateral purposes 837

*——S. 60—If subsequent to a mortgage, a charge was created on the same property, and the mortgagor bound himself by covenant not to redeem first mortgage or transfer the property before paying in addition to the original mortgage amount, the further amount borrowed also, the property can't be redeemed by paying the amount of the first mortgage alone 832

*——S. 61—If subsequent to a mortgage, a charge was created on the same property and the mortgagor bound himself by covenant not to redeem the first mortgage or transfer the property before paying in addition to the original mortgage amount, the further amount borrowed also, the property can't be redeemed by paying the amount of the first mortgage alone 832

——S. 63—Mortgagee granting occupancy rights on receipt of Nazarana Mortgagor is entitled to Nazarana 153

——S. 67 — Obiter — In decree for foreclosure after expiration of period of grace property passes to mortgagee. In decree for sale the mortgagor has still further time even after the period of grace till the sale is held and afterwards confirmed by the Court 818

——S. 68—Right to personal decree is different from right given by covenant in deed to recover money by sale 877

——S. 68—Section applies even when mortgagee retains possession of part of the mortgaged property 877

——S. 72—Improvements of ordinary convenience are not improvements, within the section 47

*——S. 72—Mortgagee must account for profits of and deliver possession of plots not mortgaged but presumably got as mortgagees in possession 444

*——S. 72—Usufructuary mortgagee agreeing to pay malikana is liable for non-payment in suit for redemption 591

——S. 74—A person who is not entitled to redeem the mortgaged property but who pays the mortgage money and gets into possession of the property does not thereby acquire the rights and liabilities of the mortgagee 834

*——S. 76—Interest on surplus usufruct is not payable 881

——S. 76—Whether arrears of rent accrued owing to default of usufructuary mortgagee is question of law and fact 877

*——S. 82—Scope—In the case of the representative of the mortgagor himself no question of contribution arises 929

*——S. 83—Deposit being refused by mortgagee—Mortgage is not extinguished 26

——S. 88—New C.P.C.—Preliminary decree in mortgage suit being passed before and final decree, after new Civil Procedure Code, an application for execution beyond 12 years after date of final decree is barred since new Code governed case, final decree only being executable decree 696

—— S. 91—A person in joint cultivation of occupancy holding can redeem 147

——S. 101 —A person who is not entitled to redeem the mortgaged property but who pays the mortgage money and gets into possession of the property does not thereby acquire the rights and liabilities of the mortgagee 834

oo——S. 105 — Kabuliat though accepted by landlord does not create title in lessee as a lease would do 514

——S. 106—Is liable to be overruled by custom or contract 726

——Ss. 106 and 111 (*g*)—In suit for ejectment denial of landlord's title before suit is filed is necessary for dispensing with notice 726

*——S. 120—Exchange is not market value of the property given by either but the inherent value and the convenience of either party 390

Trespass--

——Suit for removal of trees and possession of land is good within 12 years 443

Trespasser—

——Tacking is allowed even in case of an invalid transfer by trespasser 738

Trustee—

——*De son tort*—Definition.—Person in whom the trust property never vested and who was never given possession as trustee but who as manager of the property took upon himself the position and duties of trustee was held to be only trustee *de son tort* 884

U

U. P. Court of Wards Act (IV of 1912)—

——S. 54—Notice by transferor does not help transferee 98

U. P. Excise Act (IV of 1910)—

——S. 60-A—Offence of possessing excisable article except cocaine is not summarily triable 675

——S. 64 (*c*)—Sale against rules in presence of one partner makes the other partner criminally liable 101

——S. 71—Transfer of key of a locked box to a friendly co-occupant does not divest the owner of his possession 381

U P. Land Revenue Act (III of 1901)—

——Partition--Revenue Courts cannot partition buildings but Civil Courts can, in proceedings under Land Revenue Act 854

——S. 4—Rights of lambardar to sue the co-sharers.— A lambardar can sue the other co-sharers of the village, who hold *sir* or Khudkasht land, for a refund of the whole of the profit which they may have realised in excess of their share and not only to the extent of the share of the lambardar in such excess. S. 165 of the Agra Tenancy Act (II of 1901) does not exclude the general authority, which the lambardar possesses to represent his co-sharers in such a litigation 935

——S. 36—Lambardar alone cannot be blamed for not applying for assessment 613

——S. 36—Parties can agree to rent not above the legal maximum 944

——Ss. 87, 88—Recorded rent must be decreed by Civil Court except in case of clerical error 429

——Ss. 118 and 119—Do not apply where plaintiff sues defendant to have the latter's trees on the former's plot to be removed 160

U. P. Land Revenue Act—

——S. 233-K.— A Muhammadan tenant-in-common cannot be represented by another Muhammadan tenant-in-common merely because their interest are identical 427

——S. 233-K—Suit for possession of plot included in partition proceedings does not lie in Civil Court 682

——S. 233-K—Suit to challenge partition on the ground of fraud is not maintainable 879

U. P. Local Rates Act (I of 1915)—

——S. 14—Relief claimed being declaration "that imposition of 1874 is illegal and invalid as against himself." Suit is to set aside assessment of rate imposed under Local Rates Act 652

U. P. Municipalities Act (II of 1916)—

——Bye-laws under Rule 36 (2)—Candidate can withdraw during polling 134

——S. 16 (3) (*c*)—Words "Place of profit" do not include ordinary commercial contract 135

——Ss. 20 and 22—Presentation to Joint Magistrate in pursuance of custom, instead of to the Collector is valid. Petition can be made only by a candidate in whose favour rests have been recorded can apply under S. 20—Verification is not necessary 132

——S. 23, sub-S. 3 — High Court can't revise order under S. 467 by Election Commissioner 684

——S. 47—Complaint—Non-appearance of complainant does not justify dismissal of complaint, as under this Act, the Magistrate takes cognizance from information received and prosecution is not instituted upon complaint 528

——S. 85 (1)—Striking work after notice is an offence 188

*——S. 113—In the case of public ways only the surface vests in municipality and not the soil 599

——S. 128 (1), cl. 9—"Carrying on a trade" does not include working as a clerk 567

——Ss. 178 and 214—Alteration in a wall is alteration in building 200

——S. 267—Board can ask for demolition of a structure previously permitted to be built by them 157

U. P. Municipalities Act—

——S. 326—Waiver—Plea of want of notice under S. 326 can be waived 467

V

Voidable Transfer.

*——Transferee of a person who could avoid cannot avoid 29

W

Wajib-ul-arz.

——Is *prima facie* evidence of custom but may record contract about some matters—Incidents of custom may be proved by production of wajib-ul-arz or external evidence 753

——The fact that it contains many provisions relating to matters of contract does not prevent its being treated also as record of custom 274

——Abadi — Construction — Qassabs are not Sheikhs and therefore they cannot claim rights of transfer given to Sheikhs 509

——Construction—Wajib-ul-arz recording custom of pre-emption can be interpreted to confer right of pre-emption as between members of different categories of pre-emptors *inter se* in the absence of provision to the contrary 753

——Evidentiary value—Presumption as to its being a record of custom may be rebutted 123

——Inclusion of matters not possibly or properly the subject of custom renders clause invalid as record of custom in regard to any of the matters of which it forms part 753

*——Pre-emption — Foreclosure of mortgage is not sale F.B. 324

——Pre-emption—Right of redemption given to a stranger cannot be a record of custom F.B. 321

Wajib-ul-arz—

——Presumption of custom of pre-emption raised by entry in a wajib-ul-arz is not rebutted by the circumstance that more than 100 years ago the villages were owned by a single proprietor 859

Wakf—

——Constructions raised on wakf land—Suit by some members of public for demolition, lies 850

Whipping Act (IV of 1909)—

——S. 5—Whipping is in lieu of any any other punishment 455

Will—

*——Performance of condition subsequent which was a defeasance clause being impossible, estate becomes absolute 625

Words—

——*Hissedaran shikmi*—Hissedaran shikmi means co-sharers in the same khata, the khata being a smaller sub-division of a patti 375

Workmen's Breach of Contract Act (XIII of 1859)—

——An offence under S. 2 is triable by a Second Class Magistrate 616

Workmen's Breach of Contract (Amended) Act (XII of 1920)—

——Complaint should be brought within 3 months from the neglect to perform contract 616

——Offence under S. 2 of the Act of 1859.—On conviction for an offence under S. 2 of the old Act of 1859 some period of grace the length of the period being determined by the Magistrate in his discretion should be allowed to the accused for the repayment. 616

*——S. 4—New contract in place of old one—No cash advance for the second time—Contract is valid 143

THE

ALL INDIA REPORTER

1924 ALLAHABAD

COMPARATIVE NOMINAL INDEX

OF CASES REPORTED IN

I. L. R. 46 ALLAHABAD

WITH REFERENCES TO THE PAGES OF

THE ALL INDIA REPORTER

Names of Parties		I. L. R.	pp.	A. I. R.		pp.
Abdul Ghafur Khan v. Akram Hasan	...		741	1924	A	717
Abdul Rahim v. Abdul Rahman	...		884	"	"	851
Abdul Shakur v Muhammad Matin	...		414	"	"	307
Abdur Rashid v Qudrat-un-nissa Bibi	...		542	"	"	713
Abid Husain Khan v. Kaniz Fatima	...	PC	269	"	PC	102
Adya Saran Singh v Jagannath	...		323	"	A	561
Aisha Bibi v. Mahfuz-un-nissa Bibi	...		310	"	"	362
Alkhu Rai v. Lachhman Upadhya	...	FB	274	"	"	324
Amrit Bibi v. Mustafa Husain	...		28	"	"	20
Anandi v Nand Lal	...		665	"	"	575
Anantu Kalwar v. Ram Prasad Tiwari	...		295	"	"	465
Auseri Lal v. Mullhan	...		369	"	"	557
Babban Pande v. Lachhman Chaudhri	...		205	1924	A	371
Babu Ram v. Musammat Kokla	...		210	"	"	391
Bageshar Rai v. Mahadei	...		525	"	"	461
Baij Nath v. Panna Lal	...		635	"	"	706
Baldeo Prasad v. Fateh Singh	...		533	"	"	933
Balgobind v. Sheo Kumar	...		864	"	"	818
Basdeo Rai v. Jhagru Rai	...		333	"	"	400
Bengal and North-Western Railway v. Munna Lal, Bishambhar Nath	...		844	"	"	760
Beni Prasad v. Sheo Din	...		361	"	"	425
Bhim Singh v. Ram Singh	...		301	"	"	309
Bhishambhar Nath v. Muhammad Ubaid-ullah Khan	...		227	"	"	559
Bihari Lal v. James Maclean	...		297	"	"	392
Bihari Lal v. Shib Lal	...		633	"	"	591
Bohra Akhey Ram v. Basant Lal	...		894	"	"	860
Bombay, Baroda and Central India Railway Company v. Budh Sen, Pusp Chand	...		55	"	"	180
Brij Bhushan Lal v. The Municipal Board of Kanauj	...		685	"	"	567
Brij Narain v. Mangal Prasad	...	PC	95	"	PC	50
Champi v. Tara Chand	...		744	1924	A	892
Chandar Sahai v. Durga Prasad	...		538	"	"	682
Chandrika Ram Tiwari v. Narain Prasad Rai	...		617	"	"	745
Chedi v. Ram Lal	...		80	"	"	224
Chetan Singh v. Sirtaj Singh	...		709	"	"	908
Chet Ram v. Sita Ram	...		717	"	"	678
Chheda v. Achhu Singh	...		690	"	"	572
Chhote Lal v. Kedar Nath	...		565	"	"	703
Chiranji Lal v. Syed Ilias Ali	...		620	"	"	751

Names of Parties	I. L. R.	pp.	A I. R.		pp.
Darbari Lal v. Gobind Saran	...	822	1924	A	902
Daya Ram v. Thakuri	...	622	"	"	668
Dhanraj Misr v. Rameshwar Misr	...	170	"	"	227
Dildar v. Shukr-ullah	...	152	"	"	444
Durga Prasad Sahu v. Tameshar Prasad	...	754	"	"	897
Dwarka Dhish Prasad Singh, *Application of*—	...	245	"	"	398
Dwarka Prasad Mithal, Vakil, *In the matter of*—	...FB	121	"	"	253
East Indian Railway Company v. Sri Ram Mahadeo	...	125	1924	A	177
Emperor v. Aladin	...	107	"	"	215
——— v. Ali Ahmad Khan	...	86	"	"	214
——— v. Angnu	...	41	"	"	188
——— v. Anis Beg	...	77	"	"	215
——— v. Atma Ram	...FB	447	"	"	338
——— v. Badlu Shah	...	138	"	"	454
——— v. Bakhshi	...	43	"	"	187
——— v. Baldeo Prasad	...	851	"	"	770
——— v. Banarsi	...	254	"	"	381
——— v. Bidha	...	114	"	"	319
——— v. Bihari Singh	...	663	"	"	676
——— v. Brij Bihari Lal	...	91	"	"	209
——— v. Chitar Singh	...	158	"	"	267
——— v. Debi Ram	...	623	"	"	675
——— v. Ganpat Lal	...	537	"	"	664
——— v. Ghariba	...	109	"	"	269
——— v. Gobind Ram	...	146	"	"	558
——— v. Habib-ul-Razzaq	...	81	"	"	197
——— v. Hira Lal	...	828	"	"	765
——— v. Jafar Husain	...	105	"	"	306
——— v. Kamla Pati	...	128	"	"	539
——— v. Kanhai Lal	...	354	"	"	578
——— v. Kashi Ram	...	906	"	"	779
——— v. Kishan Singh	...	174	"	"	455
——— v. Kunwar Jaswant Singh	...	137	"	"	317
——— v. Lachhman	...	243	"	"	413
——— v. Lachman	...	92	"	"	212
——— v. Mukhtara	...	915	"	"	783
——— v. Panna Lal	...	265	"	"	411
——— v. Puttu Lal	...	54	"	"	316
——— v. Ram Dayal	...	94	"	"	214
——— v. Ram Narain	...	446	"	"	675
——— v. Roshan Singh	...	235	"	"	592
——— v. Sardara	... FB	236	"	"	220
——— v. S. M. Bose	...	218	"	"	314
——— v. Tulshi Das	...	787	"	"	768
——— v. Umed Singh	...	64	"	"	299
Fateh Chand v. Murari Lal	...	840	1924	A	906
Gadodia and Co. v. The Great Indian Peninsula Ry. Co.	...	161	1924	A	254
Gajadhar v. Jagannath	... FB	775	"	"	551
Ganesh Das v. Raja Suraj Pal Singh	...	233	"	"	537
Ganesh Rai v. Bhushi Rai	...	903	1925	A	69
Ganga Prasad v. Ganeshi Lal	...	119	1924	A	161
Gauri Shankar Singh v. Sheonandan Misra	...	384	"	"	543
Ghasi Ram v. Bhola Nath	...	115	"	"	153

Names of Parties		I. L. R. pp.	A. I. R.		pp.
Gobind Ram v. Kunj Behari Lal	... FB	398	1924	A	341
Gobind Singh v. Bhirgu Nath Singh	...	686	"	"	788
Gopal Rai, Phul Chand v. The Great Indian Peninsula Ry. Co.	...	837	"	"	621
Hanuman Prasad v. Raghunath Prasad	...	573	1924	A	715
Har Prasad v. Ram Sarup, Radha Kishan	...	922	"	"	872
Himanchal Singh v. Jatwar Singh	...	710	"	"	570
Hira Lal v. Khairati Lal	...	211	"	"	360
Hunter v. Damodar Das	...	759	"	"	772
Husain Bhai v. Beltie Shah Gilani	...	733	"	"	808
Ismail Hasan v. Mehdi Hasan	...	897	1924	A	881
Jagmohan Prasad v. Brijendra Bahadur Singh	...	627	1924	A	523
Jawahir Lal v. Jarau Lal	...	192	"	"	350
Joshi Shib Prakash v. Jhinguria	...	144	"	"	446
Jwala Prasad v. Hoti Lal	...	625	"	"	711
Jwala Prasad v. Irshad Muhammad Khan	...	512	1925	A	50
Kali Charan v. Piari	...	769	1924	A	740
Kanhaiya v. Kanhaiya Lal	...	372	"	"	376
Kanhaiya Lal v. Ashraf Khan	...	230	"	"	355
Kanhaiya Lal v. His Highness the Maharaja of Benares	...	355	"	"	422
Kanhaiya Ojha v. Jagrani Kunwar	...	419	"	"	597
Karamat v. Wazir Husain	...	140	"	"	542
Karim Bakhsh v. Wahaj-ud-din	...	214	"	"	427
Kedar Nath v. Shankar Lal	...	303	"	"	514
Kedar Nath, Durga Prasad v. Bishwanath Lakshmi Chand	...	417	"	"	510
Kesho Prasad Singh v. Sheo Pragash Ojha	...PC	831	"	PC	247
Khudaijat-ul-Kubra v. Amina Khatun	...	250	"	A	388
Kirtarath Gir v. Mathura Prasad Ram	...	924	1925	A	72
Kundan Lal v. Parshadi	...	570	1924	A	744
Kunti v. Gajraj Tiwari	...	847	"	"	826
Lakshmi Narain Misir v. Musammat Sumarti Kunwar	...	439	1924	A	731
Lalla Mal, Hardeo Das, *In the matter of*	...	1	"	"	137
Lal Umrao Singh v. Lal Singh	...	917	"	"	796
Mahabir v. Manohar Singh	...	208	1924	A	540
Mahabir Prasad Misr v. Amla Prasad Rai	...	364	"	"	379
Mahabir Singh v. Matabadal Singh	...	549	"	"	735
Maharana Kunwar v. E. V. David	...	16	"	"	40
Majju v. Lachman Prasad	...FB	671	"	"	535
Makhan Lal v. Bihari Lal	...	688	"	"	571
Mani Lal v. Rani	...	327	"	"	534
Meghraj v. Krishna Chandra Bhattacharji	...	286	"	"	365
Mitra Sen Singh v. Janki Kunwar	...PC	728	"	PC	213
Moazzam Ali v. Raza Ali	...	856	"	A	818
Mohan v. Bishambhar Sahai	...	68	"	"	450
Moti Ram v. Muhammad Abdul Jalil	...	509	"	"	414
Mubarak Husain v. Ahmad	...FB	489	"	"	328
Mubarak-un-nissa Bibi v. Muhammad Raza Khan	...	377	"	"	384

Names of Parties	I. L. R.	pp.	A. I. R.		pp.
Muhammad Abdul Rahman Khan v. Muhammad Ayub Khan	...	889	1924	A	806
Muhammad Jan v. Fazal-ud-din	...	514	"	"	657
Muhammad Jan v. Shiam Lal	...FB	328	"	"	218
Muhammad Nazir v. Muhammad Sulaiman	...	424	"	"	603
Muhammad Nuh v. Brij Bihari Lal	...	656	"	"	939
Muhammad Raza Khan v. Muhammad Askari Khan	...	470	"	"	599
Muhammad Shafi v. Bindeshri Saran Singh	...	52	"	"	443
Mukerji, A C. v. Municipal Board of Benares	...	175	"	"	467
Mulani v. Maula Bakhsh	...	260	"	"	370
Nageshar Prasad v. Ram Harakh Pande	...	370	1924	A	541
Narain Das v. Bankim Chandra Deb	...	912	1925	A	194
Narain Singh v. Chiranji Lal	...	568	1924	A	730
Nazir Ahmad v. Muhammad Sharif	...	453	"	"	682
Phulwanti Kunwar v. Janeshar Das	...	575	1924	A	625
Piari Lal, Gopi Nath v. The East Indian Railway Company	...	691	"	"	574
Pitambar Lal v. Dodi Singh	...	3?9	"	"	503
Puran Singh v. Dat Ram	...	165	"	"	447
Putli Kunwar v. Janki Das	...	813	"	"	850
Radha Kishen v. Kedar Nath	...	815	1924	A	845
Radhe Lal v. Mul Chand	...	820	"	"	905
Raghubar Dayal v. The Secretary of State for India in Council	...	427	"	"	415
Raghunandan Prasad v. Ghulam Ala-ud-din Beg	...	571	"	"	689
Raghunandan Ram, Gopi Ram v. The Great Indian Peninsula Railway Company	...	649	"	"	692
Raghunandan Singh v. Tulshi Singh	...	38	"	"	315
Raja Udairaj Singh v. The Secretary of State for India in Council	...	553	"	"	652
Rajpati v. Deoli	...	877	"	"	784
Ram Chand v. Maula Bakhsh	...	110	"	"	178
Ram Charan v Bulaqi	...	858	"	"	854
Ram Charan Lal v. Dharam Singh	...	173	"	"	444
Rameshra v. Kalpu Rai	...	264	"	"	538
Ram Gobind Singh v. Lallu Singh	...	88	"	"	203
Ram Govind Pande v. Panna Lal	...	70	"	"	305
Ram Nath v. Emperor	...	611	"	"	684
Ram Prasad v Mahabir	...	220	"	"	310
Ram Sri v. Sri Kishan	...	879	"	"	777
Randhir Singh v. Rajpal Misir	...FB	478	"	"	321
Rati Ram v. Barhmajit	...	45	"	"	302
Samar Bahadur Singh v. Jit Lal	...	359	1924	A	390
Sanmukh Pande v. Jagarnath Pande	...	531	"	"	708
Sanwal Das v. The Collector of Etah	...	560	"	"	700
Sarab Sukh Das v. Ram Prasad	...	130	"	"	357
Sartaji v. Ramjas	...	59	"	"	166
Sat Dhar v. Ram Chandra	...	153	"	"	261
Sat Narain v. Sarju	...	167	"	"	265
Secretary of State for India in Council v. Radhe Lal	...	455	"	"	692
Shah Lal Chand v. Shah Ram Chand	...	674	"	"	753
Shahzad Singh v Hanuman Rai	...	562	"	"	704
Sharif Ahmad Alvi v. Muhammad	...	148	"	"	375

Names of Parties		I. L. R. pp.	A. I. R.	pp
Sheo Ghulam v Salik Ram	...FB	791	1924 A	481
Sheo Prasad Dube v. Sarju Mahto	...	35	" "	449
Sheo Ratan Singh v. Karan Singh	...	860	" "	857
Sher Muhammad Khan v. Parbhu Lal	...	47	" "	274
Shib Deo Misra v. Ram Prasad	...	637	1925 A	79
Sita Ram v. Musammat Govindi	...	458	1924 A	593
Sita Ram Singh v. Cheddi Singh	...	882	" "	798
Sobhaddi Lal v. Gobind Singh	...	616	" "	742
Sobha Ram v. Tursi Ram	...FB	693	" "	495
Sri Ganeshji Maharaj v. Lalta Prasad	...	842	" "	801
Subedar v. Jagat Narain	...	773	" "	848
Sukhdeo Rai v. Ram Chandar Rai	...	706	" "	622
Surajman Chaube v. Anjore Shukul	...	73	" "	263
Tara Chand v. Champi	...	767	1924 A	718
Tara Chand v. Jugul Kishore	...	713	" "	686
Teja v. Tika Ram	...	32	" "	225
Thakur Sri Gat Ashram Narainji v. Jaisth Madho Acharia	...	651	" "	504
Tika Ram v. Daulat Ram	...	465	" "	530
Tota Ram v. Panna Lal	...	631	" "	668
Uma Shankar v. Gobind Narain	...	892	1924 A	855
Umrao v. Lachhman	...	321	" "	448
Yakub Ali v Dhan Singh	...	316	1924 A	429
Yasin Bibi v. Syed Munawar Husain	...	743	" "	799
Zamani Begam v. Khan Muhammad Khan	...	142	1924 A	251

:THE

ALL INDIA REPORTER

1924 ALLAHABAD

COMPARATIVE TABLES

Hints for the use of the following Tables :—

TABLE No. I—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1924 with corresponding references of the ALL INDIA REPORTER.

TABLE No. II—This Table shows serially the pages of the other REPORTS and JOURNALS for the year 1924 with corresponding references of the ALL INDIA REPORTER.

TABLE No. III—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER, 1924 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of INDIAN LAW REPORTS, ALLAHABAD SERIES for 1924 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 46 ALLAHABAD.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 46 Allahabad = All India Reporter.

1	2			1	2			1	2			1	2		
1	1924	*A*	137	86	1924	*A*	214	146	1924	*A*	558	233	1924	*A*	537
16	"	"	40	88	"	"	203	148	"	"	375	235	"	"	592
28	"	"	20	91	"	"	209	152	"	"	444	236	"	"	220
32	"	"	225	92	"	"	212	153	"	"	261	243	"	"	413
35	"	"	449	94	"	"	214	158	"	"	267	245	"	"	398
38	"	"	315	95	"	*P C*	50	161	"	"	254	250	"	"	388
41	"	"	188	105	"	*A*	306	165	"	"	447	254	"	"	381
43	"	"	187	107	"	"	215	167	"	"	265	260	"	"	370
45	"	"	302	109	"	"	269	170	"	"	227	264	"	"	538
47	"	"	274	110	"	"	178	173	"	"	444	265	"	"	411
52	"	"	443	114	"	"	319	174	"	"	455	269	"	*PC*	102
54	"	"	316	115	"	"	153	175	"	"	467	274	"	*A*	324
55	"	"	180	119	"	"	161	192	"	"	350	286	"	"	365
59	"	"	166	121	"	"	253	205	"	"	371	295	"	"	465
64	"	"	299	125	"	"	177	208	"	"	540	297	"	"	392
68	"	"	450	128	"	"	539	210	"	"	391	301	"	"	309
70	"	"	305	130	"	"	357	211	"	"	360	303	"	"	514
73	"	"	263	137	"	"	317	214	"	"	427	310	"	"	362
77	"	"	215	138	"	"	454	218	"	"	314	316	"	"	429
80	"	"	224	140	"	"	542	220	"	"	310	319	"	"	503
81	"	"	197	142	"	"	251	227	"	"	559	321	"	"	448
				144	"	"	446	230	"	"	355	323	"	"	561

I. L. R. 46 Allahabad = All India Reporter (*Concld*)

1	2			1	2			1	2			1	2		
327	1924	A	534	514	1924	A	654	656	1924	A	939	815	1924	A	845
328	"	"	218	525	"	"	461	663	"	"	676	820	"	"	905
333	"	"	400	531	"	"	708	665	"	"	575	822	"	"	902
354	"	"	578	533	"	"	933	671	"	"	538	828	"	"	765
355	"	"	422	537	"	"	664	674	"	"	75	831	"	PC	247
359	"	"	390	538	"	"	682	685	"	"	567	837	"	A	621
361	"	"	425	542	"	"	713	686	"	"	788	840	"	"	906
364	"	"	379	549	"	"	735	688	"	"	571	842	"	"	801
369	"	"	557	553	"	"	652	690	"	"	572	844	"	"	760
370	"	"	541	560	"	"	700	691	"	"	574	847	"	"	826
372	"	"	376	562	"	"	704	693	"	"	495	851	"	"	770
377	"	"	384	565	"	"	703	706	"	"	622	856	"	"	818
384	"	"	543	568	"	"	730	709	"	"	908	858	"	"	854
398	"	"	341	570	"	"	744	710	"	"	570	860	"	"	857
414	"	"	307	571	"	"	689	713	"	"	686	864	"	"	818
417	"	"	510	573	"	"	715	717	"	"	678	877	"	"	784
419	"	"	597	575	"	"	625	728	"	PC	213	879	"	"	777
424	"	"	603	611	"	"	684	733	"	A	808	882	"	"	798
427	"	"	415	616	"	"	742	741	"	"	747	884	"	"	851
439	"	"	731	617	"	"	745	743	"	"	799	889	"	"	806
446	"	"	675	620	"	"	751	744	"	"	892	892	"	"	855
447	"	"	338	622	"	"	668	754	"	"	897	894	"	"	860
453	"	"	682	623	"	"	675	759	"	"	772	897	"	"	881
455	"	"	692	625	"	"	711	767	"	"	718	903	1925	"	69
458	"	"	593	627	"	"	523	769	"	"	740	906	1924	"	779
465	"	"	530	631	"	"	668	773	"	"	848	912	1925	"	194
470	"	"	599	633	"	"	591	775	"	"	551	915	1924	"	783
478	"	"	321	635	"	"	706	787	"	"	768	917	"	"	796
489	"	"	328	637	1925	"	79	791	"	"	481	922	"	"	872
509	"	"	414	649	1924	"	692	813	"	"	850	924	1925	"	72
512	1925	"	50	651	"	"	504								

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1924 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

22 Allahabad Law Journal = All India Reporter.

1	2			1	2			1	2			1	2		
1	1924	A	254	59	1924	A	350	91	1924	A	310	144	1924	A	381
5	"	"	447	62	"	"	371	98	"	PC	28	149	"	"	370
7	"	"	424	65	"	"	445	105	"	"	60	153	"	"	709
10	"	"	444	67	"	"	540	110	"	A	218	155	"	"	474
11	"	PC	3	68	"	"	391	113	"	"	431	159	"	"	538
14	"	"	2	70	"	"	430	116	"	"	413	162	"	"	411
16	"	"	56	73	"	"	427	118	"	"	398	165	"	"	392
20	"	A	428	76	"	"	360	122	"	"	388	169	"	PC	44
26	"	"	467	79	"	"	694	126	"	"	318	173	"	"	40
40	"	PC	1	81	"	"	696	129	"	"	592	177	"	"	34
42	"	"	48	83	"	"	314	130	"	PC	65	180	"	A	309
45	"	"	36	85	"	"	220	137	"	A	324				

22 Allahabad Law Journal = All India Reporter (Concld.)

1	2			1	2			1	2			1	2		
182	1924	A	465	439	1924	A	700	680	1924	A	672	857	1925	A	1
185	"	"	514	441	"	"	735	683	"	"	712	861	1924	"	790
191	"	"	503	445	"	"	652	684	"	"	686	861	"	"	792
193	"	"	365	452	"	"	702	688	"	P C	183	866	"	"	884
202	"	"	307	455	"	"	703	690	1925	A	79	880	"	"	761
205	"	"	362	457	"	"	669	700	1924	"	799	881	1925	"	137
212	"	"	429	459	"	"	720	702	"	"	908	883	"	"	71
215	"	"	520	461	"	"	730	703	"	"	747	887	"	"	60
217	"	"	341	463	"	"	737	706	"	"	808	890	"	"	19
232	"	"	905	464	"	"	689	713	"	"	678	897	"	"	144
234	"	"	448	466	"	"	744	719	"	"	772	900	"	"	121
235	"	"	561	468	"	"	745	725	"	"	740	902	"	"	138
239	"	"	665	470	"	"	742	729	"	"	599	905	"	"	133
241	"	"	373	472	"	"	740	737	"	"	843	909	"	"	1 5
244	"	"	433	473	"	PC	75	739	"	"	848	911	"	"	119
247	"	"	534	487	"	A	414	741	"	"	768	913	"	"	115
249	"	"	338	490	"	"	933	744	"	"	8 4	919	"	"	103
254	"	PC	126	493	"	"	751	745	"	"	849	928	"	"	117
263	"	A	492	496	"	"	676	747	"	"	850	931	1924	PC	133
265	"	"	410	497	"	"	684	749	"	"	905	9 5	"	"	156
284	"	PC	102	501	"	"	645	751	"	"	765	9 5	1924	A	612
288	"	A	578	505	"	"	675	753	"	"	902	51	"	PC	216
289	"	"	425	506	"	"	668	758	"	"	906	959	"	"	184
292	"	"	390	508	"	PC	137	761	"	"	845	962	"	"	209
295	"	"	379	518	"	A	719	766	"	"	791	968	"	"	202
299	"	"	510	520	"	"	663	768	"	"	801	977	1925	A	131
301	"	"	911	521	"	"	625	769	"	"	760	980	"	"	180
304	"	PC	121	558	"	"	711	772	"	"	710	983	1924	PC	221
307	"	A	384	561	"	"	321	776	"	"	818	990	"	"	188
314	"	"	394	568	"	"	715	779	"	"	826	994	1925	A	108
317	"	"	422	570	"	"	572	783	"	"	854	100	"	"	129
321	"	"	328	572	"	"	523	785	"	"	859	1009	"	"	26
339	"	"	557	576	"	"	937	788	"	"	857	1012	"	"	17
340	"	"	612	579	"	"	591	791	"	"	8 8	1018	"	"	174
342	"	"	541	581	"	"	706	803	"	"	777	1020	"	"	10
345	"	"	376	583	"	"	668	806	"	"	784	1028	"	"	62
349	"	"	597	585	"	"	593	807	"	"	855	1031	"	"	154
354	"	"	415	591	"	"	530	809	"	"	798	1033	"	"	141
365	"	"	867	597	"	"	535	810	"	"	79	1035	"	"	172
369	"	"	543	599	"	"	567	812	"	"	851	1038	"	"	184
382	"	PC	93	601	"	"	551	816	"	"	800	1039	"	"	179
384	"	"	125	610	"	"	481	817	"	"	806	1041	"	"	182
386	"	"	95	626	"	"	495	820	"	"	778	1045	"	"	24
394	"	"	113	638	"	"	676	823	"	"	850	1049	"	"	165
400	"	A	657	639	"	"	566	825	1925	"	6	1060	"	"	146
410	"	"	811	641	"	"	504	829	1924	"	779	1075	"	"	185
411	"	"	664	645	"	"	692					1079	"	"	155
413	"	"	698	647	"	"	518	833	"	"	881	1095	"	"	175
417	"	"	705	650	"	"	939	838	"	"	783	1097	"	"	221
419	"	"	461	657	"	"	575	840	"	"	796	1100	"	"	239
423	"	"	870	662	"	"	568	844	"	"	872	1102	"	"	226
425	"	"	747	663	"	"	574	846	"	"	785	1110	"	"	218
427	"	"	682	665	"	"	892	850	"	"	865	1106	"	"	230
430	"	"	533	673	"	"	715	851	"	"	875	1112	"	"	215
432	"	"	711	676	"	"	788	853	"	"	871	1116	"	"	241
436	"	"	667	678	"	"	569	855	"	"	787	1119	"	"	236

L. R. 5 Allahabad (P. C.) = All India Reporter.

1	2	1	2	1	2	1	2
1	1924 P C 50	73	1924 P C 48	113	1924 P C 126	165	1924 P C 28
8	1923 " 128	76	" " 109	121	" " 40	171	" " 198
19	1924 " 56	83	" " 113	125	" " 44	175	" " 202
25	1923 " 95	89	" " 123	129	" " 184	182	" " 209
30	" " 184	92	" " 125	132	" " 186	188	" " 206
33	1924 " 65	94	" " 121	133	" " 183	190	" " 156
46	" " 2	97	" " 137	135	" " 143	199	" " 216
49	" " 36	105	" " 133	136	" " 191	206	" " 60
53	" " 3	109	" " 93	137	" " 144	212	" " 102
55	" " 1	110	" " 34	145	" " 200	216	" " 95
57	" " 75			147	" " 162		

L. R. 5 Allahabad (Civil) = All India Reporter.

1	2	1	2	1	2	1	2
1	1924 A 153	102	1924 A 520	264	1924 A 379	369	1924 A 523
5	" " 447	104	" " 370	268	" " 911	375	" " 536
7	" " 542	107	" " 392	270	" " 933	376	" " 920
8	" " 173	110	" " 743	273	" " 603	378	" " 745
11	" " 723	112	" " 538	276	" " 862	380	" " 700
14	" " 227	113	" " 467	279	" " 873	382	" " 937
16	" " 444	130	" " 350	282	" " 461	384	" " 692
17	1923 " 514	142	" " 388	286	" " 493	385	" " 521
21	1924 " 100	145	" " 324	289	" " 708	386	" " 738
22	" " 26	151	" " 321	291	" " 748	389	" " 565
24	" " 97	158	" " 559	293	1925 " 205	392	" " 759
26	" " 144	160	" " 464	294	" " 199	393	" " 715
28	" " 302	161	" " 400	296	1924 " 870	395	" " 919
29	1923 " 584	177	" " 355	298	" " 867	396	" " 692
31	1924 " 107	180	" " 529	301	" " 735	398	" " 918
33	" " 371	182	" " 373	306	" " 543	400	" " 750
36	" " 375	184	" " 534	317	1925 " 206	401	" " 527
39	1923 " 574	186	" " 396	318	1924 " 811	404	" " 518
40	" " 572	189	" " 541	319	1925 " 202	406	" " 922
41	1924 " 229	191	" " 688	321	1924 " 713	408	" " 707
43	" " 391	193	" " 365	324	1923 " 54	410	" " 504
44	" " 709	201	" " 328	325	1924 " 912	414	" " 591
46	" " 398	217	" " 557	329	" " 703	416	" " 567
50	" " 318	218	" " 480	331	" " 682	417	" " 622
52	" " 696	219	" " 448	334	" " 617	419	" " 473
53	" " 169	221	" " 394	335	" " 929	421	" " 522
55	" " 294	223	" " 909	342	" " 731	423	" " 677
61	1924 " 29	225	" " 510	347	" " 668	424	" " 939
68	" " 360	226	" " 503	348	" " 706	431	" " 928
71	" " 310	228	" " 925	350	" " 704	432	" " 571
75	" " 309	230	" " 910	353	" " 730	433	" " 574
77	" " 474	231	" " 526	354	" " 924	435	" " 575
80	" " 514	233	" " 425	356	" " 689	439	" " 570
86	" " 465	235	" " 414	357	" " 916	441	" " 579
88	" " 218	238	" " 376	360	" " 751	458	" " 551
91	" " 313	242	" " 415	362	" " 740	465	" " 788
93	" " 307	252	" " 691	363	" " 669	467	" " 690
95	" " 445	254	" " 390	364	" " 742	469	" " 753
97	" " 362	257	" " 384	366	" " 573	478	" " 535
		262	" " 816	367	" " 761		

Comparative Tables

L. R. 5 Allahabad (Civil) = All India Reporter (*Concld.*)

1	2			1	2			1	2			1	2		
480	1924	*A*	908	580	1924	*A*	849	648	1925	*A*	130	722	1925	*A*	71
482	"	"	808	582	1925	"	98	649	"	"	103	723	"	"	211
488	"	"	495	583	1924	"	801	657	"	"	68	725	1924	"	761
498	"	"	686	585	"	"	818	659	1924	"	718	726	"	"	875
502	"	"	892	586	"	"	605	661	1925	"	8	727	1925	"	65
509	"	"	897	593	"	"	806	663	"	"	54	729	"	"	213
518	"	"	772	596	1925	"	6	665	"	"	144	731	1924	"	865
524	"	"	799	599	1924	"	851	668	"	"	66	732	1925	"	131
525	"	"	747	603	"	"	850	670	"	"	59	734	1924	"	872
526	"	"	880	605	"	"	860	671	"	"	47	736	1925	"	176
528	1925	"	243	607	1925	"	77	673	1924	"	787	740	"	"	182
530	1924	"	876	608	"	"	57	674	"	"	796	744	"	"	117
532	"	"	825	609	"	"	44	677	"	"	740	747	"	"	141
533	"	"	848	615	"	"	58	681	1925	"	133	749	"	"	60
534	"	"	843	616	1924	"	802	685	"	"	51	751	1924	"	871
536	"	"	845	618	"	"	612	686	"	"	56	753	1925	"	187
541	"	"	905	625	"	"	881	688	"	"	52	755	"	"	240
542	1925	"	34	629	1925	"	123	689	"	"	78	756	"	"	154
545	1924	"	818	632	"	"	42	690	"	"	120	758	1924	"	597
556	"	"	902	634	1924	"	798	692	"	"	214	761	"	"	657
561	"	"	859	636	1925	"	138	694	"	"	164	769	"	"	698
563	"	"	854	638	1924	"	855	695	"	"	140	773	1925	"	137
565	"	"	804	639	"	"	793	697	1924	"	884	775	"	"	1
568	"	"	826	640	1925	"	115	709	1925	"	142	780	"	"	180
571	"	"	857	642	"	"	102	712	"	"	119	783	1924	"	800
573	"	"	794	644	"	"	209	715	1924	"	790	784	1925	"	218
575	"	"	621	645	1924	"	800	718	1925	"	174	785	1924	"	625
577	"	"	791	647	1925	"	96	720	1924	"	792	818	1925	"	234
579	"	"	760												

L. R. 5 Allahabad (Criminal) = All India Reporter.

1	2			1	2			1	2			1	2		
1	1924	*A*	203	50	1924	*A*	317	88	1924	*A*	492	129	1924	*A*	777
4	"	"	211	52	"	"	453	89	"	"	564	131	"	"	765
5	"	"	435	53	"	"	296	90	"	"	676	133	"	"	766
8	"	"	209	54	"	"	455	91	"	"	675	136	"	"	776
9	"	"	193	55	"	"	694	92	"	"	673	137	"	"	779
11	"	"	212	57	"	"	533	93	"	"	674	140	"	"	781
12	"	"	694	59	"	"	662	94	"	"	676	143	"	"	778
14	"	"	213	61	"	"	696	96	"	"	666	145	"	"	783
15	"	"	205	63	"	"	528	97	"	"	569	147	"	"	762
19	"	"	319	64	"	"	592	98	"	"	568	149	"	"	768
20	"	"	214	65	"	"	411	99	"	"	563	153	1925	"	129
21	"	"	269	67	"	"	413	101	"	"	511	156	"	"	62
22	"	"	215	69	"	"	675	105	"	"	438	158	1924	"	616
24	"	"	695	70	"	"	666	109	"	"	684	161	1925	"	126
25	"	"	220	71	"	"	314	113	"	"	670	174	1924	"	664
30	"	"	209	73	"	"	381	119	"	"	566	175	1925	"	4
33	"	"	338	78	"	"	578	120	"	"	624	177	1924	"	645
38	"	"	437	79	"	"	665	121	"	"	770	187	1925	"	73
40	"	"	267	81	"	"	701	124	"	"	763	193	"	"	223
43	"	"	441	84	"	"	667	126	"	"	784	199	"	"	220
46	"	"	558	86	"	"	664	127	"	"	764	201	"	"	227
49	"	"	454												

Cr. L. J. & Indian Cases = All India Reporter

Please refer to Comparative Table No. II in 1924 *LAHORE*

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1924. Allahabad section with corresponding references of other REPORTS, JOURNALS or PERIODICALS.

N.B.—*Column* No 1 *denotes pages of the* ALL INDIA REPORTER. 1924 Allahabad.
Column No. 2 *denotes the references of other* REPORTS, JOURNALS or PERIODICALS.

1924 Allahabad = Other Journals

1	2		1	2		1	2	
1	21	A L J 529	4	75	I C 1023	53	74	I C 924
	4	L R A Cr. 106	26	45	A 592	54	45	A 701
	45	A 656		21	A L J 645		21	A L J 626
	74	I C 849		5	LRACiv 22		4	LRACiv 342
	24	Cr L J 817		74	I C 763		77	I C 30
7	45	A 530	28	21	A L J 595	57	45	A 711
	21	A L J 438		4	L R A Civ. 314		21	A L J 634
	4	L R A Civ. 249		74	I C 343		75	I C 835
	73	I C 986	29	45	A 692		4	LRA Rev. 437
8	45	A 534		21	A L J 610	59	21	A L J 516
	21	A L J 448		74	I C 325		4	LRACiv 503
	4	LR A Civ. 242		5	L R A Civ. 61		74	I C 756
	77	I C 1046	31	21	A L J 641	60	21	A L J 734
9	45	A 529		4	L R A Civ. 441		4	LRACiv 529
	21	A L J 455		74	I C 513		75	I C 404
	4	L R A Cr. 79		45	A 735	62	45	A 628
	73	I C 935	37	45	A 718		21	A L J 541
	24	Cr L J 711		4	LRACiv 598		4	LRACiv 553
10	21	A L J 330		21	A L J 659		74	I C 817
	4	LR ARev 165		74	I C 498	63	21	A L J 498
	72	I C 155	40	21	A L J 737		4	LRACiv 555
11	45	A 46		4	LRA Civ. 483		74	I C 911
	74	I C 999		46	A 16			
12	21	A L J 713		77	I C 57	64	73	I C 602
	4	LR A Civ. 473	47	73	I C 985	65	45	A 653
	75	I C 309	48	21	A L J 527		21	A L J 607
15	45	A 715		4	LR A Civ. 272		4	LRACiv 337
	4	LRACiv 601		75	I C 104		74	I C 345
	21	A L J 656	49	21	A L J 472	66	45	A 667
	74	I C 495		81	I C 490		21	A L J 665
17	21	A L J 571	50	21	A L J 436		4	LRACiv 298
	4	LR A Civ. 464		4	L R A Civ 274		75	I C 100
	74	I C 466		74	I C 481	68	45	A 554
	45	A 624					21	A L J 454
20	21	A L J 750	51	45	A 654		4	LRACiv 256
	4	LR A Civ. 496		21	A L J 608		74	I C 746
	46	A 28		4	LRA Civ 324	69	45	A 676
	77	I C 66		74	I C 931		21	A L J 671
23	45	A 297	52	21	A L J 542		4	LRACiv 317
	21	A L J 232		4	LRACiv 281		79	I C 693
	4	LR A Civ. 386		74	I C 322	70	45	A 679
	73	I C 648	53	45	A 640		21	A L J 669
24	45	A 576		21	A L J 576		4	LR-ACiv 315
	4	LR A Civ. 284		4	LRACiv 208		74	I C 353

1921 Allahabad = Other Journals (*Contd.*)

1	2		
71	75	*I C*	52[illegible]
	24	*Cr L J*	635
72	45	*A*	633
	21	*A L J*	585
	74	*I C*	529
	24	*Cr L J*	785
76	45	*A*	700
	21	*A L J*	619
	4	*L R A Cr*	140
	75	*I C*	584
	25	*Cr L J*	72
77	21	*A L J*	621
	4	*L R A Cr*	142
	75	*I C*	353
	24	*Cr L J*	929
78	73	*I C*	769
	24	*Cr L J*	673
79	45	*A*	623
	21	*A L J*	591
	4	*LRACiv*	304
	75	*I C*	898
80	45	*A*	621
	21	*A L J*	480
	4	*LRACiv*	581
	83	*I C*	19
81	77	*I C*	144
82	45	*A*	709
	21	*A L J*	648
	4	*L R A Civ*	353
	77	*I C*	6[illegible]4
83	21	*A L J*	673
	74	*I C*	443
	24	*Cr L J*	779
84	21	*A L J*	593
	4	*L R A Cr*	129
	75	*I C*	730
	25	*Cr L J*	42
86	21	*A L J*	822
	4	*L R A Civ*	557
	79	*I C*	438
88	45	*A*	729
	74	*I C*	869
91	45	*A*	744
	21	*A L J*	697
	4	*L R A Rev*	333
	74	*I C*	647
94	45	*A*	608
	21	*A L J*	551
	4	*L R A Civ*	291
	75	*I C*	351
95	74	*I C*	14
97	21	*A L J*	569
	5	*L R A Civ.*	324
	74	*I C*	922
98	45	*A*	563
	21	*A L J*	521
98	4	*L R A Civ*	265
	74	*I C*	389
99	21	*A L J*	526
	4	*L R A Civ*	278
	74	*I C*	372
100	21	*A L J*	567
	5	*L R A Civ.*	21
	74	*I C*	827
101	45	*A*	642
	25	*Cr L J*	1211
	82	*I C*	139
102	74	*I C*	220
103	4	*L R A Civ*	378
	79	*I C*	450
104	45	*A*	630
	2	*A L J*	617
	4	*L R A Civ*	301
	73	*I C*	950
105	45	*A*	649
	21	*A L J*	604
	4	*L R A Civ*	356
	74	*I C*	927
107	21	*A L J*	701
	5	*L R A Civ.*	31
	74	*I C*	943
111	21	*A L J*	683
	4	*L R A Civ.*	326
	75	*I C*	316
112	4	*LRA Civ.*	191
	74	*I C*	760
113	45	*A*	682
	21	*A L J*	650
	4	*L R A Civ*	320
	74	*I C*	142
114	45	*A*	810
	21	*A L J*	548
	4	*L R A Civ*	289
	73	*I C*	990
116	21	*A L J*	811
	4	*L R A Civ*	561
	75	*I C*	502
119	45	*A*	741
	21	*A L J*	686
	4	*L R A Civ*	577
	79	*I C*	87
121	74	*I C*	112
122	74	*I C*	186
123	4	*L R A Civ*	339
	83	*I C*	49
125	45	*A*	725
	21	*A L J*	646
	4	*L R A Rev*	331
125	74	*I C*	502
126	45	*A*	724
	21	*A L J*	637
	4	*L R A Civ*	596
	74	*I C*	918
127	74	*I C*	842
128	21	*A L J*	602
	73	*I C*	518
	4	*L R A Cr*	138
	24	*Cr L J*	630
129	4	*L R A Civ*	355
	74	*I C*	692
130	45	*A*	594
	76	*I C*	1032
	25	*Cr L J*	312
131	45	*A*	680
	21	*A L J*	654
	4	*L R A Cr*	134
	75	*I C*	159
	24	*Cr L J*	911
132	45	*A*	687
	74	*I C*	2
134	45	*A*	685
	21	*A L J*	639
	74	*I C*	24
135	4	*L R A Civ*	335
	45	*A*	720
	21	*A L J*	661
	4	*L R A Civ*	587
	74	*I C*	490
137	46	*A*	1
	21	*A L J*	703
	4	*L R A Civ*	451
	75	*I C*	339
141	74	*I C*	448
	24	*Cr L J*	784
142	4	*L R A Cr*	216
	75	*I C*	733
	25	*Cr L J*	45
143	45	*A*	691
	21	*A L J*	622
	4	*L R A Cr.*	137
	77	*I C*	448
	25	*Cr L J*	400
144	45	*A*	669
	21	*A L J*	667
	5	*L R A Civ.*	26
	74	*I C*	905
145	45	*A*	727
	21	*A L J*	623
	4	*L R A Civ*	205
	74	*I C*	858
	24	*Cr L J*	826
146	74	*I C*	297
147	74	*I C*	755

1924 Allahabad = Other Journals (*Contd.*)

1	2	1	2	1	2
148	74 I C 776	180	46 A 55	197	4 L R A Cr 253
149	74 I C 839		21 A L J 830		25 Cr L J 961
150	45 A 571		4 LRA Civ. 570		81 I C 609
	77 I C 609		79 I C 562	200	21 A L J 774
153	21 A L J 886	183 (1)	45 A 553		4 L R A Cr 226
	5 L R A Civ. 1		21 A L J 459	201	21 A L J 791
	46 A 115		4 L R A Cr. 86		4 L R A Cr 251
	79 I C 314		73 I C 773		25 Cr L J 652
156	45 A 644		24 Cr L J 677		81 I C 140
	21 A L J 596	183 (2)	4 LRA Civ. 447	202	21 A L J 847
157	21 A L J 828		75 I C 1053		4 L R A Cr 237
	4 L R A Civ 567	185	21 A L J 420		81 I C 598
	75 I C 777		4 L R A Cr.215		25 Cr L J 950
159	74 I C 703		81 I C 153	203	46 A 88
160	4 L RA Rev 314		25 Cr L J 665		21 A L J 855
	74 I C 768	186 (1)	45 A 671		5 L R A Cr 1
161	46 A 119		75 I C 358		81 I C 618
	21 A L J 890		24 Cr L J 934		25 Cr L J 970
	4 LRA Civ 604	186 (2)	21 A L J 776	205	21 A L J 865
	79 I C 332		4 L R A Cr.234		5 L R A Cr 15
162	74 I C 486		77 I C 236		83 I C 993
163	21 A L J 476		25 Cr L J 348	207	4 L R A Cr 210
	4 L R A Civ 428	187	46 A 43		77 I C 890
	5 L R A Rev 47		21 A L J 805		25 Cr L J 490
164	74 I C 716		4 L R A Cr.207	209 (1)	46 A 91
	24 Cr L J 812		81 I C 217		21 A L J 838
165	4 L RA Rev 329		25 Cr L J 729		5 L R A Cr 8
	74 I C 197	188	46 A 41		81 I C 717
166	46 A 59		21 A L J 808		25 Cr L J 1005
	21 A L J 796		4 L R A Cr.202	209 (2)	21 A L J 873
	4 LRA Civ 505		25 Cr L J 655		5 L R A Cr 30
	79 I C 25		81 I C 143		83 I C 997
167	21 A L J 428	189	74 I C 708	211	21 A L J 859
	4 LRA Civ 540		24 Cr L J 804		4 L R A Cr 4
	75 I C 460	190	21 A L J 825		81 I C 612
169	21 A L J 809		4 L R A Cr.248		25 Cr L J 964
	5 L R A Civ 53		81 I C 595	212	46 A 92
	75 I C 785		25 Cr L J 947		21 A L J 871
170	4 LR A Civ 545	192	21 A L J 836		5 L R A Cr 11
	83 I C 54		4 L R A Cr.245		83 I C 910
173	21 A L J 901		81 I C 558	213	21 A L J 877
	5 L R A Civ 8		25 Cr L J 942		5 L R A Cr 14
	79 I C 381	193	21 A L J 869	214 (1)	46 A 94
175	45 A 537		5 L R A Cr 9		21 A L J 875
	83 I C 780		83 I C 904		5 L R A Cr 20
176	21 A L J 817	194	21 A L J 772		83 I C 1004
	4 LR A Civ 580		4 L R A Cr 218	214 (2)	46 A 86
	75 I C 254		77 I C 188		21 A L J 858
177	46 A 125		25 Cr L J 332		4 L R A Cr 252
	21 A L J 896	195	21 A L J 841		81 I C 615
	4 LRA Civ. 612		4 L R A Cr 241		25 Cr L J 967
	79 I C 341		81 I C 600	215 (1)	46 A 107
178	46 A 110		25 Cr L J 952		21 A L J 879
	21 A L J 882	197	46 A 81		5 L R A Cr 22
	4 LRA Civ. 583		21 A L J 850		81 I C 215
	79 I C 310				25 Cr L J 727

1924 Allahabad = Other Journals (*Contd.*)

1	2			1	2			1	2		
215(2)	46	*A*	77	254	78	*I C*	893	302	77	*I C*	82
	21	*A L J*	844	256	4	*L R A Civ*	458	303	71	*I C*	289
	4	*L R A Cr*	229		80	*I C*	717	304	73	*I C*	462
217	74	*I C*	969	260	74	*I C*	894	305	46	*A*	70
218	22	*A L J*	110	261	46	*A*	153		21	*A L J*	763
F B	4	*L R A Civ*	88		21	*A L J*	917		4	*LRA Civ*	507
	46	*A*	328		4	*L R A Civ*	607		77	*I C*	35
	78	*I C*	1014		79	*I C*	532	306	46	*A*	105
220	22	*A L J*	85	263	46	*A*	73		4	*LRA Cr*	259
F B	5	*L R A Cr*	25		21	*A L J*	861		81	*I C*	442
	46	*A*	236		4	*L R A Civ*	591		25	*Cr L J*	906
	81	*I C*	604		79	*I C*	605	307	22	*A L J*	202
	25	*Cr L J*	956	265	46	*A*	167		5	*LRA Civ*	93
223	45	*A*	152		21	*A L J*	925		78	*I C*	429
	20	*A L J*	924		83	*I C*	350		46	*A*	414
	69	*I C*	836		25	*Cr L J*	1390	309	46	*A*	301
224	46	*A*	80	267	46	*A*	158		22	*A L J*	180
	21	*A L J*	834		21	*A L J*	922		5	*LRA Civ*	75
	4	*L R A Cr*	233		5	*L R A Cr*	40	310	46	*A*	220
	81	*I C*	615		82	*I C*	705		22	*A L J*	91
	25	*Cr L J*	967		25	*Cr L J*	1345		5	*LRA Civ*	71
225(1)	45	*A*	606	269	46	*A*	109		79	*I C*	803
	76	*I C*	765		21	*A L J*	881	313	5	*LRA Civ*	91
225(2)	46	*A*	32		5	*L R A Cr*	21		78	*I C*	225
	21	*A L J*	754		81	*I C*	238	314	46	*A*	218
	4	*L R A Civ*	522		25	*Cr L J*	750		22	*A L J*	83
	77	*I C*	37	270	4	*LR A Rev*	138		5	*LRA Cr*	71
227	46	*A*	170		71	*I C*	1017		77	*I C*	826
	21	*A L J*	928	271	74	*I C*	331		25	*Cr L J*	474
	5	*L R A Civ*	14	273	4	*LRA Civ*	526	315	46	*A*	38
	78	*I C*	904		75	*I C*	238		75	*I C*	244
229(1)	21	*A L J*	907	274	46	*A*	47	316	46	*A*	54
	5	*L R A Rev*	13		21	*A L J.*	801		21	*A L J*	820
	79	*I C*	577		79	*I C*	41		4	*LRA Cr*	203
229(2)	21	*A L J*	932	277	74	*I C*	721		77	*I C*	818
	5	*L R A Civ*	41	292	74	*I C*	21		25	*Cr L J*	466
	79	*I C*	320	293	4	*LRA Rev*	221	317	46	*A*	137
230	21	*A L J*	839		74	*I C*	681		21	*A L J*	911
	4	*L R A Cr*	240	294	21	*A L J*	793		5	*LRA Cr*	50
	81	*I C*	613		5	*LRA Civ*	55		25	*Cr L J*	624
	25	*Cr L J*	965		77	*I C*	753		81	*I C*	112
231	21	*A L J*	899	296	21	*A L J*	915		22	*A L J*	126
	5	*L R A Rev*	1		5	*L R A Cr*	53	318	5	*LRA Civ*	50
	79	*I C*	367		81	*I C*	176		78	*I C*	145
233	4	*L R A Cr*	145		25	*Cr L J*	688		46	*A*	114
251	46	*A*	142	297	21	*A L J*	818	319	21	*A L J*	914
	21	*A L J*	908		4	*LRA Civ*	574		5	*LRA Cr*	19
	81	*I C*	586		83	*I C*	832		25	*Cr L J*	654
253	46	*A*	121	299	46	*A*	64		81	*I C*	142
F B	21	*A L J*	893		21	*A L J*	765	320	4	*LRA Cr*	124
	4	*L R A Civ*	615		4	*LRA Cr*	221		81	*I C*	715
	81	*I C*	177		77	*I C*	183		25	*Cr L J*	1003
	25	*Cr L J*	689		25	*Cr L J*	327		22	*A L J*	561
254	46	*A*	161	302	46	*A*	45	321	5	*L R A Civ*	151
	22	*A L J*	1		21	*A L J*	770	F B	46	*A*	478
	4	*L R A Civ*	619		5	*LRA Civ*	28				

1	2		1	2		1	2	
321	31	I C 25	379	46	A 394	414	46	A 509
324	46	A 274		22	A L J 295	415	22	A L J 354
F B	22	A L J 137		5	L R A Civ 264		5	L R A Civ 242
	5	L R A Civ 145		79	I C 517		78	I C 612
	80	I C 550	381	46	A 254		46	A 427
328	22	A L J 321		22	A L J 144	422	46	A 355
F B	5	L R A Civ 01		5	L R A Cr 73		22	A L J 317
	46	A 489		77	I C 829		5	L R A Rev 129
338	22	A L J 249		25	Cr L J 477		78	I C 559
F B	5	L R A Cr 38	384	46	A 377	424	22	A L J 7
	46	A 447		22	A L J 307		79	I C 630
	31	I C 438		5	L R A Civ 257	425	46	A 361
	5	Cr L J 90		79	I C 174		22	A L J 289
341	46	A 398	388	46	A 250		5	L R A Civ 233
F B	22	A L J 217		22	A L J 122		78	I C 586
	5	L R A Rev 65		5	L R A Civ 142	427	46	A 214
	83	I C 403		80	I C 413		22	A L J 73
350	46	A 194	390	46	A 359		5	L R A Rev 5
	22	A L J 49		22	A L J 292		78	I C 1035
	5	L R A Civ 130		5	L R A Civ 254	429	46	A 316
	79	I C 861		79	I C 495		22	A L J 212
355	46	A 230	391	46	A 210		5	L R A Rev 52
	5	L R A Civ 177		22	A L J 68		78	I C 863
	78	I C 402		5	L R A Civ 43	430	22	A L J 70
357	46	A 130		79	I C 634		5	L R A Rev 34
	78	I C 1018	392	46	A 297		79	I C 599
360	46	A 211		22	A L J 165	431	22	A L J 113
	22	A L J 76		5	L R A Civ 107		5	L R A Rev 37
	5	L R A Civ 68		78	I C 506		78	I C 1041
	78	I C 1037	394	22	A L J 314	433	22	A L J 244
362	46	A 310		5	L R A Civ 221		5	L R A Rev 91
	22	A L J 205		78	I C 563		78	I C 164
	5	L R A Civ 97				434	5	L R A Rev 98
	78	I C 180	396	5	L R A Civ 186		78	I C 316
365	46	A 286		79	I C 429	435	5	L R A Cr 5
	22	A L J 193	398	46	A 215		77	I C 888
	5	L R A Civ 193		22	A L J 118		25	Cr L J 488
	78	I C 243		5	L R A Civ 46	437	5	L R A Cr 38
370	46	A 260		82	I C 1022		77	I C 815
	22	A L J 149	400	46	A 333		25	Cr L J 463
	5	L R A Civ 104		22	A L J 265	438	22	A L J 20
	78	I C 222		5	L R A Civ 161		5	L R A Cr 105
371	46	A 205		83	I C 390		81	I C 705
	22	A L J 62	411	46	A 265		25	Cr L J 993
	5	L R A Civ 33		22	A L J 162	441	5	L R A Cr 43
	79	I C 584		5	L R A Cr 65		81	I C 181
373	22	A L J 241		81	I C 629		25	Cr L J 693
	5	L R A Civ 182		25	Cr L J 981	443	46	A 52
	78	I C 265	413	46	A 243		75	I C 266
375	46	A 148		22	A L J 116	444 (1)	46	A 173
	5	L R A Civ 36		5	L R A Cr 67		22	A L J 10
	79	I C 612		81	I C 171		5	L R A Civ 16
376	46	A 372		25	Cr L J 683		79	I C 626
	22	A L J 345	414	22	A L J 487	444 (2)	46	A 152
	5	L R A Civ 238		5	L R A Civ 235		78	I C 1023
	79	I C 363		78	I C 441	445	22	A L J 65

1924 Allahabad = Other Journals (*Contd.*)

1				1				2			1			
445	5	*LRACiv*	9[illegible]	473	5	*LRACiv*	419	522	5[illegible]	*IC*	740
	79	*IC*	640		52	*IC*	736	523	22	*ALJ*	572
446	16	*A*	144	474	22	*ALJ*	155		5	*LRACiv*	369
	78	*IC*	416		5	*LRACiv*	77		16	*A*	627
447	16	*A*	165		78	*IC*	226		81	*IC*	10
	22	*ALJ*	5	476	5	*LRARev*	183	526	5	*LRACiv*	231
	5	*LRACiv*	5		53	*IC*	251		82	*IC*	582
	79	*IC*	645	477	5	*LRARev*	115	527	5	*LRACiv*	401
448	16	*A*	321		79	*IC*	134		82	*IC*	372
	22	*ALJ*	234	479	5	*LRARev*	103	528	5	*LRA Cr*	63
	5	*LRACiv*	219		79	*IC*	587		83	*IC*	730
	79	*IC*	217	480	5	*LRACiv*	218	529	5	*LRACiv*	180
449	16	*A*	35		78	*IC*	58[illegible]		78	*IC*	167
	78	*IC*	519	481	22	*ALJ*	610	530	16	*A*	465
450	16	*A*	68	F B	5	*LRARev*	189		22	*ALJ*	591
	4	*LRACiv*	510		16	*A*	791		80	*IC*	661
	78	*IC*	193	492	22	*ALJ*	263		6	*LRACiv*	9
451	15	*A*	749		5	*LRACr*	88	533	22	*ALJ*	430
	81	*IC*	269		51	*IC*	610		83	*IC*	699
	25	*Cr LJ*	781		25	*Cr LJ*	999		5	*LRACr*	57
453	21	*ALJ*	930	493	5	*LRACiv*	286	534	16	*A*	327
	5	*LRACr*	52		78	*IC*	626		22	*ALJ*	247
	83	*IC*	498	495	22	*ALJ*	626		5	*LRACiv*	184
454	16	*A*	138	F B	5	*LRACiv*	488		78	*IC*	382
	21	*ALJ*	912		16	*A*	623	535	22	*ALJ*	597
	5	*LRACr*	49		53	*IC*	923	F B	5	*LRACiv*	478
	25	*Cr LJ*	552	503	16	*A*	319		16	*A*	671
	51	*IC*	40		22	*ALJ*	191	536	5	*LRACiv*	375
455	16	*A*	174		5	*LRACiv*	226		79	*IC*	1023
	21	*ALJ*	916		78	*IC*	358	537	16	*A*	233
	5	*LRACr*	54		22	*ALJ*	641		78	*IC*	371
	81	*IC*	260	504	5	*LRACiv*	410	538	16	*A*	264
	25	*Cr LJ*	772		80	*IC*	406		22	*ALJ*	159
456	4	*LRACiv*	550		46	*A*	651		5	*LRACiv*	112
457	4	*LRACiv*	472		5	*LRARev*	116	539	16	*A*	128
458	4	*LRACiv*	470	507	77	*IC*	1025		81	*IC*	711
459	4	*LRARev*	298		5	*LRACiv*	179		25	*Cr LJ*	999
	74	*IC*	177	508	5	*LRARev*	187	540	16	*A*	208
460	4	*LRARev*	341	509	16	*A*	417		22	*ALJ*	67
461 (1)	4	*LRACr*	213	510	22	*ALJ*	299	541	79	*IC*	816
	25	*Cr LJ*	454		5	*LRACiv*	225		16	*A*	370
	77	*IC*	806		80	*IC*	787		22	*ALJ*	342
461 (2)	22	*ALJ*	419		5	*LRACr*	101		5	*LRACiv*	189
	5	*LRACiv*	282	511	16	*A*	303	542	79	*IC*	417
	79	*IC*	514	514	22	*ALJ*	185		16	*A*	140
	16	*A*	525		5	*LRACiv*	80		5	*LRACiv*	7
461	5	*LRACiv*	160		78	*IC*	934	543	78	*IC*	587
465	16	*A*	295		22	*ALJ*	617		16	*A*	384
	22	*ALJ*	182	518	5	*LRACiv*	404		22	*ALJ*	369
	5	*LRACiv*	86		80	*IC*	601		5	*LRACiv*	306
	78	*IC*	619		22	*ALJ*	215	551	78	*IC*	911
466	5	*LRARev*	105	520	5	*LRACiv*	102	F B	22	*ALJ*	601
467	16	*A*	175		78	*IC*	166		5	*LRACiv*	458
	22	*ALJ*	26		5	*LRACiv*	385		80	*IC*	694
	5	*LRACiv*	113	521	5	*LRACiv*	421	557	16	*A*	775
	80	*IC*	241	522					16	*A*	369

1924 Allahabad = Other Journals (*Contd.*)

1	2			1	2			1	2		
557	22	*A L J*	339	578	81	*I C*	720	657	46	*A*	514
	5	*LRACiv*	217		25	*Cr L J*	1008		22	*A L J*	400
	78	*I C*	345	579	5	*LRA Civ*	441		5	*LRA Civ*	761
558	46	*A*	146	591	46	*A*	633	662	22	*A L J*	340
	5	*L R A Cr*	46		22	*A L J*	579		5	*L R A Cr*	59
	81	*I C*	100		5	*LRA Civ*	414		81	*I C*	436
	25	*Cr L J*	612		82	*I C*	25		25	*Cr L J*	900
559	46	*A*	227	592	46	*A*	235	664(1)	5	*L R A Cr*	86
	5	*LRACiv*	158		22	*A L J*	129		83	*I C*	736
	79	*I C*	213		5	*L R A Cr*	64	664(2)	46	*A*	537
561	46	*A*	323		25	*Cr L J*	467		22	*A L J*	411
	22	*A L J*	235		77	*I C*	819		81	*I C*	315
	5	*LRA Rev*	49	593	46	*A*	458		5	*L R A Cr*	174
	78	*I C*	391		22	*A L J*	585		25	*Cr L J*	795
563	5	*L R A Cr*	99		80	*I C*	592	665	22	*A L J*	239
	83	*I C*	650	597	46	*A*	419		5	*L R A Cr*	79
564	5	*L R A Cr*	89		22	*A L J*	349		81	*I C*	318
565	5	*LRA Civ*	389		79	*I C*	358		25	*Cr L J*	798
	81	*I C*	937		5	*LRA Civ*	758	666(1)	5	*L R A Cr*	70
	25	*Cr L J*	1113	599	46	*A*	470		25	*Cr L J*	555
566	22	*A L J*	639		22	*A L J*	729		81	*I C*	43
	5	*L R A Cr*	119	603	46	*A*	424	666(2)	22	*A L J*	520
	83	*I C*	503		5	*LRA Civ*	273		5	*L R A Cr*	96
567	22	*A L J*	599		78	*I C*	659		25	*Cr L J*	1007
	5	*LR A Civ*	416	605	5	*LRA Civ*	586		1	*I C*	719
	46	*A*	68		80	*I C*	737	667	22	*A L J*	436
	82	*I C*	89	609	78	*I C*	1008		5	*L R A Cr*	84
568	22	*A L J*	662	612	5	*LRA Civ*	618		83	*I C*	664
	5	*L R A Cr*	98		22	*A L J*	945	668(1)	46	*A*	622
	83	*I C*	695	613	77	*I C*	1032		22	*A L J*	506
569	22	*A L J*	678	615	79	*I C*	318		5	*L R A Cr*	170
	5	*L R A Cr*	97		5	*LRA Rev*	257		83	*I C*	21
	82	*I C*	36	616	5	*L R A Cr*	158	668(2)	46	*A*	631
	25	*Cr L J*	1173		82	*I C*	366		22	*A L J*	583
570	5	*LRA Civ*	439	617	25	*Cr L J*	1294		5	*LRA Civ*	347
	80	*I C*	16		5	*LRA Civ*	334		79	*I C*	997
	46	*A*	710	618	79	*I C*	893	669	22	*A L J*	457
571	80	*I C*	627		81	*I C*	103		5	*LRA Civ*	363
	5	*LRA Civ*	432	621	25	*Cr L J*	615		79	*I C*	567
	46	*A*	688		5	*LRA Civ*	575	670	5	*L R A Cr*	113
572	22	*A L J*	570		82	*I C*	313		83	*I C*	714
	46	*A*	690	622	46	*A*	837	673	5	*L R A Cr*	92
573	5	*LRA Civ*	366		5	*LRA Civ*	417	674	5	*L R A Cr*	93
	79	*I C*	1041		22	*A L J*	680	675(1)	46	*A*	446
574	22	*A L J*	663		46	*A*	706		5	*L R A Cr*	69
	5	*LRA Civ*	432	624	83	*I C*	24		81	*I C*	342
	46	*A*	691		5	*L R A Cr*	120		25	*Cr L J*	806
	82	*I C*	451	625	83	*I C*	687	675(2)	46	*A*	623
575	2	*A L J*	657		46	*A*	573		22	*A L J*	505
	5	*LRA Civ*	435		22	*A L J*	52		5	*L R A Cr*	91
	46	*A*	665		5	*LRA Civ*	785		81	*I C*	992
	83	*I C*	618	645	83	*I C*	782		25	*Cr L J*	1168
578	46	*A*	354		22	*A L J*	501	676(1)	22	*A L J*	496
	22	*A L J*	288	652	5	*LRA Cr*	177		5	*L R A Cr*	90
	5	*L R A Cr*	78		46	*A*	553		83	*I C*	711
					22	*A L J*	446				

1924 Allahabad = Other Journals (*Contd.*)

1	2			1	2			1	2		
676(2)	46	A	665	700	46	A	560	730(2)	22	A L J	461
	22	A L J	634		22	A L J	439		5	L R A Civ	353
	5	L R A Cr	94		5	L R A Civ	380		79	I C	945
677	5	L R A Civ	423		83	I C	848	731	46	A	439
	79	I C	10 0	701	5	L R A Cr	81		5	L R A Civ	342
678(1)	79	I C	566		83	I C	705		79	I C	389
678(2)	46	A	717	703	46	A	565	735	46	A	549
	22	A L J	713		22	A L J	455		22	A L J	441
	82	I C	251		5	L R A Civ	329		5	L R A Civ	301
682(1)	46	A	453	704	46	A	562		79	I C	327
	79	I C	345		22	A L J	452	737	22	A L J	463
682(2)	46	A	538		5	L R A Civ	350	738	5	L R A Civ	386
	22	A L J	427		83	I C	766		80	I C	12
	5	L R A Civ	331	706	46	A	635	740(1)	22	A L J	472
	79	I C	323		22	A L J	581		5	L R A Civ	362
684	46	A	611		5	L R A Civ	348		79	I C	575
	22	A L J	497		83	I C	737	740(2)	46	A	769
	5	L R A Cr	109	707	5	L R A Civ	408		22	A L J	725
	83	I C	654		82	I C	1		5	L R A Civ	677
686	46	A	713	708	46	A	531		83	I C	754
	22	A L J	684		22	A L J	417	742	46	A	616
	5	L R A Civ	494		5	L R A Civ	289		22	A L J	470
	83	I C	96		83	I C	83		5	L R A Civ	364
688	5	L R A Civ	19	709	22	A L J	153		80	I C	579
689	46	A	571		5	L R A Civ	44	743	5	L R A Civ	110
	22	A L J	464		78	I C	221		8	I C	171
	5	L R A Civ	356	710	78	I C	539	744	46	A	570
	79	I C	916	711	46	A	625		22	A L J	466
690	5	L R A Civ	467		22	A L J	558		79	I C	960
	82	I C	627		79	I C	1049	745	46	A	647
691	5	L R A Civ	252	713	46	A	542		22	A L J	468
	78	I C	434		22	A L J	432		5	L R A Civ	378
692(1)	46	A	45		5	L R A Civ	321		79	I C	1036
	5	L R A Civ	384		79	I C	338	746	78	I C	1022
	79	I C	534	715	46	A	573	747	46	A	741
692(2)	46	A	649		22	A L J	560		22	A L J	703
	22	A L J	645		5	L R A Civ	393		5	L R Civ	525
	5	L R A Civ	396		82	I C	659		83	I C	878
	31	I C	1	717	75	I C	114	748	22	A L J	425
694(1)	22	A L J	79	718	46	A	767		5	L R A Civ	291
	5	L R A Cr	55		22	A L J	673		80	I C	896
	25	Cr L J	472		5	L R A Civ	659	50	5	L R A Civ	400
	77	I C	824	719	22	A L J	518	751	46	A	620
694(2)	5	L R A Cr	12		5	L R A Rev	174		22	A L J	493
	25	Cr L J	476		79	I C	538		5	L R A Civ	360
	77	I C	824	720	22	A L J	459		9	I C	556
695	5	L R A Cr	24		79	I C	560				
696(1)	5	L R A Civ	52	721	75	I C	872	752	22	A L J	683
	8	I C	1030	723(1)	78	I C	881		6	L R A Civ	15
696(2)	22	A L J	81	723(2)	5	L R A Civ	11		82	I C	80
	5	L R A Cr	61	724	78	I C	844	753	46	A	674
	25	Cr L J	481	726	79	I C	106		5	L R A Civ	469
	77	I C	881	727	75	I C	813		82	I C	526
698	22	A L J	413	729	78	I C	214	759	5	L R A Civ	392
	5	L R A Civ	769	730(1)	78	I C	828	760	22	A L J	769
	83	I C	1028	730(2)	46	A	568		5	L R A Civ	579

1924 Allahabad=Other Journals (*Contd.*)

1	2		1	2		1	2	
760	50	*I C* 19	784	25	*Cr L J* 1246	811	22	*A L J* 410
	46	*A* 844		82	*I C* 174		5	*LRA Civ* 318
761(1)	5	*LRA Civ* 367		46	*A* 877		78	*I C* 631
761(1)	22	*A L J* 8[illegible]0	785	22	*A L J* 846	812	75	*I C* 953
	82	*I C* 292		82	*I C* 2[illegible]8	813	78	*I C* 814
	5	*LRA Civ* 725	787	22	*A L J* 855	814	78	*I C* 849
762	5	*L R A Cr* 147		5	*LRA Civ* 673	815	78	*I C* 1049
	83	*I C* 719	788	46	*A* 686	816	5	*LRA Civ* 262
763	5	*L R A Cr* 124		22	*A L J* 676		79	*I C* 349
	83	*I C* 692		5	*LRA Civ* 465	818(1)	22	*A L J* 776
764	5	*L R A Cr* 127		82	*I C* 16		5	*LRA Civ* 585
765	46	*A* 828	790	22	*A L J* 861		81	*I C* 851
	22	*A L J* 751		5	*LRA Civ* 715		46	*A* 856
	5	*L R A Cr* 131	791	22	*A L J* 766	818(2)	22	*A L J* 791
	82	*I C* 172		5	*LRA Civ* 577		5	*LRA Civ* 545
	25	*Cr L J* 1244	792	22	*A L J* 864		82	*I C* 184
766	5	*L R A Cr* 133		5	*LRA Civ* 720		46	*A* 864
	82	*I C* 364		80	*I C* 939	825	5	*LRA Civ* 532
	25	*Cr L J* 1292	793	22	*A L J* 810	826	22	*A L J* 779
768	46	*A* 787		5	*LRA Civ* 639		5	*LRA Civ* 568
	22	*A L J* 74	794	5	*LRA Civ* 573		83	*I C* 297
	5	*L R A Cr* 149		80	*I C* 39		46	*A* 847
	82	*I C* 476	795	5	*LRA Rev* 255	828	25	*I C* 922
	25	*Cr L J* 1308		83	*I C* 204	831	78	*I C* 480
770	22	*A L J* 772	796	5	*LRA Civ* 674	832	75	*I C* 931
	5	*L R A Cr* 121		22	*A L J* 810	833	75	*I C* 816
	82	*I C* 285		80	*I C* 890	834	78	*I C* 1026
	25	*Cr L J* 1277		46	*A* 917	836	78	*I C* 190
	46	*A* 851	798	5	*LRA Civ* 634	837	78	*I C* 955
772	46	*A* 759		22	*A L J* 809	838	78	*I C* 873
	22	*A L J* 719		46	*A* 882	840	78	*I C* 877
	5	*LRA Civ* 518		83	*I C* 1052	841	78	*I C* 531
	81	*I C* 508	799	46	*A* 743	842	78	*I C* 1043
776	5	*L R A Cr* 136		22	*A L J* 700	843	22	*A L J* 737
	83	*I C* 892		5	*LRA Civ* 524		5	*LRA Civ* 534
777	22	*A L J* 803	800(1)	22	*A L J* 816		83	*I C* 875
	5	*L R A Cr* 129		81	*I C* 525	844	79	*I C* 1048
	82	*I C* 170		5	*LRA Civ* 783			
	25	*Cr L J* 1242	800(2)	5	*LRA Civ* 645	845	46	*A* 815
	46	*A* 879		80	*I C* 21		22	*A L J* 761
778	22	*A L J* 820	801	22	*A L J* 768		5	*LRA Civ* 536
	5	*L R A Cr* 143		5	*LRA Civ* 583		80	*I C* 874
	83	*I C* 658		82	*I C* 312	848	46	*A* 773
779	22	*A L J* 829		46	*A* 849		22	*A L J* 739
	5	*L R A Cr* 137	802	5	*LRA Civ* 616		5	*LRA Civ* 533
	82	*I C* 167		80	*I C* 42		80	*I C* 25
	25	*Cr L J* 1239	804	5	*LRA Civ* 565	849	22	*A L J* 745
	46	*A* 906		32	*I C* 65		5	*LRA Civ* 580
781	5	*L R A Cr* 140	806	22	*A L J* 817		83	*I C* 969
	82	*I C* 54		5	*LRA Civ* 593	850	46	*A* 813
	25	*Cr L J* 1190		79	*I C* 1053		2	*A L J* 747
783	22	*A L J* 838		46	*A* 889		5	*LRA Civ* 603
	5	*L R A Cr* 145	808	46	*A* 733		81	*I C* 294
	46	*A* 915		22	*A L J* 706	851	22	*A L J* 812
784	22	*A L J* 806		5	*LRA Civ* 482		5	*LRA Civ* 599
	5	*L R A Cr* 126		83	*I C* 1035		80	*I C* 72

1924 Allahabad=Other Journals (*Concld*).

1	2			1	2			1	2		
851	46	*A*	884	875	22	*A L J*	851	910	5	*LRA Civ*	239
854(1)	22	*A L J*	744		5	*LRA Civ*	726	911	22	*A L J*	301
854(2)	22	*A L J*	783		82	*I C*	328		5	*LRA Civ*	268
	5	*LRA Civ*	563	876	5	*LRA Civ*	530		79	*I C*	353
	46	*A*	858	877	5	*LRA Rev*	225	912	5	*LRA Civ*	325
	83	*I C*	880	879	80	*I C*	380		79	*I C*	1019
855	5	*LRA Civ*	638	880	5	*LRA Civ*	526	915	5	*LRA Rev*	163
	22	*A L J*	807	881	22	*A L J*	833		82	*I C*	594
	80	*I C*	6		80	*I C*	63	916	5	*LRA Civ*	357
	46	*A*	892		5	*LRA Civ*	625		79	*I C*	296
856	78	*I C*	666		46	*A*	897	918	5	*LRA Civ*	398
857	22	*A L J*	788	884	22	*A L J*	866		79	*I C*	1029
	5	*LRA Civ*	571		5	*LRA Civ*	697	919	5	*LRA Civ*	395
	46	*A*	860	892	46	*A*	744		79	*I C*	1007
859	22	*A L J*	785		22	*A L J*	665	920	5	*LRA Civ*	376
	5	*LRA Civ*	561		5	*LRA Civ*	502		79	*I C*	951
	80	*I C*	902		82	*I C*	516	921	79	*I C*	956
860	22	*A L J*	823	897	46	*A*	754	922	5	*LRA Civ*	405
	5	*LRA Civ*	605		5	*LRA Civ*	504	923	5	*LRA Rev*	184
	80	*I C*	106		82	*I C*	243	924	5	*LRA Civ*	358
	46	*A*	894	902	46	*A*	822	925	5	*LRA Civ*	228
862	5	*LRA Civ*	276		22	*A L J*	753		78	*I C*	508
	78	*I C*	633		5	*LRA Civ*	556	927	75	*I C*	101
865(1)	22	*A L J*	850		80	*I C*	31	928	5	*LRA Civ*	431
	82	*I C*	347	905	46	*A*	820	929	5	*LRA Civ*	335
	5	*LRA Civ*	731		22	*A L J*	749		79	*I C*	69
865(2)	5	*LRA Rev*	113		5	*LRA Civ*	541	933	46	*A*	538
867	22	*A L J*	365		80	*I C*	933		22	*A L J*	490
	5	*LRA Civ*	298	906	46	*A*	840		5	*LRA Civ*	270
	78	*I C*	677		22	*A L J*	758		78	*I C*	654
869	79	*I C*	405		5	*LRA Rev*	241	935(1)	78	*I C*	977
870	22	*A L J*	423		80	*I C*	8	935(2)	75	*I C*	330
	5	*LRA Civ*	296	908(1)	46	*A*	709	937	22	*A L J*	576
	79	*I C*	907		22	*A L J*	702		5	*LRA Civ*	382
871	22	*A L J*	853		5	*LRA Civ*	480		79	*I C*	590
	5	*LRA Civ*	751		79	*I C*	1001	938	75	*I C*	111
872	22	*A L J*	844	908(2)	22	*A L J*	232	939	46	*A*	656
	82	*I C*	340		78	*I C*	389		22	*A L J*	659
	5	*LRA Civ*	734		5	*LRA Rev*	209		5	*LRA Civ*	424
	46	*A*	922	909	78	*I C*	326		82	*I C*	5
873	5	*LRA Civ*	279		5	*LRA Civ*	223	944	5	*LRA Rev*	136
	78	*I C*	637	910	78	*I C*	373		79	*I C*	665

THE
ALL INDIA REPORTER
1924
ALLAHABAD HIGH COURT

✱ 1924 ALLAHABAD 1

WALSH, J.

[ON DIFFERENCE BETWEEN LINDSAY AND DANIELS, JJ.]

Abdul Wahid Khan—Applicant.

v.

Abdullah Khan—Opposite Party.

Criminal Ref. No. 159 of 1923, D/-21st May 1923 from the order on reference by the S. J., Azamgarh D/-7th March, 1923.

Criminal P. C., S. 133—Civil dispute involved—Magistrate has jurisdiction to refuse to interfere—Public way—Dedication to public must be proved.

S. 133 is quite plain. The Magistrate must deal with an alleged "public" way even though it is disputed. These summary powers were primarily intended to be exercised in cases where there was no question that the way was one vested in the public, and when that question is seriously disputed, and its decision becomes a difficult matter of mixed fact and law, a Magistrate clearly has jurisdiction to exercise his discretion by declining to decide it, and sending the parties to a Civil Court. 28 All. 98, diss. 1932 Cal. 59=49 Cal. 683 F. B., Ref.

Private property cannot be converted into public merely because it looks as though it ought to be and because to do so would be convenient to a section of the public who have enjoyed permissible user over it. [P. 7 C. 1]

M. J. Banerjee and Iqbal Ahmed—for Applicant.

P. L. Banerjee—for Opposite Party.

Lindsay, J.—[29-3-1923]. The facts which have led up to this reference are set out in the order of my learned colleague and I need not repeat them.

The recommendation of the Sessions Judge is based upon two grounds. 1. that the magistrate should have stayed his hand and should have referred the parties to the civil Court when he found that a *bona fide* and substantial dispute as to title had been raised between the parties; and 2. that on the merits the order of the magistrate was not a proper order inasmuch as it had not been proved that the way in question was a public way. As to the first of these grounds we are both agreed that the magistrate's order cannot be discharged because he failed to send the parties to the civil Court. The ruling in *Emperor* v. *Dost Muhammad* (1) cannot be accepted as a correct exposition of the law.

On the merits, however, I am of opinion that the magistrate's order is not proper and I would therefore accept the recommendation of the learned Sessions Judge.

With regard to the argument that this is not a case for the exercise of our revisional jurisdiction all I desire to say is that the discretion we have to interfere ought to be exercised in all cases where an attempt is made to abuse the process of the Court so as to prevent parties from resorting to the criminal Courts to compel a decision regarding matters which properly lie within the cognizance of the civil Courts.

The present case constitutes to my mind an attempt of this nature and I therefore feel at liberty to scrutinise the evidence so as to ascertain whether the complainant has proved that the way in question is a public way.

We are not concerned here with any road made under statutory powers or vested in any public or local authority. We are dealing with an unmetalled path or track which skirts two sides of a village situated in the environs of the town of Azamgarh. The parties to the case are co-sharers in the village whose shares have been divided by partition. Their houses

(1) [1905] 8 All. 98—(1905) A.W.N. 202—2 A.L.J. 599—2 Cr.L.J. 517.

are adjacent and abut on the disputed way. In order to show that this way is a public way it must be proved that it has been dedicated to the public generally. A dedication to a limited section of the public is void and of no avail.

Such general dedication has to be inferred from the conduct of the owners of the soil and from uninterrupted user of the way by the general public.

So far as the conduct of the owners is concerned we have the admitted fact that when partition of the village was carried out the soil over which this way passes was divided between the co-sharers without any reservation of a right of passage for the public. The complainant himself was allotted one of the portions of this land (plot No. 320) and it is difficult in the circumstances to see how he can be heard to say that he has dedicated a right of passage to the general public. Nor indeed did he make any such allegation in the complaint which he lodged in the magistrate's Court. In this he described the way as follows :—

"A *kachcha* road by which all the tenants (*riaya*) and we ourselves (meaning, I presume, the Zamindars) have always been passing on foot or mounted and which is used for passing to and from by the parda ladies (*masturat*) belonging to families which live in that quarter."

That in my opinion is not a description of a road used by the public, but of one which is used by the tenants and residents of the village.

In his deposition before the Court the complainant improved on this description and said the road had been used by the public for 30 or 35 years. In answer to the Court he spoke of it as being used by people of the town and people from outside when they came to visit him at his house.

The oral evidence in the case is in my opinion vague and unconvincing and does not establish user of this road by the general public. Some of the evidence is clearly that of partisan witnesses and may be disregarded.

The patwari who speaks of the way being public has been in that office for only four or five years though he speaks of having known the locality for a longer period. He admits that in the settlement record the land is recorded as fallow or waste land (*banjar*) and that there is no village map or record showing the existence of a public right of way.

I place no reliance on the testimony of the two tenants Naresh and Sadaphal.

Then there is the evidence of Roshan Khan a veterinary surgeon who has been in practice in Azamgarh for 11 years. This evidence is very contious and the sum and substance of it is that he uses the road when he goes to visit the "Babus" (*i. e.* the zamindars). He speaks of it as being the main way to go to the complainant's house. He also speaks of visiting the house of one Muhammad Idris and using this road for the purpose. We are told that this gentleman is or was a Deputy Collector who occupied a house in the village.

The last witness is the Secretary to the Municipality, who says he has visited Sidhari and driven over the road in an ekka or four-wheeled carriage. His cross-examination suggests that he has little occasion to visit the village and that he only goes there to visit the Babus (*i. e.* the zamindars)

Such is the evidence produced for the complainant. The evidence for the opposite party is of little value with the exception of that of a partition amin, who carried out the partition of the village. He had before him at the time of giving his evidence the partition map and record and he proves that the land in dispute (No. 320) was divided among the co-sharers as *banjar* and that there was no record of its being used as a public way. He states definitely that there were only two roads (*rastas*) viz Nos: 79 and 152. He speaks of a path existing over No, 320 but he does not speak of that being treated by the parties as a public path.

On this review of the evidence I am definitely of opinion that there was no reliable proof before the magistrate that any public right of way had arisen over the land in question by dedication to the general public. Indeed the magistrate seems to have had doubts in the matter to judge from the following native

remark which occurs in his judgment. Dealing with the fact that the land (No. 320) was recorded as *banjar* at the time of partition he says :—

"This may be no wonder as every one might have thought of utilising his share of the village paths in other ways when opportunity arose so they were better shown as *banjar* lands."

It appears to me that the fact that there is no record in the settlement or village papers of any public right of way over this land and the further fact that the land was dealt with at partition in a manner quite inconsistent with the existence of any such right definitely refute the case put forward on behalf of the complainant and dispose of the evidence which was led in support of it.

We have here no case of a complaint made by one of the general public alleging the violation of a public right of way. The complainant is a zamindar: the opposite party is also a co-sharer in the village and the complainant's neighbour, and everything about the case suggests the conclusion that what was brought before the Court was nothing more than a squabble about a private right of way. Disputes of this nature are not to be decided in the criminal Courts.

For the above reasons I hold that the Session's Judge's recommendation should be accepted and the order of the magistrate discharged.

Daniels, J.—This is a reference by the learned Sessions Judge of Azamgarh on an application by Abdul Wahid Khan asking this Court to set aside in revision an order passed against the applicant under S. 137 Cr. P. C. The order relates to an alleged kutcha road in the village of Sidhari close to Azamgarh connecting the Muhammadabad and the Ghazipur roads and passing close to the houses of the parties.

On a conditional order being made against the applicant under S. 133 Cr. P. C. he appeared to show cause against it and pleaded:

Firstly, that the drain in question was fifteen or sixteen years old and did not cause any inconvenience to anybody, and secondly, that the portion of the alleged road over which it had been built was his private property (it was undoubtedly assigned to him at a partition in 1912) and that there was no public right of way over it. The learned Sessions Judge was of opinion that the moment a *bona fide* dispute as to title was raised by the defendant the jurisdiction of the Magistrate was ousted and the Magistrate was bound to stop the proceedings and to refer the parties to a civil suit. That view is supported by a ruling of a Judge of this Court in *Emperor* v. *Dost Muhammad*, (1). That ruling has recently been dissented from by a Full Bench of the Calcutta High Court in *Ram Sagar Mandal* v. *Alek Naskar* (2) and in our opinion it is incorrect. No such limitation on the jurisdiction of the Magistrate is to be found in the language of the Code. On objection being taken by the defendant under S. 135 (*b*) the Magistrate was entitled to decide, whether his conditional order was reasonable and proper or not, that is to say, he had to decide whether the defendant had unlawfully obstructed a way which is or may be lawfully used by the public.

Although he considered that the learned Magistrate had no jurisdiction to decide the point the learned Sessions Judge went on to consider the case on the merits, and has held that the Magistrate came to a wrong conclusion on the evidence and that there was no public right of way over the land in dispute. The principles by which this Court is guided in cases of revision are well established and it would not be necessary to refer to them but they have been to some extent questioned in the course of the argument. A High Court undoubtedly has jurisdiction to entertain a revision on grounds of fact, but it is equally well established that this power should be very sparingly exercised. There is a well-marked distinction between an application in revision and an appeal. It would be futile for the legislature to grant the right of appeal in some cases and to withhold it in others if the High Court, under the guise of a revision were to allow

(2) 1922 Cal. 59—49 Cal. 682—35 C.L.J. 247—26 C.W.N. 442—23 Cr. L. J. 353—67 I.C. 177 (F. B.)

conclusions of fact based on evidence to be canvassed and attacked on the footing of an appeal. Broadly speaking, the rule is that the High Court will only entertain a revision on facts where either there is no evidence to support the finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced. The case law on the subject is collected in Sohoni's Criminal Procedure Code, but the gist of the matter was admirably put by Piggott, J. in *Ahsan Ullah Khan* v. *Mansukh Ram* (3) at page 405:

"The revisional jurisdiction of this Court can always be exercised in order to prevent a gross and palpable failure of justice. At the same time it should not be so exercised as to make one portion of the Code of Criminal Procedure conflict with another, as would be the case were this Court to permit the practice to grow up of invoking its interference in revision so as to give a right of appeal where such right is definitely excluded by other provisions of the Code of Criminal Procedure."

In this respect there is no difference between a reference and a revision. A person invoking the revisional jurisdiction of the Court is bound according to the practice of the Court to apply first to the Sessions Judge or District Magistrate. If the latter considers that a case for revision is made out he reports the matter to the High Court under S. 438 Criminal Procedure Code with a view to the High Court exercising its revisional powers under S. 439. If the Sessions Judge or District Magistrate considers that the application should not be entertained he rejects it leaving the aggrieved party to apply to the High Court direct. S. 439 makes no distinction between the two cases.

The Magistrate has used in the course of his order some loose expressions which are criticised by the learned Sessions Judge, but his substantial finding is that "It cannot but be concluded that these *banjar* portions of No. 320 (the plot in dispute) were recorded all through as public passages and not private and reserved." Naturally a village by-road of this kind would only be used by persons living in the village or by persons having occasion to visit the village, but the Magistrate does distinctly find that there is a public right of way over the road in question which has been obstructed by the defendant. The defendant's plea that the drain had been in existence for twelve or fifteen years has been found to be, and undoubtedly was, false. The parties who are next door neighbours and near relations, have fallen out, and the drain has been recently dug for the express purpose of blocking the right of way which previously existed. The oral evidence strongly supports the conclusion at which the Magistrate has arrived. Apart from the complainant himself and witness Sadaphal Singh who may be attacked as having had some litigation with the defendant's mother, who state respectively that the road in question is used by people carrying dead bodies to the burning ghat and by ekkas, tumtums and carts, the complainant has called the patwari of the village, the secretary of the Municipal Board, and a veterinary assistant. The patwari distinctly deposes that the road is a public way used by people generally and by ekkas and carriages and that he has seen it so used during the last thirty or thirty-five years.

The Secretary of the Municipal Board describes it as a kutcha road connecting the Ghazipur and the Muhammadabad pucka roads, and states that he has often passed over it in an ekka or hackney carriage either to go to the house of the complainant or the house of another man named Abdul Aziz Khan, these being the only houses in the village which he happens to have occasion to visit. This witness is a man of position who is not likely to have given false evidence, and the mere fact that he visited the complainant's house is no reason for rejecting his evidence as false. M. Roshan Khan the veterinary assistant, Azamgarh, gives

(3) [1914] 36 All. 403—12 A.L.J. 511—15 Cr. L.J. 598—25 I.C. 350.

similar evidence and says that he has used the road not only to visit the complainant but to visit the bangalow of Munshi Muhammad Idris who is said to be a Deputy Collector living at Sidhari. The evidence called for the defence does not rebut this case; indeed it contains a good deal to support it. These witnesses put forward the false story of the drain having been in existence for ten or fifteen years but the very first witness admits that all the Babus, i. e. the zemindars, and other persons go via that path. In fact the main burden of his evidence was that the drain was old and did not constitute an obstruction. The defendant has in fact not relied on his oral evidence in this Court. He relies entirely on the fact that the plot in suit was not shown as road but as waste land at the settlement, and that it was divided between the different co-sharers at the partition. The former fact is not conclusive, and as to the latter the amin who carried out the partition has been called and he deposes that all the public paths of the village were divided up between the co-sharers at the partition. It appears to me therefore that this is emphatically not a case in which this Court would be justified in interfering in revision on the facts and I would reject the application.

[The Case was then laid up for opinion of a third Judge when the following judgment was delivered.]

Walsh, J.—In this case a Magistrate on the complaint of one Abdullah Khan, has ordered his neighbour one Abdul Wahid to remove a nuisance, to wit, a drain dug in an alleged public road in front of the latter's house so as to obstruct the passage of the public and of the complainant. The order was made under S. 133 of the Criminal Procedure Code. An application in revision was made to the Sessions Court of Azamgarh. The Sessions Judge being of opinion that in substance there was no evidence upon which it could properly be held that the road was a public way, and that it was an abuse of the process of the Court to attempt to put the powers under this section in motion at all, referred the matter to the High Court. Mr. Justice Daniels, before whom it came, referred it to a Bench of two Judges; in due course, it came before Mr. Justice Lindsay and Mr. Justice Daniels, and a difference of opinion has arisen both as to whether it could properly be held on the evidence to be a public road, and further, whether, assuming the view of the Magistrate to be erroneous, it was not a merely debateable question of fact with the decision of which this Court ought not, following the well established principles, to refuse to interfere.

In my opinion, there is, upon the evidence no real controversy of fact at all, except in so far as the question whether an inferance of prior dedication to be drawn from an admitted state of facts, may be said to be itself a question of fact. It is, perhaps, more properly described as a mixed question of fact and law. It will, therefore, be convenient to set out the history of this way as disclosed by the evidence.

The way is *kachcha*. It has never been properly made up, and it has certainly never been repaired by any public authority, even if any kind of casual repair has ever been done to it. It forms a kind of irregular or tortuous base to a triangle, the sides of which consist of two pakka roads which may be described as main roads, and which are undoubtedly roads vested in the district authority. The appex of the triangle is formed by the junction of these two main roads where they intersect at right angles. It might be described as a short cut or loop, connecting these two roads, and cutting off the two sides of the triangle. But its construction, and course, as well as the absence of any work of repair to it by the road authority, all show that it was not brought into existence to serve this purpose. It passes the houses of the complainant and defendant who were formerly co-sharers. It clearly came into existence as a village by-road or path, for the use and benefit of the persons owning, or occupying, or wishing to visit the houses and lands which it feeds. The

uncontradicted evidence, for example, that of a Secretary to a Municipal Board, and of a Veterinary Surgeon, shows that it has been used indifferently by members of the public visiting the places or persons abutting on the road, without objection, though this user must in the nature of things have been quite casual and intermittent. This sort of user is a common incident in the case of all private roads which serve some purpose other than purposes exclusively those of the owner, who would not be likely to interfere, even if he knew of it, if it did not injuriously affect his own interests and it certainly cannot, *suo motu*, be treated as a ground for converting a private way, if it is one, into a public way. The patwari has known and used this road for many years, and is quite satisfied that it is public. But it would be unreasonable to expect, in the case of such an obvious local convenience, the use of which created no nuisance, a village owner, to make himself generally unpopular by interference with every isolated user of this kind or with user by villagers. It is equally true that if he wished to interfere, he might find the labour of doing so a greater burden than the maintenance of his right was worth, and so be persuaded to let the latter go, and throw the road definitely open to the public by a tacit dedication. In England landowners were very fond of doing this in order to throw the burden of repair on to the rates, until the Highways Act of 1835 intervened, and prevented automatic dedication without certain formalities, which included the consent of the road authority and their right to require the road to be properly made up first.

It therefore becomes material to inquire when, and in what way, the act of dedication, other than that to be inferred from subsequent permissive user is said to have taken place, and what evidence of it is to be found in the documents. It is to be observed that originally, before partition, the land was held jointly by co-sharers. This fact makes the necessity of inquiring when the dedication was made all the more material. It was admitted in argument before me that it could not be suggested that it had been made since the partition. But one co-sharer of an undivided share cannot dedicate to the public a way over the common estate without the consent of his co-owners. The act must be the concerted act, at one given moment, of all the joint owners. It is odd that the complainant himself, who must be taken to be either one of the original dedicators, or the successor-in-title, did not venture to assist the Court in this matter by explaining how it happened. Indeed the language of his complaint indicated (though it would be unduly hard to infer much from this fact) that he regarded the way as appurtenant to his own residence, and the user as mainly for those who came there. Neither the judgment of the Magistrate, nor that of Mr. Justice Daniels, contains any finding as to the actual dedication. The truth is, that not only is there no evidence of a joint dedication but that such evidence as there is, is inconsistent with it. At the settlement in 1901 the plot or soil over which the way passes was described as "waste" or "fallow", and not as "*rasta*". By the partition in 1910 all village paths remained joint, and were allotted to those who had jointly held the lands over which such ways passed. This was a just and almost inevitable proceeding, and in the absence of clear evidence of a prior dedication is really fatal to this claim. I come therefore, to the conclusion that, upon the admitted and uncontradicted facts of the case as presented in evidence by both sides (disregarding the foolish and dishonest allegation by the defence that the drain itself was old) a Judge would have to direct a jury that there was no evidence upon which they could find that there had ever been a dedication, and that a finding in the affirmative would really be perverse.

As to the question of jurisdiction my brothers are agreed, and perhaps it does not fall to me to express any opinion. But the whole case is before me, and I will merely content myself with saying that I agree that the Magistrate had jurisdiction. The fallacy in *Emperor* v. *Dost Mohammad* (1) lies in the confusion between jurisdiction and discretion, which latter

was the second point left more or less open by the Full Bench in *Ram Saugar Mandal* v. *Alek Naskar* (2). The section is quite plain. The Magistrate must deal with an alleged "public" way even though it is disputed. But it is obvious that these summary powers were primarily intended to be exercised in cases where there was no question that the way was one vested in the public, and when that question is seriously disputed, and its decision becomes a difficult matter of mixed fact and law, a Magistrate clearly has jurisdiction to exercise his discretion by declining to decide it, and sending the parties to a Civil Court. It is impossible to peruse the judgment of the Magistrate in this case without realizing that he failed to appreciate the principles of law underlying a controversy of this kind. You cannot convert private property into public merely because it looks as though it ought to be, and because to do so would be convenient to a section of the public who have enjoyed permissive user over it, and I agree with the Sessions Judge that the Magistrate ought in this case to have declined to decide it.

Finally, I hold that in finding that this was a public way the Magistrate misdirected himself, and did so without any evidence to justify such a finding; that the complaint, whatever trespass the act committed upon the complainant's joint rights over the private way may have amounted to, which is a matter for a Civil Court, was an abuse of S. 133 of the Criminal Procedure Code; that the reference must be accepted, and the whole proceedings set aside.

Reference accepted.

✱ 1924 ALLAHABAD 7

DANIELS, J.

East Indian Railway Company—Defendants—Applicants.

v.

Firm Kishin Lal Tirkhamal—Plaintiffs—Opposite Party.

Civ. Rev. No. 23 of 1923, D/- 13th April 1923 from the S. C. C. J., Ghaziabad, D/- 9th December 1922.

Railways Act, S. 72—Risk note for "B"—'Loss'—Burden of proof.

In case of short delivery the defendant Railway must prove loss of the goods, and it is only after they have proved this that the plaintiff can be required to prove that the loss was due to a cause for which the railway company would be liable. (45 B 1201; 1923 All. 426, ref.) The word 'loss' means loss by the railway company and not loss to the plaintiff. [P. 7 C. 2; P. 8 C. 1]

L. P. Zutshi—for Applicants.

N. C. Vaish—for Opposite Party.

Judgment.—This revision raises a question of the liability of a railway company in respect of goods consigned under risk note B. In this form of risk note the consignor in view of reduced rate of freight agrees to hold the railway.

"Harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to the said consignment, from any cause whatever except for the loss of a complete consignment or of one or more complete packages..... due either to the wilful neglect of the railway administration or to theft by or to the wilful neglect of its servants ..... (with a further proviso) that wilful neglect shall not be held to include fire, robbery from a running train or any other unforeseen event or accident".

126 bags of sugar were consigned to the plaintiff under a risk note in this form. On taking delivery the number was found to be short by three bags. The plaint alleges that in consequence of this short delivery the plaintiffs have suffered loss to the amount claimed. In defence the railway company set up the risk note and they further alleged that in this case the loss of the bags was due to theft from a running train. It has been held that in this connection the terms robbery and theft are equivalent (45 All. 56). The case was tried in the Small Cause Court. The view of the learned Judge of the Court below was that as the Plaintiff did not allege in his plaint that the goods were lost but merely that he had not received them, it lay on the defendants to prove loss of the goods, and it was only after they had proved this that the plaintiff could be required to prove that the loss was due to a cause for

which the railway company would be liable. In support of this view the learned Judge relies on the case of *Ghelabhai* v. *E. I. Ry. Co.* (1) though the learned Judge prefers to cite the case from some volume of private reports. The same view was taken by Lindsay, J. in *Secretary of State* v. *Jiwan* (2) in a case in which a consignment of food had rotted owing to delay in transit and the plaintiff had suffered loss in consequence. The delay was found to be due to the wilful neglect of the railway company. The goods were consigned under risk note B as in the present case. The risk note gave the railway absolute protection in respect of damage to the goods. It did not protect them against loss if the loss was due to the wilful neglect of their servants. The learned Judge held that "loss" meant loss by the railway company and not loss to the plaintiff. On this view the plaintiff is entitled to a decree in the present case. In that case the plaintiffs were suing for something which was *prima facie* within the protection afforded by the risk note, namely, damage to the goods. Therefore in the absence of proof of loss the suit failed. Here the plaintiffs are suing for something which is *prima facie* outside the protection afforded by the note, namely, breach of the contract to deliver. In the absence of evidence of loss the plaintiff is entitled to succeed. No doubt a different view has been taken by the Punjab High Court (*Hill, Sawyers & Co.* v. *Secretary of State* (3) but the Subordinate Judge was bound to follow the rulings of this Court.

Reliance is placed by the respondent on *E. I. Ry.* v. *Nathmal* (4) and *Smith* v. *G. W. Ry. Co.* (5). In both these cases the loss of the goods was admitted by the plaintiffs. In the former case the goods were missing on the arrival of the train at its destination. In the English case it is specifically stated in the last paragraph of Lord Wrenbury's judgment that the plaintiff alleged the loss of the goods. The argument turned on whether wilful negligence could be assumed from the mere fact of non-delivery. Moreover, the protection given to the railway was in wider terms and included delay or detention.

For the above reasons I am unable to accept this revision which I accordingly dismiss with costs.

Application dismissed.

(1) [1921] 45 Bom. 1201—23 Bom.L.R. 525—63 I.C. 241.
(2) 1923 All. 426—45 All. 380—21 A.L.J. 220—71 I.C. 609.
(3) [1921]2 Lah. 133—3 Lah.L.J. 297—61 I.C. 926 (**F.B.**)
(4) [1917] 39 All. 418—15 A.L.J. 321—39 I.C. 130.
(5) [1922] 1 A.C. 178.

1924 ALLAHABAD 8

DANIELS, J.

East Indian Railway Company—Defendants—Appellants.

v

Firm Gope Krishna Kashi Prasad—Plaintiffs—Respondents.

Civ. Rev. No. 32 of 1923, D/-19th April 1923 from the Sm. C. C. J., Ghazipur, D/-30th November, 1922.

Railways Act, S. 72—Risk Note form B—Delay.

Damage suffered by the consignor owing to delay during transit entitles him to sue the company for damages. Risk note B does not protect the company in such cases 20 A. L. J. 973 and 1923 All. 426, Dist. 1924 All. 7=45 All. 530, Ref. [P. 9 C. 1]

B. K. Mookerjee—for Appellants.

S. N. Verma—for Opposite Party.

Judgment.—This is a revision directed against an order of the Small Cause Court and raises a question of the liability of the Railway Company under risk note B. The goods in question were consigned from Tarighat near Ghazipore on the E. I. Ry. to Manbhum on 26th January 1922. The goods were not lost nor were they destroyed but the Railway Coy. took five months to convey them and they did not reach their destination until 25th June 1922. The delay was unquestionably unreasonable. The trial Court finds that owing to this delay damage was suffered by the plaintiff quite independently of any deterioration of the goods. The ghee was in fact sent with a view to a

marriage which had already taken place before the consignment was received. The risk note B under which the goods were despatched protected the Railway Coy. from any claim for damages due to the loss, destruction or deterioration of the goods or for damage to the consignment except in certain specified cases. On the finding of fact of the Court below the cause of action in this case was not due to any of the special events against which the Railway is protected by the risk note. It was therefore outside the protection afforded by the note and the cases in *Ram Kishun Ram* v. *N. W. Ry. Co.* (1) and *Secretary of State* v. *Jiwan* (2) are distinguishable. The case is somewhat similar to *E. I. Rly. Co.* v. *Kishin Lal* (3) recently decided by me. On the finding of fact of the Court below the revision cannot succeed and I accordingly dismiss it with costs.

A ground that the damages were wrongly assessed was taken in the grounds of revision but was not argued and I cannot therefore take notice of it.

Application rejected.

(1) 1923 All. 122—20 A. L. J. 973.
(2) 1923 All. 426—45 All. 380—21 A.L.J. 220—71 I. C. 609.
(3) 1924 All. 7—45 All. 530—21 A. L. J. 438—73 I.C. 986.

1924 ALLAHABAD 9

RYVES, J.

Maqsud Hussain and another—Applicants

v

Emperor—Opposite Party.

Cr. Rev. No. 56 of 1923. D/-11th April 1923 from the S. J., Moradabad, D/-22nd December, 1922.

Penal Code, S. 297—Trespass—Meaning—having sexual connection in a mosque.

The word trespass in the section must be taken in its original meaning and there is no reason to restrict the meaning of the word which covered any injury or offence done and to couple it with entry upon property. 18 A. 395 ; 33 A. 772 Foll. Where A was found in a mosque having sexual intercourse with a woman B, both A and B were held guilty under this section. [P. 9 C 2.]

G. W. Dillon—for Applicants.

The Asstt. Govt. Advocate—for the Crown.

Judgment.—Maqsud Husain and Musammat Allahbandi were convicted by a Magistrate of the first class under S. 297 of the Indian Penal Code. Their appeal was rejected by the learned Sessions Judge and they have come here in revision. The facts found are as follows :—

In muhalla Kal in the town of Sambhal there is a mosque, now somewhat dilapidated, which was built by the father of Khan Bahadur Khan the chief witness in the case. On the night of the 11th October last which was the *chehlum*, there were illuminations in this muhalla. Khan Bahadur Khan was one of the persons who had organised these illuminations and at about 11 0'clock that night he was about to enter the mosque to say his evening prayers when in consequence of information given to him by some boys he went back to the illuminations and fetched three other Muhamedans and entered the mosque. There they found Muqsud Husain and Musammat Allahbandi lying on a cot having sexual connection. The witnesses ran up and seized them both and dragged them outside. A number of Muhamedans at once came up and were so horrified at the desecration of the mosque that they handled the accused somewhat roughly. These are the facts found and they are amply borne out by the evidence. The learned Counsel for the applicants raises two points (1). That no trespass has been proved against the accused within the meaning of the section.

He argues that the word "trespass" in that section must have the same meaning as criminal trespass in other parts of the Code. As long ago as 1896 it was held by a learned Judge of this Court in *Queen Empress* v. *Subhan* (1) that the word trespass in the section must be taken in its original meaning and as a word which covered any injury or offence done and to couple it with

(1) [1896] 18 All. 395.

entry upon property. That decision has remained unchallenged for 27 years. It was quoted with approval in *Emperor* v *Ram Prasad* (2) by a Divisional Bench of this Court and the same view seems to have been taken by a Bench of the Madras High Court *In re Ratna Mudali* (3). In my opinion this argument therefore fails.

The second argument put forward is that what really happened was that the accused and the woman had gone into the mosque solely with the intention of looking at the illuminations and had taken the cot with them merely to sit on it when under a moment of impulse they misconducted themselves, and that therefore, there was no intent within the meaning of the section. I do not propose even to consider this argument because it is based only on the ingenuity of Counsel and is not supported by any evidence and is in fact flatly contradicted by the statements of the accused themselves and their evidence. According to them they were not inside the mosque at all. There was no cot and there was no misconduct. The conviction therefore in my opinion was right and the sentence appropriate. I reject the application.

Application dismissed.

---

(2) [1911] 33 All. 773—8 A.L.J. 927—12 Cr. L. J. 532—12 I. C. 300.
(3) [1887] 10 Mad 126.

1924 ALLAHABAD 10

MEARS, C. J. AND BANERJI, J.

Baru Mal—Plaintiff—Appellant.

v.

Sunder Lal — Defendant—Respondent.

L. P. A. No. 128 of 1921, D/-9th February 1923, from the Judgment of Stuart, J. D/- 13th July 1921.

Civil P. C. S. 11—*Decision in previous suit when res judicata.*

Even though the property in dispute in the previous suit does not comprise the whole of the property in dispute in the subsequent suit but the question of plaintiff's title is identical and is decided in that suit the same question cannot be raised and decided in subsequent suit. [P 10 C 2]

S. N. Sen—for Appellant.

M. L. Agarwala and P. L. Banerji—for Respondent.

Banerji, J.—The question in this case is whether a previous decision operates as res judicata under the provisions of section 11 of the Code of Civil Procedure. The plaintiff claims certain property by virtue of a sale deed, dated 29th of July 1917. Before the institution of the present suit the defendant had brought a suit in the Revenue Court to eject the plaintiff from 5 plots out of the property comprised in the sale deed, on the allegation that the plaintiff was the tenant of the defendant. In that suit the plaintiff claimed proprietary title in respect of that property by virtue of the sale deed, which is the basis of the present claim in this suit. The Revenue Court, upon that plea being raised, could have adopted one of two courses. It might have referred the parties to the Civil Court, or it might have constituted itself a Civil Court and tried the question itself. It did not refer the parties to the Civil Court and must be deemed to have elected to try the question of title. Its decision was adverse to the present plaintiff, who was defendant in the previous suit, and the Court held that the plaintiff had failed to prove the proprietary right set up by him. In the present suit the plaintiff claims not only the plots which were in dispute in the suit in the Revenue Court but also other plots. It has been held that the present claim is barred by reason of the decision in the previous suit. The decision in that suit must be deemed to be the decision of a Civil Court. It is true that the property in dispute in the previous suit did not comprise the whole of the property now in dispute but the question of the plaintiff's title to both descriptions of property is identical and must be deemed to have been decided in that suit. The decision negatived the title, and therefore the issue as to the title must be deemed to have been decided in the previous suit. As we have stated above the Court in the previous suit was by reason of the action taken by it equivalent to a Civil Court which

could have tried the subsequent suit. The title of the plaintiff was the matter in issue in the previous suit and having been once decided against the plaintiff, it cannot be raised and decided in this subsequent suit. In this view this appeal is not sustainable and is dismissed with costs.

Appeal dismissed.

✱ 1924 ALLAHABAD 11

STUART AND SULAIMAN, JJ.

Mohan Lal—Defendant—Appellant.

v.

Prasadi Lal and another—Plaintiffs—Respondents.

S. A. No. 771 of 1921, D/- 4th July 1922 from the D. J., Meerut, D/- 3rd February, 1921.

Mortgage—Suit for sale of half the property—One of the mortgagees a part owner.

Ordinarily the acquisition of a share in the equity of redemption by one only of several mortgagees does not necessarily break up the integrity of the mortgage so as to entitle a mortgagor, interested in only a fractional part of the property, to redeem his share on payment of a proportionate amount. But when the mortgagees sue for only half the mortgage money they must be deemed to have practically admitted that something has happened which has had the effect of satisfying half the mortgage amount, and therefore it would be highly inequitable to allow the plaintiffs to throw the burden of their share of the mortgage money on the whole property. They will be allowed to sell only a proportionate part of the property. [P. 11 C. 2; P. 12 C. 1]

U. S, Bajpai—for Appellant.

S. N. Gupta—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for sale on the basis of a mortgage deed, dated the 21st of September, 1910, executed by defendants Nos. 1 and 2 and the father of defendant No. 3 in favour of Plaintiff No. 1, the father of Plaintiff No. 2, and Mohan Lal, defendant No. 4. The plaintiffs' case was that they were entitled to half the mortgage money while Mohan Lal was the owner of the other half, but as Mohan Lal had purchased the entire equity of redemption in execution of a simple money decree they sued to recover only half the mortgage money by sale of the entire mortgaged property. The pleas raised in defence by the contesting defendant Mohan Lal were (1) that the money was advanced by him alone and he was the sole mortgagee, the other names having been entered only fictitiously, and (2) that in any case the plaintiffs were entitled to sell only half of the mortgaged property.

The Court of first instance came to the conclusion that the plaintiffs had a share in the mortgagee rights, and held that out of the mortgage money amounting to Rs. 500 the plaintiffs had contributed two sums of Rs. 75 and Rs. 87-8-0, and it gave them a decree for these two sums plus interest, but directed that the amount be realized by sale of the entire mortgaged property. This decree has been affirmed on appeal.

The defendant has come up in second appeal to this Court and two main points are urged. The first is that the sum of Rs. 75 paid by the plaintiffs was included in the sum of Rs. 87-8-0 referred to in the written statement. This contention has no force. The sum of Rs. 75 has been proved to the satisfaction of both the Courts below to have been paid by the plaintiffs direct to Musammat Manbhari, a previous creditor mentioned in the deed, whereas Rs. 87-8-0 is an item which is found to have been paid to Mohan Lal, defendant, himself towards the bond in suit.

The second point raised is as to the plaintiffs' right to sell the whole mortgaged property.

Now, it may be that in order to effact a merger the two rights must be co-extensive in some share, howsoever small, though one be higher than the other, and that ordinarily the acquisition of a share in the equity of redemption by one only of several mortgagees does not necessarily break up the integrity of the mortgage so as to entitle a mortgagor, interested in only a fractional part of property, to redeem his share on payment of a proportionate amount. In such cases the other mortgagees, who have neither expressly nor by implication agreed to the breaking up of the integrity, may successfully resist the claim. But that point does not arise in the present case which stands on quite a different footing. Here the

plaintiffs, in suing for only half the mortgage money have practically admitted that something has happened which has had the effect of satisfying half the mortgage amount. It would be highly inequitable to allow the plaintiffs to throw the burden of their share of the mortgage money on the whole property for it may very well place the defendant in a very much worse position than he might have been in but for the auction purchase. Had the plaintiffs treated the mortgage as being still intact and sued for the whole sum, impleading Mohan Lol merely as a representative of the mortgagors, and agreed to share with Mohan Lal either the sale proceeds or the property purchased in execution of the mortgage decree, the case might have been different. But to permit the plaintiffs to sell the whole property in order to realize simply their share of the mortgage money would be grossly unjust, as it may possibly result in Mohan Lal's losing his share of the mortgage money as well as the mortgaged property. The plaintiffs by suing for only their share of the mortgage money must be deemed to have admitted that the balance of the mortgage money has been satisfied by the acquisition of a proportionate share of the mortgaged property.

We are therefore distinctly of opinion that in the circumstances of this case the plaintiffs should be given a decree to recover their share of the mortgage money as against a proportionate part of the mortgaged property only, which comes to Rs. 162-8-0/ Rs. 500 = 13/40.

We accordingly allow the appeal and modify the decree of the Courts below, directing that the amount decreed be realized by sale of only 13/40 of the mortgaged properties. A fresh decree under order 34, rule 4, will be prepared. We extend the time for payment up to six months from this date.

Appeal allowed.

1924 ALLAHABAD 12

LINDSAY AND SULAIMAN. JJ.

Bansidhar and others—Plaintiffs—Appellants.

v.

Babu Lal and others—Defendants—Respondents.

F. A. No. 304 of 1920, D/- 2nd July 1923, from the decree of the Sub. J., Farrukhabad, D/- 31st July, 1920.

Contract Act, S. 25—New contract—Statement of pleader does not give rise to.

While a suit was pending the pleader for the defendants stated that if the plaintiff presented probate or Letters of Administration or succession certificate the defendants would have no objection to pay him the amount in dispute with interest thereon for six months.

Held: that the pleader who made the statement had no general or special authority from the defendant which would entitle him to enter into a contract on their behalf to pay a time-barred debt and therefore this statement was not a new contract within S. 25 (3) so as to give rise to a fresh cause of action, especially when there is nothing whatever to show that the record of the statement made by the pleader was signed by the pleader or by any other agent. [P 15 C 1]

G. Agarwala and *U. S. Bajpai*—for Appellants.

K. N. Katju and *H. K. Kaul*—for Respondents.

Lindsay, J.—The suit out of which this appeal has arisen was brought to recover a sum of Rs. 17,000/- odd, the defendants in the case being Babu Lal and Kishun Gopal sons of Kedar Nath. These defendants apparently are the owners of the firm called "Babu Lal and Kedar Nath" carrying on business at Cawnpore. The firm has become insolvent and the estate of the defendants is now represented by the Official Receiver.

The plaintiffs in the suit are the descendants of one Bhawani Shanker who died on the 12th of Frbruary 1912. This man Bhawani Shanker owned a business at Farrukhabad which was carried on in the name of Mahanand Ram Bhawani Shanker.

On the 27th or 28th of December, 1911 Bhawani Shanker sent certain Hundis to the defendant firm at Cawnpore for realisation and credit to his account.

It is stated that the directions to the defendant firm were that the money

should be treated as a fixed deposit payable six months after date.

On the 8th of February 1912 Bhawani Shanker wrote a letter to the defendant firm with respect to this deposit. He directed the defendants to open a fresh account in his name and to credit him with a sum of Rs.12,000/- and in his letter he stated that this sum was to be applied for the purpose of educating five boys of his community to enable them to pass the LL. B. and Pleadership examination of the High Court.

This letter was received by the defendant firm and was answered by a letter dated the 9th February 1912 which is to be found at page 1 of the supplemental book A.

Four days after he wrote this letter Bhawani Shanker died. After this, certain claims were presented to the defendant firm in respect of this money and one of the claimants was Mohan Lal who apparently had succeeded to the business of Bhawani Shanker of Farrukhabad.

The defendant firm having these several claims made against it refused to pay until one or other of the claimants had established his title to the money.

The result of all this was that a suit was filed on the 29th June 1915 by Mohan Lal against the defendant firm claiming this money.

That suit was resisted on several grounds. One of the pleas in defence taken was that the money was trust money and that the plaintiff Mohan Lal could not recover it. Another plea was a plea of limitation.

In the course of the trial of that suit a certain statement was made on behalf of the defendant firm by the pleader who was engaged to conduct the defence.

On the 23rd November 1915 while the suit was still pending the pleader for the defendants stated that if the plaintiff Mohan Lal presented probate or Letters of Administration or a succession certificate the defendants would have no objection to pay him the amount in dispute with interest thereon for six months.

The suit was however dismissed by the subordinate Judge on the 27th January 1916 on the ground that the plaintiff, Mohan Lal had failed to obtain a succession certificate. This order dismissing the suit was confirmed in appeal by this Court.

At the time the suit brought by Mohan Lal was pending in the Court of the subordinate Judge proceedings were going on in the Court of the District Judge for the purpose of obtaining a succession certificate. For one reason or another this certificate was not obtained till the month of December 1913. Mohan Lal has since died and now we have the present suit instituted on the 27th January 1920.

We have to deal here with two pleas which were raised in defence. One was that the money held by the defendant firm was trust money which Bhawani Shanker had made over for the purpose specified in his letter of the 8th February 1912. It was pleaded that the present plaintiffs had no right to have the money. The other plea taken was that the suit was barred by time.

The learned subordinate Judge was of opinion that the suit was not barred by limitation. On the other hand he was of opinion that the money had been dedicated in trust for the purposes specified in the letter of Bhawani Shanker which he wrote in the month of February 1912. The result of the proceedings in the Court below was that the suit was dismissed.

In appeal two points are raised before us. It is argued on behalf of the plaintiffs appellants that the Court below was wrong in holding that a trust had been created and that the plaintiffs were not entitled to the sum in dispute. On the other hand the learned Advocate who represents the Official Receiver supports the judgment of the Court below on the ground that the suit was barred by limitation.

We will deal with this latter point first.

On the face of it the suit as a suit for recovery of money which was deposited in December 1911 and which was payable in June 1912 is time-barred but the plaintiffs claim to be suing on a fresh cause of action arising out of what took place in the earlier suit on the 23rd of November 1915

The plaintiffs founded their cause of action upon the statement made by the pleader for the defendant firm in that earlier case, the statement to which we have already referred. It was not pleaded that anything contained in this statement amounted to an acknowledgment which would extend the period of limitation. Obviously no such plea could be taken for the statement, whatever it amounted to, was made after the period of limitation had expired.

But what the plaintiffs say is this. They contend that the statement made by the pleader on the 23rd November 1915 gave rise to a new contract under S. 25 of the Indian Contract Act.

Under the section in question a promise made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law of limitation is a valid and binding contract.

And so it is argued that when the pleader stated that the defendant firm had no objection to pay the money claimed to the plaintiffs if the plaintiffs succeeded in getting Probate or Letters of Administration or a Succession Certificate, a fresh contract was entered into and it is further argued that a suit on this contract is within time on the ground that the promise was conditional upon the plaintiffs obtaining a succession certificate. As that certificate was not obtained till the month of December 1918 it was argued that this suit instituted in January 1920 was within limitation.

In our opinion the judgment of the subordinate Judge on this issue is erroneous.

In order to establish a valid contract under S. 25 of the Contract Act it is necessary to show that a promise was made in writing and that this writing was signed by the person to be charged therewith or was signed by his agent generally or specially authorised in that behalf.

It is argued for the respondents in the first place that there is no proof on the record that the pleader who made this statement was either generally or specially authorised to represent the defendants for the purpose of making a fresh contract under S. 25. We have here to notice what happened in the Court of the Subordinate Judge in the earlier suit. We have already mentioned that the defendants' pleader made the statement upon which the plaintiffs now rely on the 23rd of November 1915.

On the 17th January 1916 the defendants presented a petition in Court repudiating the statement which had been made on their behalf. It was stated in this petition that one Salik Ram the general attorney gave certain instructions to the pleader who was conducting the defence and that he had given these instructions without any authority. It was stated clearly in this petition that the defendant firm had not relinquished any of the pleas which they had raised in their written statment of defence. An affidavit was put in support of this application.

The subordinate Judge at that time dealt with this application in his order of 17th January 1916 which is printed at page 33 of the paper book He rejected the petition saying that the Vakil had not exceeded his authority inasmuch as he was "competent to abandon any issue or plea."

As the case stands we have no proof at all that the pleader, who made the statement relied upon, had any general or special authority from the defendant firm which would entitle him to enter into a contract on their behalf to pay a time-barred debt. The pleader's authority was confined to the conduct of the case and the subordinate Judge rightly observed that he was competent to abandon any issue or plea. All that his statement amounted to was that if during the pendency of the suit the plaintiff Mohan Lal obtained a succession certificate the defendants were ready to submit to a decree for the amount claimed together with interest for six months. We have already mentioned that the suit was dismissed a couple of months later on the ground that the plaintiff had failed to take out a succession certificate. We cannot therefore treat this statement as showing in any way that the pleader who made it had authority

to bind the defendant firm by a fresh contract under S. 25 of the Contract Act.

Another point which had to be noticed is this. In order that a valid contract may be constituted under S. 25 (3) of the Contract Act it is necessary that the statement should be in writing and should be signed by the person to be charged therewith or by his agent generally or specially authorised. There is nothing whatever before us to show that the record of the statement made by the pleader on the 23rd November 1915 was signed by the pleader or by any other agent. All we have got before us is a certified copy of an entry which we take to have been written on the order sheet recording the statement made by the pleader. There is nothing whatever to show that this statement is signed by anybody except perhaps the subordinate Judge who is responsible for initialling the entries on the order-sheet. This matter seems to have escaped the notice of the learned subordinate judge and we think therefore that he was wrong in holding that the statement made by the pleader on the 23rd November 1915 gave rise to a new contract and to a fresh cause of action.

This being so, the plaintiffs can only fall back upon the original cause of action and as we have already pointed out a suit on that cause of action is long time-barred.

In this view of the case it is not necessary for us to discuss the other question, namely, whether there was good dedication of this fund to trust purposes and we therefore abstain from saying anything beyond this, namely, that Dr. Katju who represents the Official Receiver admits that this money was held in trust by the defendant firm.

The result therefore is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

✱ 1924 ALLAHABAD 15

MEARS, C J. AND PIGGOTT, J.

Sham Behari Lal and others—Plaintiffs—Appellants.

v.

Musammat Ram Kali—Defendant—Respondent.

F. A. No. 354 of 1920, D/- 12th June, 1923 from the decree of the Sub. J. Shahjahanpur, D/-17th January 1920.

Hindu Law—Succession—Stridhan—Daughter inheriting stridhan takes a limited estate—Benares School.

A female taking property by inheritance from her mother, does not take it as her own stridhan, but takes it with a limited estate, with the reverter after her death to the heirs of her predecessors i. e., the mother. 25 A 476 P.C.Foll,38 M. 1 and 17 C.911 Ref. [P.15 C.2]

Gulzari Lal, J. B. Lal and S. P. Sinha—for Appellants.

B. R. Dave and U. S. Bajpai—for Respondent.

Piggott, J.—This was a claim to certain property by inheritance. It was at one time the *stridhan* property of Musammat Sahodra, and descended after Sahodra's death to Musammat Ram Piari, her daughter. Ram Piari is now dead and the defendant in possession is Ram Kali, daughter of Ram Piari. The plaintiffs are the sons of one Ganga Din, who was a son of Musammat Sadodra. As the trial Court has rightly remarked, it is now quite settled law that Musammat Ram Piari, taking this property by inheritance from her mother, did not take it as her own *stridhan*, that she took it with a limited estate, with the reverter after her death to the heirs of her predecessor.

The question for dedermination then is whether the defendant Musammat Ram Kali, as the daughter's daughter of Musammat Sahodra, is a nearer heir to Musammat Sahodra than the two plaintiffs who are the son's son of that lady.

On behalf of the respondent it is contended that, under the Mitakshara school of law, there can be but one answer to this question, and that the daughter's daughter has the preference. In principle two other High Courts have undoubtedly affirmed the view that, in such a case as the present, we have to look to the *stridhan*

heirs of the female in whose hands the property was held as *stridhan*, vide *Subramanian Chetti* v. *Arunachelam chetty* (1) and *Huri Dayal Singh Sarmana* v. *Grish Chunder Mukerjee* (2) Morevover, in the case of *Sheo Pertab Bahadur Singh* v. *The Allahabad Bank* (3) there is a very significant remark by their Lordships of the Privy Council inserted as a comment upon a dictum of the learned Judges of this Court who dealt with the same litigation at an earlier stage. Their Lordships had to deal with property which had been the *stridhan* of a lady named Kailash Kunwar and had passed from that lady to her daughter, Janki Kunwar. The main question which they had to determine was whether Janki Kunwar took that property from her mother with a limited estate, or whether the property itself remained *stridhan* in the hands of Janki Kunwar. Incidently however their Lordships discussed the question of the devolution of the property after Jangi Kunwar's death, and they quote a dictum of the learned Judges of this Court, to the effect that when Janki Kunwar died childless the succession necessarily went to the heirs of her father". After quoting this remark their Lordships add, "presumably as the *stridhan* heirs of her mother in the absence of lineal heirs of the latter". It seems to us quite clear from this passage that if their Lordships had to determine the devolution of the property then in suit upon the death of Janki Kunwar they would have looked for the *stridhan* heir of her mother Kailash Kunwar, and enquired who those heirs would be according to the school of law to which the parties in that litigation were subject. If these were the only authorities before us the point would seem almost too clear for argument. A certain difficulty has been created by an argument strongly pressed upon us by the learned counsel for the appellants, based upon the decision of their Lordships of the Privy Council in *Sheo Shanker Lal* v. *Debi Sahai* (4). The main question which their Lordships then had to decide was whether property inherited by a female from her mother was or was not *stridhan* in the hands of the female who so inherited it. That question, as we have already noticed, they answered in the negative. At page 471 of the report their Lordships say, "the precise question therefore arising for decision is whether, under the Hindu law of the Benares school, property which a woman has taken by inheritance from a female is her *stridhan* in such a sense that on her death it passes to her *stridhan* heirs in the female line to the exclusion of males". That was the only question really determined in the judgment. It must however be admitted that the defendants in that litigation were setting up, by way of *jus tertii* the rights of a daughter of the female who had received the property in suit by inheritance, and therefore a daughter's daughter of the female who last held that property as *stridhan* with full rights of ownership over the same. Their Lordships decided the case against the alleged *jus tertii* of this daughter's daughter. The learned Judges of the Madras High Court in the case which we have already referred to [*Subramaniam* v. *Arunachalam* (1)] discussing this point, assumed that the decision in *Sheo Shanker Lal* v. *Debi Sahai* (4) proceeded upon a very limited pleading. They assumed that the right set up by way of a *jus tertii* was the right of the daughter as such and that nothing was ever pleaded, and nothing was ever decided, about the rights of that same female as a daughter's daughter. Mr. Mayne on the other hand in his Commentary on the Hindu law states, with full knowledge of the facts, for he had himself argued the case before their Lordships of the Privy Council, that as a matter of fact the difficulty suggested above was brought to the notice of their Lordships, but was met by himself in argument by a plea based upon a suggested differentiation in the line

(1) [1905] 24 Mad. I. (F. B.)
(2) [1890] 17 Cal. 911.
(3) [1903] 25 All 476—30 I. A. 29—5 Bom L. R. 833—13 M. L. J. 336—7 C. W. N. 840 (P. C.)
(4) [1903] 25 All. 468—30 I. A. 202—5 Bom. L. R. 828—7 C.W.N. 831—13 M.L.J. 330—8 Sar. 465 (P. C.)

of descent between different kinds of *stridhan* property. It seems sufficient for us to say that the judgment of their Lordships of the Privy Council in *Sheo Shanker Lal* v. *Debi Sahai* (4) is really silent on the particular issue which we have now to determine. The question which their Lordships set out to decide we have already quoted from the judgment itself and the decision of that question does not determine the appeal before the Court. The further question raised regarding the result of the appeal in the case of *Sheo Shanker Lal* v. *Debi Sahai* (4) may be applicable either on the lines suggested by the learned Judges of the Madras High Court, or on the basis of the settlement made by Mr. J. B. Mayne in his commentary. We do not think that the arguments based upon the decision in this case can be allowed to outweigh the considered opinion expressed upon the same point in the case immediately following, that of *Sheo Partab Bahadur Singh* v. *The Allahabad Bank* (3) or that we ought, on the grounds taken by the learned counsel in support of the appeal, to dissent from the opinions of the learned Judges of the Madras and of the Calcutta High Courts in the cases we have already quoted. In our opinion therefore the decision of the trial Court was right: and we dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

1924 ALLAHABAD 17

MEARS, C. J. AND PIGGOTT, J.

Gauri Shankar and others—Defendants—Appellants.

v.

Manki Kunwar—Plaintiff—Respondent.

F. A. No. 49 of 1921, D/-14th May 1923 from the decree of the Addl. Sub, J., Benares.

Civil P. C., O. 6—Plaint—Particulurs of fraud alleged—Proof of fraud—Subordinate Courts; duties of.

To prove a case of fraud it must be proved that representations were made which were false to the knowledge of the party making them or were such that the party making them could have no reasonable belief that they were made for the purpose of being acted upon and believed, that they were believed and acted upon and caused the actual damage for which relief is claimed. [P. 19 C. 2]

If Subordinate Judges would make the parties comply with reasonable strictness with the provisions of Order 6 cases would be more satisfactorily decided and a very large amount of public time would be saved in their disposal with a corresponding benefit to litigants. Subordinate Judges should be watchful to see that in all cases the parties have pleaded their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met, and this rule is one of general application. Frequently the result of ordinary particulars of nebulous claims and defences will be to make it manifest that the claim or defence has no substance. [P. 18 C. 2

S. N. Sen, Damodar Das, K. N. Katju, Kumuda Prasad and Badri Narain—for Appellants.

B. E. O'Conor, Mukhtar Ahmed and N. P. Asthana—for Respondent.

Mears, C.J.—In the lower Court this was a suit for specific performance of a contract for sale embodied in a document dated the 2nd of December, 1918. That document set forth that a dispute had arisen between Musammnt Manki Kunwar and the defendant and other parties in like interest in relation to about 17 acres of land in Mauza Lachipur. That land had been bought by Gauri Shanker a few years before. That land was the subject of a pre-emption suit brought by the present plaintiff, which at the date of this agreement of the 2nd of December, 1918, had been through two Courts, and in each Court had been decided adversely to the lady. At the date of this agreement there was an appeal pending in the High Court with a view to put an end to the dispute relating to this land in Mauza Lachipur, and also with a view to put an end to a rivalry between the parties with regard to certain land under the control of the Maharaja of Benares, they entered into the agreement in suit. In substance, in certain events, the lady had to pay Rs. 5,000 in order to become the owner of the land in Mauza Lachipur; and as regards the other property, Mauza Saktanpur and other Mauzas, set out in the plaint, the parties were willing to become partners in that property, and partners on the basis of each taking a half. It appears that there were various.

persons who wished to acquire this property, and a man whose name is of no importance in the action, first offered a small amount of nazrana. The lady capped that by what became ultimately an offer of Rs. 10,000 and thereupon the defendant and his party added to it Rs. 1,000 making the offer Rs. 11,000. In this state of affairs the Court of His Highness the Maharaja of Benares looked into the matter, and by the 2nd of December all the parties to this suit had recognised the inadvisibility of bidding against each other, and indeed, on the 4th of January, 1919, they made it perfectly clear to the officers of His Highness that Rs. 11,000 would be paid—as to Rs. 5,500 by the lady and as to Rs. 5,500 by Gauri Shanker and his father-and they would be content each to receive one-half of the property. That is in fact what has happened.

The complaint of the present plaintiff was that in breach of the definite agreement the defendants had refused to convey to her the Lachipur property for the Rs. 5,000 set out in the agreement. The defendant, searching about for a defence, thought that some vague allegations of fraud would help him and embodied them in paragraph 4. The plaintiff did not apply for particulars of the fraud and the learned Subordinate Judge in entire disregard of the provisions of O. 6 of the Code of Civil Procedure proceeded to frame issues. The one relating to fraud was remarkable. It runs as follows :—Issue I (c) "Were there any allegations in connection with the pre-emption second appeal made with intense deception which affected the defendants as alleged in paragraph No. 4 of the written statement ? If so, how does that fact affect the claim ?"

It was the duty of the pleader for the plaintiff to apply to the Subordinate Judge to order the defendant to deliver further and better particulars of the charge of fraud. He did not do so. When settling issues it was the duty of the Judge himself to require the defendant to specify with particularity the nature of the fraud alleged. He should have done this in the interest of the plaintiff and because the rules require it and in the public interest. If Subordinate Judges would make the parties comply with reasonable strictness with the provisions of Order 6, cases would be more satisfactorily decided and a very large amount of public time would be saved in their disposal. with a corresponding benefit to litigants.

Taking the case of fraud as an illustration; the proper form of application in an ordinary suit where the plaintiff has alleged fraud vaguely would be somewhat as follows ;—"that the plaintiff be ordered within ten days to deliver to the defendant further and better particulars of the fraud alleged in paragraph ..... of the plaint stating.

(4) whether the representations alleged were verbal or in writing. If in writing, identifying and producing the document or documents for inspection ; if verbal, giving "the substance of each and every of the said representations and stating as regards each one the date when and the place where and the person by whom and the person to whom the said representation was made and that the plaintiff be precluded at the trial from giving any evidence of any representations other than those (if any) clearly pleaded in .... paragraph and the particulars to be delivered and that the plaintiff be ordered to pay Rs..... to the defendant as the costs of, and occasioned by, this application such payment to be made with the delivery of the particulars to be ordered."

Subordinate Judges should be watchful to see that in all cases the parties have pleaded their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met, and this rule is one of general application. Frequently the result of ordinary particulars of nebulous claims and defences will be to make it manifest that the claim or defence has no substance.

A Subordinate Judge should, when ordering particulars to be given, order the party in default to pay a

specified sum of costs to the other side for the costs occasioned by the application; such payment to be made on or before the delivery of the particulars. If the order is disobeyed and the plaintiff is in default, he should have his action stayed; and if the defendant is in default his defence should be struck out.

Particulars having been furnished the Judge should be careful at the trial to exclude all evidence which is not fairly covered by the original paragraph and the particulars and should give that as his reason.

Unless pleadings are definite a Judge is entirely at the mercy of the parties and has a difficulty in excluding evidence however irrelevant. The case is protracted and the opposite party, not infrequently, put in an unfair position. A defendant is entitled before delivering his written statement to have an order that the plaintiff shall deliver to him a pleading in compliance with Order 6. Equally a plaintiff is entitled, before being called to take any further step in the action, to have proper particulars of the defendant's written statement. If the Judge is of opinion that a groundless application is made to him, the party putting in the application should likewise be ordered to pay costs.

We have made these observations at length because we are persuaded that, without undue strictness or pedantry, every Subordinate Judge could effect a large saving of public time by requiring reasonable compliance with the existing rules, and we think that Subordinate Judges should entertain applications by the parties if made within a few days on the recipt by them of the plaint and written statement, respectively. Pleadings at present are not infrequently deliberately framed in the most general of terms and are involved, unsystematic, argumentative and indeed abusive. They should contain clear, definite allegations of fact, with, when occasion demands it, the necessary reference to statutory law.

In the particular case under consideration if the defendant had been made to specify in clear terms what was the nature of the fraud that he alleged, with the proper particulars which such a plea requires, it would have been found at once that there was no substance in his allegation. It now turns out that it condenses itself into this, that because the lady was alleging from first to last that she had a right of pre-emption, therefore she was guilty of deceipt or, to use the curious language of the Subordinate Judge as embodies in issue I (c) "intense deception." That is a phrase with which we are wholly unfamiliar. There is no doubt that the lady was alleging a right of pre-emption. It may have been a good claim, it may have been a bad claim. At the very time when the right of pre-emption was being asserted by her in the agreement of the 2nd of December, 1918, matters had reached the stage when two competent Courts had decided against her, and this was a fact that was known to the defendants; and yet it is said that the lady made statements as regards her right to pre-emption which were false to her knowledge, were intended to deceive, and in fact did deceive these defendants and caused them damage in that they were induced to enter into the contract because it is not put that way in the pleadings, that would have shown there was no substance in the plea. The learned Subordinate Judge, when he got into close quarters with the facts, said that he did not believe the defence allegation that the plaintiff got the agreement "through deceptive words". To prove a case of fraud it must be proved that representations were made which were false to the knowledge of the party making them or were such that the party making them could have no reasonable belief that they were true, that they were made for the purpose of being acted upon and believed, that they were belived and acted upon and caused the actual damage for which relief is claimed. We can find no possible answer of the defendant to this suit

and we are of opinion that this is one of those cases in which specific performance of the contract must be declared, and that the Judge was right. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

1924 ALLAHABAD 20

BANERJEE, Ag. C. J. AND PIGGOTT, J.

Mt. Amrit Bibi—Defendant—Appellant.

v.

Mustafa Hussain (Plaintiff) *and others* (Defendants)—Respondents.

F. A. No. 50 of 1921, D/-3rd July, 1923, from the decree of the Sub. J., Allahabad, D/-14th January, 1921.

Mahomedan Law—Will—Shia Law-Will of life estate in entire property is equivalent to will of entire property.

A testator provided that his wife should be in possession of the whole of the estate for her life time, and that after her death his daughter's daughter would be the owner (malik) of the property; and after her, her male issue and failing male issue female issue would get the property, and failing these the grandsons of the sister would get it.

Held: that the will must be deemed to be a will of the entire property to the exclusion of daughter's daughter and unless she can be held to have assented to the will it would not be valid even as regards one-third. 30 All. 153 Foll. [P. 23 C. 1.]

Iqbal Ahmad—for Appellant.

Haider Mehdi, Raza Ali, A. Sanyal and K. N. Katju—for Respondents.

Banerjee, Ag. C. J.—This and the connected appeal No. 178 of 1921 arise out of a suit instituted by the plaintiff respondent for possession of immoveable as well as moveable properties of various descriptions. The bulk of this property is alleged to have belonged to one Abid Husain, who died in the year 1909. He left surviving him his widow, Musst. Amrit Bibi, the first defendant, a grand-daughter Musst. Umme Habiba (the daughter of a deceased daughter) and three grandsons of one of his sisters. These grand-sons are the defendants Nos. 2,3 and 4.

Abid Husain is said to have made a will in the year 1907, when he was going to Karbala. Musst. Umme Habiba died in 1919. The plaintiff is her husband and he claims a share in the property which according to him passed to Umme Habiba. If Abid Husain did not make a will 14 annas of his property would go under the Shia law, to which sect he belonged, to Musst. Umme Habiba and 2 annas to Musst. Amrit Bibi. Accordingly it is stated that Musst. Umme Habiba inherited 14 annas of the property, and the plaintiff as her husband is entitled to half of the aforesaid 14 annas, that is, to 7 annas out of 16 annas. The plaintiff denies the alleged will, and he also claims a declaration that the will was never made, and that if it was made it was invalid and could not have any operation under the Muhammedan Law.

The property claimed was of five descriptions. There was some zamindari property which is specified in schedule A annexed to the plaint. There was some house property mentioned in Schedule B. Schedule C specifies certain deposits in the Allahabad Bank and also in the Post Office Savings Bank. In Schedule D is specified certain jewellery and other moveable property which is alleged to have belonged to Umme Habiba. And Schedule E is property which the plaintiff alleges belonged to him, being cricket gear and articles of a similar nature. Out of the property mentioned in schedule D the plaintiff claims an 8 annas share.

The Court below has dismissed the claim in regard to the property mentioned in Schedules D and E, and has granted the plaintiff a decree for the share claimed by him out of other properties.

Appeal No. 50 of 1921 has been preferred by Musst. Amrit Bibi; and the connected appeal No. 178 of 1921 has been preferred by defendants Nos. 2, 3 and 4. The plaintiff has filed cross-objections in respect of the portion of the claim which has been dismissed by the Court below.

We shall deal now with each description of property claimed by the plaintiff. First of all as to the zemindari property Musst. Amrit Bibi's defence was that her dower amounted to Rs. 51,000 and that she was in

KASHMIR UNIVERSITY
Acc. No ...17706.....
Dated .....4.11.80.....

possession of the property in lieu of her dower. The Court below has found that the dower of the lady did not exceed Rs. 5,000 and that this Rs. 5,000 has already been realised by her out of the usufruct of the property, which she has been enjoiying since the death of her husband. The evidence as to the amount of the dower being in excess of Rs. 5,000 is very meagre. After the death of her husband an application was made by her for probate of the will of her husband, to which we have referred above. With the application for probate she filed an inventory and an affidavit, and in the affidavit she stated the amount of her dower to be Rs. 5000/-. No doubt she denies in the present suit that she had any knowledge of the contents of the affidavit or of the application. But it has been clearly proved that she did put her thumb impression to the affidavit, and that she swore it before an Honorary Magistrate, and was identified by a Mukhtar who has given evidence in the case. There is no reason to disbelieve the evidence of this Mukhtar and the Court below has believed him. It is clear that the lady admitted her dower to be Rs. 5000/; and that being so, the usufruct of the property was more than sufficient to wipe off the amount of her dower.

Her contention in regard to the house mentioned in list B is that it is her own property, and that the house which belonged to Abid Husain was appropriated by the East Indian Railway when the Railway line was first constructed. There is no evidence to show that the house of Abid Husain was appropriated by the Railway. On the contrary in the schedule of property, to which we have referred, she stated that the house belonged to Abid Husain. Further more there is the evidence of her own witnesses that the house was reconstructed by Abid Husain. So that there can be no doubt that the house did belong to Abid Husain and not to the defendant Amrit Bibi.

As regards the property mentioned in schedule C, that property consists of a deposit of Rs. 7000/- and odd in the Allahabad Bank, and of a further deposit of Rs. 1100/- in the Post Office Savings Bank. As regards the amount deposited in the Allahabad Bank, it has been clearly proved that Musst. Amrit Bibi went to the Bank in an ekka, affixed her thumb impression to the receipt granted to the Bank for the amount payable under the deposit receipts, one of which originally stood in the name of Abid Husain alone and the other jointly in her name and in the name of Abid Husain, and she directed the Bank clerks to make over the amount to the plaintiff who accompanied her to the Bank and identified her before the Bank Officials. The Bank officials proved that the money was actually handed over to the plaintiff. It is however stated on behalf of Musst. Amrit Bibi that the plaintiff himself appropriated the Rs. 7000/- and odd realised from the Bank and never paid it over to her. Against the statement of Musst. Amrit Bibi is the statement of the plaintiff himself in which he swears that he handed over the notes received from the Bank to Amrit Bibi and that she locked them up in her iron safe subsequently. It is most unlikely that the plaintiff was allowed to take away this large sum of Rs. 7000/- especially as at the time when the money was withdrawn the plaintiff was only a student in the College, and was quite a young man. On the other hand it is more probable that the lady herself kept the money in her iron safe. It is true there is no evidence to show what was the necessity for withdrawing the money from the Bank but the fact remains that the money was withdrawn and handed over by the Bank Officials to the plaintiff and afterwards remained in the custody of Amrit Bibi. This is further shown by the fact that one of the currency notes for Rs. 500/-received from the Bank, was lent by her to one Mital Prasad upon a promissory note. Mital Prasad has given evidence, and in his account book is mentioned the number of the note which he had received. The promissory note was in favour of Musst. Amrit Bibi and Mital Prasad has sworn that he got the money, namely the currency note for Rs. 500/- from Musst. Amrit Bibi's *karinda*. He

has repaid the money, and he is in possession of the promissory note. It is suggested that the plaintiff returned the promissory note to him, and he has obtained a discharge in order that he might give evidence in favour of the plaintiff to the prejudice of the defendants. There is no valid reason for accepting this suggestion. The promissory not has been partially torn up and handed over to him. He deposed that he had in all probability made an entry of the repayment in his account book. That account book of course was not produced but we have the sworn statement and we have the other circumstance to which we have referred. The Court below has preferred to believe the statement of the plaintiff in this respect and we see no reason to come to a different conclusion.

As regards the amount of one of the fixed deposit receipts which stood in the name of Abid Hussin and his wife Musst. Amrit Bibi, it was urged that half of that amount must be deemed to have belonged to Musst. Amrit Bibi herself. There is nothing to justify this contention: on the contrary in the written statement she admitted that the moneys mentioned in list C belonged to Abid Husain.

As for the Rs. 1,100 in deposit in the Post Office Savings Bank, it was said in the plaint that Amrit Bibi had withdrawn that amount. There is no evidence that she did so but the fact that the money was in deposit was admitted by her in her written statement, and if it is still in the bank and has not been realised by her, she will be entitled to withdraw the whole of it from the Savings Bank, and the passing of a decree against her for recovery of the plaintiff's share of the amount of that deposit will in no respect prejudice her in this suit. We therefore see no reason to disturb the decree of the Court below as regards the deposit of 1100 in the Post Office Savings Bank.

Mr. Iqbal Ahmad on behalf of Musst. Amrit Bibi raised a contention that the claim in regard to the deposits must be held to be time barred inasmuch as the money was withdrawn in 1915, and Musst. Umme Habiba was alive till 1919 and never claimed it. In the first place this contention was never put forward in the Court below. In the next place it is manifest from the evidence that the two ladies Amrit Bibi and Umme Habiba lived jointly and on most amicable terms. The possession of the money by Amrit Bibi was equivalent to possession by Musst. Umme Habiba. There was no conflict of interest between them and there was no occasion for her to demand this money from Musst. Amrit Bibi. In fact Musst. Umme Habiba had never been excluded from the ownership of this money and in her life-time her right had never been denied by Amrit Bibi. As regards this part of the claim therefore the appeal has in our opinion no force.

As regards the cross objections filed on behalf of the plaintiffs, the evidence is not satisfactory, and it has not been shown to our satisfaction that the finding of the Court below is erroneous.

The result therefore is that the appeal No. 50 of 1921 as well as the cross-objections filed in that appeal must fail.

As regards appeal No. 178 of 1921, it relates to the question of the will alleged to have been made by Abid Husain in 1907. The fact of the will is no longer denied and it must be taken for the purposes of this case that as a matter of fact the will was executed by Abid Husain. By that will he provided that Musst. Amrit Bibi should be in possession of the whole of the estate for her life time, and that after her death Musst. Umme Habiba would be the owner (*malik*) of the property; that after her, her male issue and failing male issue female issue would get the property, and failing these the defendants 2,3 and 4, the grandsons of the sister of Abid Husain, would get it. Under the Shia law the will would be valid to the extent of one-third even without the consent of the heirs: if it was a will of the entire property in favour of an heir it would not be valid unless the other heirs assented to it. The point was considered by this Court in the case of *Fahmida*

Khanum v. *Jafri Khanum* (1). In that case it was held that if a bequest was made of one-third only it would be valid ; but if the bequest was of the entire property it would not be valid even as regards one-third unless it was assented to after the death of the testator by the other heirs. In the present case the bequest was clearly one of the entire property. It is true that a life estate was given to Musst. Amrit Bibi, but it was a life estate in the whole of the property. Whereas if no will had been made she would have only got a 2 annas share and the grand-daughter of the testator would have got 14 annas. The effect of the will was to deprive the grand daughter of the testator of the 14 annas share which she would have at once inherited and to postpone her right to the 14 annas to the death of Amrit Bibi. This was an exclusion of the grand-daughter from a very considerable share of the property, and therefore the will in the present case must be deemed to be a will of the entire property to the exclusion of one of the heirs. Unless therefore Musst. Umme Habiba can be held to have assented to the will it would not be valid even as regards one-third. It is said that the assent to the will was given on her behalf by her father Jawad Husain. In the first place there is nothing to show that Jawad Husain ever assented to this will. It is true that as Mukhtar of Amrit Bibi he got the will registered and subsequently proceedings were taken for obtaining Probate of the will ; but he does not seem to have acted in his capacity as guardian of the minor and in those proceedings to have given his assent to the will, either expressly or impliedly. Musst. Umme Habiba was herself a minor, about 10 or 12 years of age, at the time of the death of Ahid Husain. She lived till she was about 22 years of age. But during this period she does not appear to have given her consent to the will, or to have in any other manner acquiesced in the will. There is nothing to show that she had any knowledge of the will or that she had ever seen it or heard of its contents. Two witnesses were no doubt examined who stated that the lady had said that she had no objection to her grand father's will. The lower Court has disbelieved these witnesses and we are not in a position to say that the conclusion of the Court below in that respect was erroneous. We think it very unlikely that Umme Habiba stated in the presence of these witnesses that she had no objection to the will and that she assented to it.

The appeal filed on behalf of the defendants Nos. 2,3 and 4, namely appeal No. 178 of 1921, also fails.

The result is that we dismiss both the appeals and the cross-objections with costs which in this Court will include fees on the higher scale.

Appeals dismissed.

(1) [1908] 30 All. 153—5 A.L.J. 169—(1908) A.W.N. 55.

1924 ALLAHABAD 23

MEARS, C. J. AND STUART, J.

Bhagwati Shukul—Plaintiff—Appellant.

v.

Ram Jatan Tewari and others—Deendants—Respondents.

L. P. A. No. 85 of 1922, D/- 29th November 1922, from the judgment of Ryves, J. reported in 1922 All 381.

Hindu Law--Widow—Gift to son-in-law of entire property to induce him to marry her blind and crippled daughter—Gift whether invalid after her lifetime.

A Hindu widow has for certain purposes a clear authority to dispose of her husband's property and she might do it for religious purposes which include dowry to a daughter. Although as a general rule such dowry shall not exceed a quarter, the word "quarter" as used here, simply enjoins the allowance of as much as will suffice for the marriage. A gift of the whole property of small value will be held valid after her lifetime. 37 Cal. 1 and 22 Mad. 113 Ref.

Harnandan Prasad—for Appellant.

Mears C. J.—We are of opinion that the learned Judge decided this case rightly. We, therefore, dismiss the appeal.

Appeal dismissed.

[For the Judgment of Ryves, J, *see* 1922 All. 381.]

✱✱ 1924 ALLAHABAD 24

LINDSAY AND SULAIMAN, JJ.

Saheb Singh and others—Plaintiffs—Appellants.

v.

Girdhari Lal and others—Defendants—Respondents.

F. A. No. 82 of 1921, D/- 30th April 1923, against the decree of the Subordinate Judge, Meerut D/-9th December 1920.

Hindu Law—Alienation by father—Legal necessity—Immoral nature of debts—Burden of proof.

It is only when the property has passed out of the family on account of an antecedent debt or where it has been sold by public auction, that the sons cannot challenge the alienation unless they show that the debt was tainted with immorality. It is not correct to say that in every case where the property has passed out of the family (though under a private sale not in lieu of any antecedent debt and even when the legal necessity has not been established) the sons cannot challenge it unless they show that the debts were contracted for immoral purposes. Where a property has been sold by the father and the sons bring a suit to recover it, and apparently the property has not been sold away at public auction, then it lies upon the transferee to justify the alienation of the estate by showing that the debt was in lieu of some antecedent debt or that the alienation was for some legal necessity. 39 A. 437 P. C. Ref. [P. 25 C. 1 & 2]

Nihal Chand and H. K. Mukerji—for Appellants.

K. N. Katju and K. C. Mital—for Respondents.

Judgment.—This is a plaintiffs appeal arising out of a suit for recovery of possession of a shop by avoidance of a sale deed, dated the 9th of August 1918, executed by the plaintiffs' father Girdhari Lal. The plaintiffs' case was that the property was ancestral and that the sale-deed was without any consideration and further that there was no legal necessity for it and that Girdhari Lal was a man of immoral character and habits and the debt, if any, had been tainted with immorality. On behalf of the defendants the allegations contained in the plaint were denied and it was urged that the sale was justified. The learned Subordinate Judge has rejected the evidence of the plaintiffs that Girdhari Lal was a man of immoral character and he has further held that there is no evidence whatsoever to connect the immorality alleged with the amount advanced under the deed. He has further held that the defendants vendees have shown that in fact part of the sum was paid in lieu of an antecedent debt and that there was legal necessity for the balance.

The plaintiffs have come up in appeal to this Court and challenge the findings of the learned Subordinate Judge.

The learned Subordinate Judge was of opinion that it was the duty of the sons to show why they were not bound by their father's acts. For this view he relies on a passage in Dr. Gour's Hindu Code at p. 590 to the effect that the question of the burden of proof must depend upon whether the property has or has not passed out of the family by an alienation made by the father. If it has, then the son suing to dispossess the alienee must show why he is not bound by the father's alienation.

Reliance is placed on the authority of the earlier Privy Council cases, namely *Suraj Bunsi Koer* v. *Sheo Prasad Singh* (1) *Nanomi Babuasin* v. *Modhun Mohun* (2) and *Bhagbut Prasad Singh* v. *Girja Koer* (3) In all those cases the property had passed out of the family under an execution sale and it was after the execution sale that the sons wanted to challenge the alienation. As was pointed out in the first of these cases it is only "Where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, (that) his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that

---

(1) [1880] 5 Cal., 148—6 I. A. 88—4 C. L. R. 226—4 Sar. I. (P. C.)
(2) [1886] 13 Cal. 21—13 I. A. 1—4 Sar. 682 (P. C.)
(3) [1888] 15 Cal 717—15 I. A. 99—5 Sar. 186 (P. C.)

they were so contracted, and secondly that the purchasers at an execution sale, being strangers to the suit, if they have no notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings." There was no departure in the last two cases from the rules of law laid down in the first case. In the recent case of *Sahu Ram Chander* v. *Bhup Singh* (4) their Lordships adhered to the interpretation put by Sir John Stanley in *Chandradeo Singh* v. *Mata Prasad* (5) on the pronouncement in the case of *Suraj Bansi Koer* v. *Sheo Prasad Singh* (1) and remarked that a correct and useful statement of the law was that it was only where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property. unless they show that the debts were contracted for immoral purposes and that purchasers had notice that they were so contracted.

It is quite clear therefore that it is only when the property has passed out of the family on account of an antecedent debt or where it has been sold by public auction, that the sons cannot challenge the alienation unless they show that the debt was tainted with immorality. It is not correct to say that in every case where the property has passed out of the family (though under a private sale not in lieu of any antecedent debt and even when the legal necessity has not been established) the sons cannot challenge it unless they show that the debts were contracted for immoral purposes. Where a property has been sold by the father and the sons bring a suit to recover it, and apparently the property has not been sold sway at public auction, then it lies upon the transferee to justify the alienation of the estate by showing that the debt was in lieu of some antecedent debt or that the alienation was for some legal necessity.

In the present case the document in question was in lieu of Rs. 7500/- It consisted of two items namely Rs. 1237-8-0 due on a promissory note for Rs. 1000/- said to have been executed on the 2nd of January 1917, and the balance of Rs. 6262-8 paid in cash before the Sub-Registrar.

As to the first item we think there can be no doubt that it had been paid prior to the execution of the sale-deed. We have the statement of Ram Saran Das vendee supported by an entry in the account books that the sum of Rs. 1000- had been borrowed on the 2nd of January 1917 by Girdhari Lal from him. The amount of the principal and interest due on it would come up to Rs 1237-8 Girdhari Lal has not gone into the witness-box to deny the passing of this part of consideration and in fact there is no evidence to contradict the vendee. We are therefore of opinion that this sum was due. This, being a debt due personally from the father and being antecedent in time to the transaction in question and not having been secured on the property, was clearly an antecedent debt and was binding on the family. As to the balance, the defendants' case is that Girdhari Lal was very much indebted and that there were numerous debts outstanding against him in the bazar. Before the execution of the sale-deed the vendee was assured by Girdhari Lal that he owed a number of these debts and was in urgent necessity to pay them. Ram Saran's version is that he actually made enquiries in the bazaar and learnt from a number of people that sums of money were due to them from Girdhari Lal; that after this enquiry he agreed to advance the money to Girdhari Lal. In support of this Ram Saran Das has gone into the witness-box and he has produced some of

(4) [1917] 39 All. 437—44 I. A. 126—15 A. L. J. 437—19 Bom. L. R. 498—26 C.L.J. 1—21 C.W.N. 698—33 M.L.J. 14— (1917) M.W.N. 439—22 M.L.T. 22—6 L.W. 213—1 P.L.W. 557—39 I.C. 280 (P.C.)

(5) [1909] 31 All. 176—6 A.L.J 263—1 I. C. 479 (F.B.)

these creditors. Mohan Lal witness has stated that Rs. 1000 had been advanced by him to Girdhari Lal under a promissory note and that there are entries in his account books. Peare Lal another witness has sworn that a sum of Rs. 1150 was paid to him on account of the debt due to him. Ram Richpal Singh has stated that Rs. 880 were realised by him on the 9th August 1918 from Girdhari Lal and that there are entries in his account books to prove it. Another Ram Richpal Singh had proved that a sum of Rs. 662 was paid to him on the 28th October 1918 as part of the amount due on promissory note for Rs. 600 dated the 11th February 1916. We have also a statement of one Mohan Lal that on the 5th November 1918 he was paid Rs. 3,533 by Girdhari Lal. The total of these sums comes to Rs. 6,225. There is also evidence to the effect that there were other debts due from Girdhari Lal at the time the sale-deed was executed. The learned Subordinate Judge has believed the evidence of these witnesses except that of Peare Lal. The reason given by him for disbelieving this last mentioned witness is that he has not produced any *bahi khata* or documentary evidence in support of the alleged loan and that it is possible that he has come to support the defendant, he being a friend of his. Peare Lal apparently is a respectable witness. He pays Rs. 500 or 600 Government revenue and about Rs. 300 income-tax. He had stated that the money advanced had belonged to his wife, and it was on that account, that it was not entered in his *bahi khata*. We must say that we see no reason to disbelieve his statement. Peare Lal stated that he returned the document as soon as it was paid off which of course might have been done. In our opinion, therefore the defendant vendee had before taking the sale-deed made reasonable and sufficient enquiries to satisfy himself that antecedent debts were existing and that GirdhariLal had necessity to transfer the property in order to pay off those debts. It was not absolutely necessary for Ram Saran Das to prove how the money advanced by him was actually applied, but in this particular case, we are of opinion, that he has also proved that the greater part of this money was certainly applied for the purposes mentioned.

To disprove the existence of any legal necessity the plaintiffs led evidence to show that Girdhari Lal was a man of immoral character, that he had had two mistresses one after the other and was addicted to drinking and gambling. Four witnesses named Ashfaq Ali, Puran Devi, Ram Prasad and Shiam Sunder have been examined. Their evidence however is only of a general character and has been wholly rejected by the learned Subordinate Judge. We see no reason to differ from his view. Furthermore, the evidence of these witnesses does not in any way connect any of the items, proved by the defendant vendee, to have been due from Girdhari Lal with his immorality or gambling. We are therefore of opinion that it is not open to the plaintiffs to challenge this alienation without proving that these debts are tainted with immorality or illegality. This they have failed to do. The result is that this appeal fails and is hereby dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

✱ 1924 ALLAHABAD 26

MEARS, C. J. AND PIGGOTT, J.

Ahmadullah—Plaintiff—Appellant.

v.

Abdul Rahim—Defendant—Respondent.

L. P. A. No. 129 of 1921, D/- 3rd May 1923, from the Judgment of Stuart, J.

T. P. Act, S. 83 — Deposit refused by mortgagee—Mortgage not extinguished.

The making by a mortgagor of a deposit, under S. 83 of the T. P. Act does not *ipso facto* extinguish the mortgage where the mortgagee has refused to accept the deposit. If the mortgagor is dissatisfied with the action of the mortgagee in refusing to accept the money deposited in full satisfaction of the mortgage he must bring a suit for the enforcement of his legal rights. Unless and until he does so successfully the mortgage still subsists. The fact that the mortgage had been followed by a contract of tenancy, the mortgagee having left the mortgagor in possession as his tenant, makes no differences. [P. 28 C. 1]

U. S. Bajpai — for Appellant.
N. P. Asthana—for Respondent.

[*The following is the Judgment of the Single Judge of the Hon'ble High Court from which the Letters Patent appeal was filed.*—]

Stuart, J.—Sheikh Abdul Rahim executed a mortgage of a house in Agra, by way of conditional sale on the 26th June, 1910, in favour of Sheikh Ahmadulla for a consideration of Rs. 99-15-0. On the following day Abdul Rahim executed a *Kerayanama* by which he agreed to take the house for three years as tenant from the mortgagee on a monthly rent of one rupee. The deed provided for redemption within a period of six years. Sheikh Abdul Rahim continued in possession of the house during the period prescribed in the *Kerayanama* and afterwards. In the year 1918 he was still in possession, although the term of the *Kerayanama* had expired nearly 5 years before. He owed three years rent. He then mortgaged the property again to Musammat Mariam and it was agreed that she should pay Rs. 99-15-0 to redeem the first mortgage and Rs. 36, which he owed for rent to Ahmadullah. She accordingly paid Rs. 135-15-0 into Court under S. 83, Act IV of 1882, on the 3rd of April 1918. Ahmadullah refused to take the money out. Ahmadullah instituted a suit on the 4th of September 1918. He did not say anything in the plaint about the existence of the mortgage, or the fact that the mortgage money and the rent due, had been tendered to him. He stated, that Abdul Rahim was a monthly tenant of the house and that he had served a notice on him to quit because he had not paid three years rent. He sued for Rs. 36 rent and for the ejectment of Abdul Rahim. The learned Munsif dismissed the suit. He held, that although the mortgage was not extinguished by the tender, the tender was a good tender and a tender which the plaintiff ought to have accepted, and that, after the tender was made, the plaintiff's position resembled that of a trustee on behalf of the defendant. As the arrears of rent had also been tendered, he came to the conclusion that the plaintiff was not entitled to eject the defendant or to any other relief. An appeal was filed to the Court of the Subordinate Judge. The learned Subordinate Judge came to the conclusion that the mortgage still existed, and that the plaintiff was entitled to possession as mortgagee and as landlord. He, therefore, decreed the suit. The case comes here in second appeal. The Courts below have not quite appreciated the facts. The mortgage is mortgage by conditional sale. It is not a usufructuary mortgage. It contained a clause that the mortgagor could not redeem after six years had elapsed. This clause could not operate to extinguish the mortgage until the plaintiff had obtained a decree for foreclosure. It is very clear what the plaintiff has done. He wishes to obtain the property. He has, therefore, refused to accept the tender. If he can get possession of the property, he thinks he will be in an assured position for then, if the defendant sues to redeem, he will put up against him the clause in the mortgage-deed debarring him from redemption after six years. I express no opinion on the value of this plea, but he evidently thinks it a good one. Unless he can obtain possession he will be in not so good a position for then he must apply for foreclosure and then the Court will be in a position, apart from the provisions of the deed, to allow the defendant an opportunity of redemption. This is, I think, the reason why he has said nothing about the terms of the mortgage-deed in his plaint. He has clearly brought this suit for ejectment of the defendant as his tenant in order to enforce his mortgage. The suit should have been a suit for foreclosure. For the reasons that the plaintiff has deliberately not disclosed the true facts and has sought a wrong remedy his suit must be dismissed. I, therefore, allow the appeal and direct that the plaintiff's suit stands dismissed. The plaintiff will pay his own costs and those of the defendants in all Courts.

On the Letters Patent appeal being heard the following Judgment was delivered :—

Judgment.—The facts out of which this appeal arises are best stated in the

judgment of the lower appellate Court, dated the 24th of July, 1919, where the essential question for determination is clearly set forth. That question is whether the making, by a mortgagor, of a deposit under S. 83 of the Transfer of Property Act, *ipso facto* extinguishes the mortgage in spite of the fact that the mortgagee has refused to accept the deposit. In our opinion that question can only be answered as it was answered by the lower appellate Court: the mortgage is not extinguished. The parties remain in the relationship to one another of mortgagor and mortgagee. It is for the mortgagor, dissatisfied with the action of the mortgagee in refusing to accept the money deposited in full satisfaction of the mortgage, to bring a suit for the enforcement of his legal rights. Unless and until he does so successfully, the mortgage still subsists. There is some complication introduced into the present case by the fact that the mortgage had been followed by a contract of tenancy, the mortgagee having left the mortgagor in possession as his tenant. We do not see that this circumstance in any way affects the principle we have just laid down, or the applicability of that principle to the parties whose case is now before us. The mortgagee is constructively in possession of the property through his tenant, who happens to be also his mortgagor. He is entitled to a decree for ejectment. If the claim for rent, which was also put forward by the plaintiff in the suit, had been on account of rent falling due after the deposit made on behalf of the mortgagor, it would have been necessary for the Court to consider the operation of S. 84 of the Transfer of Property Act, No. IV of 1882. But the claim is on account of rent which fell due before that date. We think the decision of the lower appellate Court was right and that it should not have been disturbed by the learned Judge of this Court. We allow this appeal, set aside the decree of the learned Judge of the Court and restore that of the lower appellate Court. All costs in this Court will be paid by the defendant respondent.

Appeal allowed.

1924 ALLAHABAD 28

MEARS, C. J. AND PIGGOTT, J.

Mahomed Afzal and others—Plaintiffs—Appellants.

v.

Maulvi Muhammad Mahmood and others—Defendants—Respondents.

F. A. No. 66 of 1921, D/-14th May, 1923 from the S. J., Muzaffarnagar, dated the 8th January 1921.

Mahomedan Law — Waqf—Construction—Gift or waqf.

Under the terms of the deed named persons were to take the property becoming owners thereof immediately and they and their descendants after them were to enjoy the property for ever without any power to alienate. The word Waqf was used in more than one place by the executant in describing the document itself. But otherwise it was expressly and in terms a gift to three specified persons.

Held ; the mere use of the word "waqf" in a deed does not make it a waqf. [P. 29 C.1]

Ibni Ahmed and Iqbal Ahmed—for Appellants.

Bhagwati Shanker, and S. N. Sen—for Respondents.

Piggott, J.—The question raised by this appeal is whether a certain deed of the 27th of March 1880 was a *waqf* under Muhammadan law that is to say, a dedication of property for charitable and religious purposes, or was a gift in favour of certain specified individuals. Under the terms of the deed certain named persons were to take the property becoming owners thereof immediately and they and their descendants after them were to enjoy the property for ever without power to alienate. If it was in fact a transfer by way of gift in favour of these specified donees then, as the Court below has rightly held, the condition against alienation fails and the descendants of the donees take the property with full ownership and power of alienation. If on the other hand the document in question is in law a deed of *waqf*, other consequences follow. It is quite true that the word "*waqf*" is used in more than one place by the executant in describing the document itself. On the other hand there is nothing in the wording of the deed which can possibly be stretched so as to constitute a transfer of ownership in favour of the deity. It is expressly and in terms a gift to three

specified persons. It has been contended before us that the use of the word "*waqf*" overrides all other terms in the document, and necessarily involves a transfer of ownership in favour of the deity such as is required to constitute a valid dedication under Muhammedan law. We are not prepared to accept this contention. It has been urged once already in this Court in connection with this very document before a Bench of which one of us was a member, and was summarily rejected. The crucial passage, quoted from Mr. Syed Ameer Ali's book on Muhammedan law, at page 217 of the Fourth Edition is in the following words "when the word *waqf*, or any of its synonyms in vogue, is used in making the consecration the law fixes upon it all the legal incidents of a permanent and valid dedication." This statement of priniciple implies that there must be a consecration, in the making of which the word *waqf* is used. It seems to us that what we have before us here is a gift in favour of private individuals, which the donor in the course of the document wrongly describes as a "*waqf*". We think this is a distinction of principle on which this case must be decided. Agreeing with the decision of the Court below we dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed

✱ 1924 ALLAHABAD 29

LINDSAY AND SULAIMAN, JJ.

Inayat Elahi and others—Defendants—Appellants.

v.

Hardeo Sahai alias *Halla Ram and others*—Plaintiffs and Defendants—Respondents.

F. A. Nos. 136 and 137 of 1921, D/- 6th June, 1923, from the decision of the Sub. J., Mainpuri, D/- 29th June, 1920.

(a) T. P. Act, S. 6 (d)—Void and voidable—Option to avoid cannot be transferred.

A transaction which is voidable remains good so long as it is not challenged by the members who have the option to have it set aside. It is for them to exercise or not to exercise the option. If without exercising that option they transfer the property, the transferee cannot be allowed to say that he has acquired that option by the transfer. [P 30 C 1]

(b) Plea—Subsequent transferee can plead want of necessity.

It is open to a subsequent transferee to take the plea that the prior mortgage was without legal necessity. 33 All. 783 (F. B.) Foll. [P 31 C 1]

(c) Hindu Law—Debts—Necessity—Proof—Subsequent admission.

Where money was first borrowed as early as 1873 and evidence as to the actual necessity had disappeared, subsequent admission of its validity would be a very strong piece of evidence as to necessity. Where a mortgagee wishes to enforce a charge against the family property the burden lies on him to satisfy the Court that the mortgage transaction had been entered into for family necessity or in lieu of antecedent debt of the father or with the consent, express or implied, of all the members of the family, [P 32 C 2]

Iqbal Ahmad—for Appellants.

S. N. Sen and *J. B. Lal*—for Respondents.

Judgment.—First Appeal Nos. 136 and 137 of 1921 are connected appeals by certain defendants arising out of two Suits for sale on the basis of two mortgage deeds of the same date, namely, the 2nd of June 1914.

The first of the two mortgage deeds was executed by Bhawani Prasad and others in favour of Hardeo Sahai, and the second by the same mortgagors in favour of Hukam Chand and Gauri Shanker. Under these two deeds amounts due under two prior mortgage deeds dated 16th of June 1894 and the 1st of March 1897 were paid off and only a sum of Rs. 500/- was paid in cash which was said to have been required for the purchase of corn for daily consumption and for the completion of the mortgage deeds in question.

In the one case the only contesting defendant was a subsequent transferee Inayat Ilahi and in the other Maharaj Singh, one of the members of the mortgagor's family, also contested the suit. The other defendants did not put in any appearance. On behalf of the contesting defendants the execution of the documents as well as the passing of consideration were denied. It was further pleaded that there had been no legal necessity for the transfers, and that the mortgage deeds were therefore not binding on the family.

The learned subordinate Judge was of opinion that it was not open to Inayat Ilahi, he being a transferee only, to raise such a plea, and he further held that the other contesting defendant Maharaj Singh, not having been born at the time when the two prior mortgage deeds were executed, was not competent to challenge the transactions. He accordingly decreed both the suits in full.

Inayat Ilahi and some of the defendants, other than Maharaj Singh, have preferred two appeals and on their behalf, although the findings as to the execution and the passing of considerations are not challenged, it has been strongly contended that there was in fact no legal necessity for these transfers.

The first question which arises is as to whether it is open to the transferee Inayat Ilahi to raise the question of want of legal necessity. This question we would have thought depended on the further question whether a mortgage of joint property by a Hindu father without any legal necessity and not in lieu of any antecedent debt and without the consent, express or implied of the other members of the family, was void or only voidable. If such a transfer were void there can be no doubt whatsoever that any subsequent transferee who comes into possession of the property would be entitled to raise the point that the transaction was not binding on the property.

On the other hand if the mortgage transaction were merely voidable at the option of the non-contesting members of the family, then it is difficult to see how a subsequent transferee of the property itself could be allowed to question it. A transaction which is voidable remains good so long as it is not challenged by the members who have the option to have it set aside. It is for them to exercise or not to exercise the option. If without exercising that option and in fact admitting the validity of the mortgage they transfer the property, the transferee cannot be allowed to say that he has acquired that option by the transfer.

Undoubtedly it has been held in number of cases that a transfer by a Hindu widow, who represents the whole estate for the time being and who certainly has power to transfer the property for her life-time, is only voidable at the option of the reversioners and not absolutely void. But as to a Hindu father, the whole estate does not vest exclusively in him but in the family of which he is the head. He may also, as the manager, be the agent of the family in relation to the outside world. The question whether a transfer by him without legal necessity is void or voidable is another matter. There are certainly observations in some old cases which go to show that such a transfer is not absolutely void but only voidable. In the case of *Hanuman Kamat* v. *Honuman Mandur* (1) their Lordships of the Privy Council observed at p. 126 that the sale by a Hindu father "was not necessarily void but only voidable if objection were taken to it by the other members of the joint family."

And the same view was expressed by a single judge of this Court in the case of *Bishamber Dayal* v. *Parshadi Lal* (2). On the other hand, the learned advocate for the appellants relies on the observations in the cases reported in 15 All. 339 and 33 All. 783 where it was distinctly held that such a transfer without the consent of the other members of the family was "invalid".

Their Lordships in the leading case of *Sahu Ramchandra* v. *Bhup Singh* (3) at page 442 observed "any deed of gift, sale or mortgage granted by one coparcener on his own account of, or, over, the joint family property is invalid ; the estate is wholly unaffected by it and its entirety remains free of it". It may be that the word "invalid" is not necessarily the same thing as void. We do not however think it necessary to go any further into this

(1) [1892] 19 Cal. 123—18 I.A. 158—6 Sar. 91 (P.C.)
(2) [1912] 10 A.L.J. 112—16 I.C. 629.
(3) [1917] 39 All. 437—44 I.A. 126—15 A.L.J. 437—19 Bom. L.R. 498—26 C.L.J. 1—21 C.W.N. 698—33 M.L.J. 14—(1917) M.W.N. 439—22 M. L. T. 22—6 L.W. 213—1 P.L.W. 557— 39 I.C. 280 (P.C.)

question as we feel ourselves bound by the ruling of the Full Bench in *Muhammad Muzamullah Khan* v. *Mithu Lal* (4) which laid down that it is open to a subsequent transferee, to take the plea that the prior mortgage was without legal necessity.

The question still remains how far the present transferee Inayet Ilahi is bound by his undertaking to pay off the prior debts. In the sale deed which was executed on the 6th January 1919 in his favour it was admitted by the vendors in the clearest terms that the prior debts contracted by their ancestors were binding on them. They purported to transfer only the equity of redemption (*i. e.* property subject to those mortgages) and actually left in deposit with the vendee the whole sum due in order that the same may be paid to the representatives of the prior mortgagees. Having undertaken to pay off these debts the vendee now turns round and says that he is not bound to pay them, though his sale deed contains a very clear admission on behalf of all the members of the family who were parties to it that the prior mortgage debts had been incurred for legal necessity and were binding on the family.

It is to be noted that 12 years have not yet expired since the execution of the sale deed. The vendee's title as against the whole family therefore rests on this document alone that is to say he must admit that it is under this document that he has acquired the property from the whole family. This in our opinion means that the persons who executed the document in his favour were acting on behalf of the whole family. It follows therefore that the admission contained in this document must so far as the vendee is concerned, be taken to be an admission made on behalf of the whole family ; and that admission is that the prior mortgage deeds were binding on the family.

And therefore even though it is true that such an admission cannot operate as an estoppel against the defendant inasmuch as there was no privity of contract between the mortgagees and him, and further because the plaintiffs' position has in no way been compromised, there can be no doubt that this admission is a very strong piece of evidence in favour of the view that the transactions must have been for valid necessity otherwise they would not have been accepted as such by all the members.

Coming to the facts we find that the dealings really go back to a very early period. The earliest document that was executed was dated the 22nd January 1873 by Hardeo the grandfather of the present mortgagors in favour of one Ajit Singh for a sum of Rs. 98/- the whole of which had been paid in cash. It is true that this amount being secured on the family property cannot be treated as an antecedent debt in the strict sense of the term. But it having been borrowed as early as 1873 and evidence as to the actual necessity having disappeared, subsequent admission of its validity would be a very strong piece of evidence to be considered. This deed was followed by a mortgage deed of the 19th May 1873 by the same mortgagor in favour of the same person for a further sum of Rs. 200/-the whole of which was either acknoweledged to have been received before hand or was paid in cash before the sub-registrar. The third document was of the 26th January 1874 for a sum of Rs. 250/- out of which Rs. 113-8 were given credit for on account of the amount due on the first-mentioned document and Rs. 136/8 were received in cash. The 4th mortgage was for a sum of Rs. 400/- under which Rs. 229/- were paid off on account of the amount due under the deed of the 19th May 1873 and a sum of Rs. 171/- was received in cash. There is a recital in this document that this sum of Rs. 171/- was required for the purpose of paying Government revenue for the June instalment and for meeting certain personal expenses.

The 5th document was dated the 5th January 1875 for a sum of Rs. 400/- under which the earlier document of the 26th January 1874 was paid off and a further sum of Rs. 118/- was advanced. Then we have the

(4) [1911] 33 All. 783—8 A.L.J. 901—11 I.C. 220 (F. B.)

document of the 5th August 1875 under which the 4th and 5th mortgage-deeds were paid off and the balance was received in cash. All these transactions are transactions entered into by Hardeo the grandfather of the mortgagors as early as the seventies.

On the 31st January 1887 a mortgage by conditional sale for a sum Rs. 3,100/- was executed in favour of the same mortgagee Ajit Singh under which he was put in possession of the mortgaged properties and the amount due on the earlier document of the 5th August 1875 was paid off. There is a further recital in this document that Rs. 505-7-3 were due on account of a Munsif's Court decree and Rs. 64-8-9 were due on account of prior debts. Rs. 150/- were paid in cash. There can be no doubt that this mortgage by conditional sale was fully acted upon and the mortgagee entered into possession soon after. He and his representative have been in possession of the property since then, which means that during the whole of a period of over thirty years the mortgagors' family has allowed this property to remain out of its possession.

On the 16th June 1894 another mortgage-deed was executed by Durga Prasad, Munna Lal and Bhawani Prasad, the sons of Hardeo, in favour of one Mt. Lachmi Bai for a sum of Rs. 6,400/-. Under this document Rs. 6,100, were left with the mortgagee to pay off the mortgage by conditional sale the validity of which was of course accepted and Rs. 300/- were acknowledged to have been received in cash. There can be no doubt that subsequently Mst. Lachmi Bai the mortgagee paid off the prior mortgage and entered into possession of the property in place of the previous mortgagee. On the 1st of March 1897 another mortgage deed by the same 3 persons was executed for a sum of Rs. 900/- and the recital is to the effect that the money was required to pay off a decree for arrears of rent held by Chaudhri Sunder Singh and another and to meet certain personal expenses. The property hypothecated under this bond was the same as covered by the mortgage by conditional sale.

Up to the year 1914 no attempt was made by any member of the mortgagor's family to challenge any of these mortgage deeds or to recover the property from the possession of the mortgagees. The family seems to have acquiesced in these transfers. A third party would therefore be quite justified in presuming that the debts must have been incurred for family necessity. On the 2nd June 1914 six members of the family, namely, Bhawani Prasad acting in his own right and as guardian of his sons Bansi Dhar and Raghubar Singh (2) Gaya Prasad, (3) Kalka Prasad for self and as guardian of his minor son Sarup Singh, (4) Murlidhar, (5) Sheo Narain for self and as guardian of his minor sons Sughar Singh, Babu Ram and Chute Tua and (6) Sanet Singh in his own right and as guardian of Maharaj Singh executed the documents in suit under which the amounts due under the previous mortgage deeds of 1894 and 1897 mentioned above were left with the mortgagees to be paid off and the balance of Rs. 500/- was said to have been required for purchasing corn for daily consumption and meeting the expenses of the execution and the registration of the deeds.

It was some years after these mortgage deeds that Inayet Ilahi obtained a sale-deed on the 6th January 1919 in which there was a fresh admission on behalf of the mortgagors that the two mortgage debts in question had been validly incurred and were binding on the family.

It is true that in a case where a mortgagee wishes to enforce a charge against the family property the burden lies on him to satisfy the Court that the mortgage transaction had been entered into for family necessity or in lieu of antecedent debt or with the consent, express or implied, of all the members of the family. In the present case we are of opinion that this burden has been sufficiently discharged. In the first place, the transactions extend back to the year 1873 and for all this long period there never has been any protest made by any member of the

family. Further more there is nothing to show that in the years 1894 and 1897 there were any major members of the family alive who were not parties to the transaction and whose consent ought to have been obtained and was not obtained. In fact the ages of the various defendants as given in the plaint would rather go to show that all of them or at least most of them were not even born in those years. A long series of renewals of mortgage transactions extending for over a generation without any protest by any member of the family would show its acquiescence and raise a fair presumption that if there had not been a valid necessity for them some objection would have been raised. The present mortgagees were not the mortgagees in the years 1894 & 1897, and so it is not a matter within their special means of knowledge as to whether the amounts borrowed on these dates had been incurred for legal necessity. In view of the long continued acquiescence of all the members of the family, at any rate by all the adult members of the family, and the express admission contained in the sale-deed of 6th January 1919, we are of opinion that it must be held that in this case the burden of proof of legal necessity has been completely discharged. It is not now possible after the lapse of so many years to produce evidence to show for what purpose the money was borrowed or how it was actually spent by the mortgagors. All that the mortgagees are required to show is that like ordinary men they were reasonably satisfied that legal necessity must have existed. In view of the conduct of all the members of the family in allowing the property to remain out of their possession for such a long time we think that this must be taken to have been so. Even though all these sums were borrowed on the security of the family property and although there is no direct evidence to show the actual necessity to meet which all the sums were borrowed, we are of opinion that the burden of proving the existence of legal necessity must be held to have been discharged. It was to pay of these debts and in that way to recover the property from the mortgagees, that the mortgage deeds in suit were executed. The family cannot now be allowed to retain the benefit and repudiate the liability.

We think it right to note that in the Court below with the exception of the transferee, only one defendant, Maharaj Singh, contested one of the suits. All the other defendants did not put in any appearance nor filed any written statement. The question of want of legal necessity was a mixed question of law and fact and none of these defendants ever attempted to raise it. None of them went into the witness box to explain away their own admissions. The plaintiffs produced some oral evidence also, which under the circumstances we do not propose to discuss. After the decrees in the two suits were passed Maharaj Singh the only defendant who was a member of the family submitted to the decrees and has not appealed. The persons who now appeal are the transferees, Sh. Inayet Ilahi and certain other defendants who did not put in an appearance in the Court below and who did not raise the question at all. Their reluctance to submit themselves to cross-examination suggests to some extent that they did not feel confident that they would be able to explain their previous admissions. The evidence of Jhau Lal and Hardeo Sahai is to the effect that Rs. 500 were taken to meet private expenses and the expenses of registration. The recital in the deed is to the same effect. The defendants have given no oral evidence to rebut it. Their own evidence would at least have shown for what purpose Rs. 500 were required. Neither the transferee nor these other defendants who never contested the claim can therefore succeed The result is that both these appeals fail and are hereby dismissed with costs including in this Court fees on the higher scale.

Appeals dismissed.

1924 ALLAHABAD 34

MEARS, C. J, and PIGGOTT, J.

Kapur Chand and others—Opposite Party—Appellants.

v

Lala Kanhaiya Lal—Applicant—Respondent.

L. P. A. No. 173 of 1921, D/-21st June 1923, from the judgment of Wallach, J., D/- 9th August, 1921.

Execution – Successive applications for execution when and to what extent barred.

There is nothing to prevent several applications being made, directed against and linked into partnership of private property. There is nothing to prevent a succession of applications directed against persons who are ascertained to be, or believed to be, partners in the particular venture out of which the decree has arisen. The limitation however that is imposed on all these applications is that, if there has been a previous application, in which there has been a definite decision affecting a particular piece of property, or a particular person, and from that decision nothing has been done by way of appeal or institution of suit if either of these methods were available, that decision is a final decision between the parties, and if in any subsequent proceedings, the point again becomes material the parties are bound by that previous decision, and the matter cannot be reopened. To that extent, and that extent only, is there limitation on the successive applications in execution.[P. 37 C. 1]

A. P. Dube—for Appellants.

L. M. Banerjee—for Respondent.

Mears, C. J.—On the 9th of April 1915 a firm, Bhairon Prasad and Mahadeo, borrowed Rs. 2500/-on a promissory note, the money having been lent by one Gajadhar. On the next day the firm borrowed a similar amount from another firm and both these notes subsequently were purchased by Kanhaiya Lal, the respondent in this matter. On the 10th of August 1916 Kanhaiya Lal brought a suit for the recovery of the Rs. 5000/- and interest. On the 28th of November 1916 the suit was compromised by one Mangli Prasad. At that date Mangli Prasad had a younger brother Phul Chand and a still younger brother, by name Suraj Karan, who was a minor. Mangli Prasad, purporting to act as a member of the firm agreed in writing to pay Rs. 6,120 in certain instalments, assented to the insertion of the usual default clauses, in the compromise and set aside certain immoveable property which he declared to be hypothecated to the due discharge of this debt. In the document of compromise he stated that Phul Chand and Suraj Karan were his brothers, and he spoke of them as joint owners with himself in the property specified at the foot of the deed, and also as members of the firm. That compromise was embodied in a decree of the 20th of November 1916. Kanhaiya Lal no doubt was confident that he had got a decree which, if default were made, could readily be put into execution. Default was made and on the 30th of July the respondents applied for execution. On the 8th of August they asked for an injunction restraining the transfer of or creation of charges over this property, and on the 18th of August this property was attached. On the 8th of September and again on the 12th of September Phul Chand for himself and his younger brother filed two applications. The first application was to set aside the decree. The second application was to at aside the attachment on the ground that the property sought to be attached, and which was the subject of hypothecation in the compromise decree, was wholly and entirely the property of Phul Chand and Suraj Karan, and the firm had no concern with it at all and that they, the two younger brothers were separate fr m Mangli Prasad. Objections were lodged by the respondent on November 3rd, and 10th, and amongst these objections the present respondent stated that it was not necessary in the suit to disclose the names of all the persons who were the partners. He further stated that Mangli Prasad had acted throughout as *karta* of the joint Hindu family, that he and his two brothers were joint that the business was the business of the family, and the property comprised in the compromise decree was also property of the joint family. The grounds of the application of the 12th of September alleged, as we have stated, a separation by Phul Chand and Suraj Karan from Mangli Prasad, it gave no date of that separation, and no particulars other than the assertion that as the result of that separation Mangli Prasad had been given a block of

property elsewhere as his share whilst they had got other property comprising *inter alia* the property sought to be taken in execution.

It appears from the very scanty record that lies before us, that the learned Subordinate Judge apparently grouped the two applications of the 8th and 12th of September together. We have studied with great care, and with the assistance of Mr. Dube and Mr. Lalit Mohan Banerji, the order that he passed, because it is agreed that, if it should transpire that he in fact decided as a relevant matter that which at a later stage (in May 1919) the learned Subordinate Judge was again asked to decide, the decision of Mr. Justice Walsh, to which we will refer later, will be the decision to be preferred.

The exact text of the order sheet is to be found at page 931 [*Phulchand* v. *Kanhaiya Lal* (1)].

The order sheet of the 6th of September 1918 runs as follows:—"The decree holder has obtained a simple money decree against defendant No. 1, that i. e., firm Bhairon Prasad and Mahadeo. The present objectors were not parties to the decree. Mangli Prasad appeared for the firm. These objectors are brothers of Mangli Prasad. They were never disclosed in the plaint as partners. The property attached has not been proved to be the property of the firm. Under the circumstances attached property must be the property of the objector as well as that of the judgment debtor Mangli Prasad representing the firm. Ordered 2/3rd share in the property attached to be released; parties to bear their own costs".

Now it is necessary to consider what the parties were contending for. Kanhaiya Lal, the decree holder, wanted the attachment of property which under the compromise decree had been hypothecated by the eldest of the three brothers on the assertion that it was property which belonged to the firm and that the three brothers constituted a joint family. The order of the Judge involves first of all a finding by him that the status of the family had undergone a change. He evidently accepted the story of Phul Chand and Suraj Karan that there had been a separation. He appears to have believed whatever evidence was put before him and that their status had altered from that of joint tenants to tenants-in-common, because he treated this property, not as the objector wished it to be treated, as belonging wholly to them, but treated it on the basis that each brother had an equal one-third share. He must have decided that the two younger brothers were not partners in the firm, and he also decided clearly that it was not proved that the property, though represented by Mangli Prasad to be the property of the firm, was in truth the property of the firm. It is on those findings, erroneous as they may have been, that the order of 6th September 1918 was based, and its propriety cannot be challenged now. The decree holder, dissatisfied as he may well have been, did not appeal from that order, nor did he under Order 21 rule 63 make this question, as to whether the property comprised in the compromise decree belonged to the firm or not, a matter for a suit. It is said that the decree-holder could not have appealed; but we are by no means satisfied with that. We cannot decide that matter because it is conceded that he certainly had a right to proceed under Order 21 rule 63. Instead of taking a course in which there would have been regular pleadings and definitely formulated issues, he, on the 14th of September, applied to the Judge for review and submitted to the Judge that the order of the 6th of September was an erroneous one and asked for a reconsideration of the matter.

The learned Subordinate Judge is said to have taken no steps in this matter until the 3rd of May 1919, on which day he passed an order saying that he had already decided that the objectors were not parties to the decree, and the property not proved to be the property of the firm, that there was no new ground disclosed for a review, and that there was no mistake apparent on the face of the record. On these grounds he dismissed the *ex-parte* application. Thereupon,

(1) 1922 All. 247—44 All. 130—19 A. L. J. 923—65 I. C. 295.

two days later, the decree holder made an application asking that the liability of the opposite parties might be determined, and that leave might be given to execute the decree against them. On the 23rd of June 1920 the Subordinate Judge disposed of that application, holding that the order of the 6th of September 1918 did not operate as a bar to this application, and that it might be entered upon and decided. He went into the evidence on either side and made an order favourable to Kanhaiya Lal, the present respondent. The objectors appealed to this Court and the matter was considered, by Mr. Justice Walsh and Mr. Justice Wallach on 9th August 1921. There was a difference of opinion between them, Mr. Justice Walsh coming to the conclusion that the order of the 6th of September 1918 had involved issues on which decisions had been given and that by the application of the 5th of May 1919 the respondents were seeking to reopen questions which had become final. Mr. Justice Wallach was of opinion that the order of the 6th of September 1918 did not exclude an application under Order 21 rule 50 (2).

It is in these circumstances that the matter has come up before us, and the question for our determination is: ought the Subordinate Judge to have entertained the application of the 5th of May 1919; or ought he, without going into the evidence on the merits, to have held himself precluded by virtue of the previous struggle between the parties which was concluded by the order of 6th September 1918.

We are of opinion that the judgment of Mr. Justice Walsh is to be preferred, for these reasons. The position of the respondent when he first sought to obtain execution was as follows. He could have limited his execution to the partnership property, relying upon the fact that service had been duly effected upon Mangli Prasad, a partner. He might also have proceeded personally against Mangli Prasad. So that he had a dual remedy by the mere fact of service on Mangli Prasad, that is a remedy against the whole of the property of the partnership; and a remedy against the personal property and person of Mangli Prasad. Because of the form of the compromise decree the respondent naturally sought the property therein pointed out and he proceeded under Order 21 rule 50 (1); and we regard his application as being limited exclusively to property which he believed, on the representations of Mangli Prasad, to be partnership property, certain of being attached. When in reply to the attachment of the 18th of August Phul Chand and Suraj Karan filed applications, the Judge before allowing execution had to be satisfied that the property sought to be attached was the property of the partnership. Having regard to the form which the applications of the 8th and 12th of September took and the form of the objections of November 3rd and 10th by the plaintiff, it would appear that incidentally but nevertheless necessary to the determination of this question whether the property was the property of the partnership, was the question of the status of the family and the membership of the firm, and the Judge by the terms of his order sheet and by the statement made by him when dismissing the application for review does undoubtedly show that he dealt with all those three matters.

As regards the order of the 6th of September 1918, as we have already said, nobody in either Court has had a good word to say for it. It appears to us to be erroneous; but the decision may have been a right one, inasmuch as it must have been dependent upon evidence produced before the Subordinate Judge, which is not before us. The respondent complains that, by that erroneous order of the 6th of September 1918, he has been grievously injured, and that having paid money for the promissory notes which formed the basis of the action, and having obtained a compromise into which no other business man would have entered, has been by trickery and process of law deprived of this recourse against what he still undoubtedly believes to be partnership property, and property of a joint Hindu family. Mr. Justice Walsh in his judgment took the line that the respondent was himself largely to blame

for this and we feel there is some force in that observation, because it was unwise of him, having got what he considered to be plainly a perverse decision of the 6th of September, to apply for a review to the same Judge. His proper course, if he took the view that the order of the 6th of September was not appealable, was to institute a suit and have the matter carefully and properly thrashed out. He did not do that, and such issues as can fairly be presumed to have necessarily been before the Subordinate Judge and to have been decided by him, have been finally decided, whether such issues were rightly or wrongly decided. That was the position on the 9th of May, and we have already said that we are of opinion that on that day the learned Subordinate Judge in going into the matter on the application under Order 21 rule 50 (2), was going over, as regards some of the issues, the same ground which the previous Judge had decided.

It is quite true, as the respondent has pressed upon us, that successive steps may be taken in execution; that is to say there is nothing to prevent several applications being made, directed against and linked into partnership of private property. There is nothing to prevent a succession of applications directed againt persons who are ascertained to be, or believed to be, partners in the particular venture out of which the decree has arisen. The limitation however that is imposed on all these applications is that, if there has been a previous application, in which there has been a definite decision affecting a particular piece of property, or particular person, and from that decision nothing has been done by way of appeal or institution of suit, if either of these methods were available, that decision is a final decision between the parties; and if in any subsequent proceedings, the point again becomes material the parties are bound by that previous decision, and the matter cannot be reopened. To that extent, and that extent only, is there limitation on the successive applications in execution. We think that the objection which was taken to the learned Subordinate Judge going into this matter on the 9th of May, which was that he was going to cover as regards material matters points which had been discussed and settled finally between the parties in September 1918, was a right objection, and he ought not to have entertained the application of May 9th.

The sesult therefore is that we set aside the order of this Court and also the order of the Court below, and in lieu thereof we dismiss the application presented by the respondent Kanhaiya Lal under Order 21 rule 50 (2). Under the circumstances we leave the parties to bear their own costs throughout.

Appeal allowed.

✱ 1924 ALLAHABAD 37

LINDSAY AND SULAIMAN, JJ.

Baijnath Rai and others — Plaintiffs—Appellants.

v.

Gokul Rai and after his death Brij Behari Rai and Avadh Behare Rai and others—Defendants—Respondents.

F. A. No. 236 of 1921, D/- 14th June, 1923, from the decision of the Sub. J., Ghazipur, D/- 31st March, 1921.

Hindu Law — Debts—Son suing to set aside alienation by father—Necessity to be proved by defendant transferee.

In every case the burden *prima facie* lies on the plaintiff to establish his case; but where it is either admitted or proved that the plaintiff was a member of a joint Hindu family, that the property transferred was an ancestral property, and that it had been transferred without the plaintiff's consent and not apparently in lieu of antecedent debt or at an auction sale, the burden would lie on the defendant transferee to justify the alienation. [P 38 C2]

S. N. Sen and U. S. Bajpai—for Appellants.

M. L. Agarwala—for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for setting aside three sale-deeds two of which were executed on the 4th of December 1921 and the third on the 30th of July 1913 by the fathers and grandfathers of the present plaintiffs on the ground that these alienations of ancestral property were without any legal necessity. There was no suggestion

in the plaint that the debts had been contracted for any illegal or immoral purposes.

The defendants transferees contested the claim mainly on the ground that the debts had been incurred for family necessities and were binding on the plaintiffs. It was also pleaded that the claim was barred by time inasmuch as the plaintiffs were not born at the time of the first transfers.

The Court below found that the plaintiff No. 1 was alive at the time when the transfers of 1901 took place and that the two remaining plaintiffs were born before the execution of the third sale-deed. It accordingly held that the plaintiffs were entitled to maintain the suit. It however dismissed the suit on the ground that the burden lay on the plaintiffs to prove that the transactions were without any legal necessity and inasmuch as the plaintiffs had failed to discharge that burden the claim stood dismissed. It relied mainly on two authorities, namely, the case reported in A. W. N. (1887) 116 and a judgment of the Patna High Court reported in 54 I. C. 946.

The plaintiffs have come up in appeal to this Court and on their behalf it is strongly contended that the burden of proof was wrongly laid on them.

Both the cases referred to by the learned Subordinate Judge were cases in which the mortgagees were suing to enforce their mortgage and were therefore not parallel cases. In the first of these two cases all that Sir John Edge, C. J. remarked was that where a son comes into Court to ask relief against a sale effected by his father *for an antecedent* debt it would be for the son to make out a case for the relief asked.

In the Patna case however at p. 948 there is an observation by Sultan Ahmad J. to the effect that Courts have always drawn a distinction between a case where the property has passed out of the hands of the family by mortgage, sale or other alienation by the father, and the son sues for the recovery of the same and the case where the mortgagee seeks to enforce the mortgage executed by the father against the sons who are in possession of the property. In the former case the son must show the grounds on which he seeks to set aside the alienation by the father. In the latter it is the mortgagee who has to show how he claims for the repayment of the debt of the father.

If the learned Judge intended to lay down a general proposition of law that in every case where a Hindu son brings a suit to recover possession of properties from transferees the burden lies on him to prove that the transfer was without any legal necessity then we would be inclined not to agree with that view. Of course, in every case the burden *prima facie* lies on the plaintiff to establish his case; but where it is either admitted or proved that the plaintiff was a member of a joint Hindu family, that the property transferred was an ancestral property, that it had been transferred without the plaintiff's consent and not apparently in lieu of any antecedent debt or at an auction sale, the burden would lie on the defendant transferee to justify the alienation.

It is however not necessary for us to remand the case, for both the parties produced all the evidence which they intended to produce and no evidence has been shut out. We therefore propose to consider the case on its merits.

The dealings between the parties go back to a very early period. On the 15th July 1876 a possessory mortgage for Rs. 299 was executed by Ram Yad Rai and others, the recital in the deed being to the effect that the money was borrowed for the payment of Government revenue and for household expenses. This was followed by a second possessory mortgage-deed dated 29th May 1885 for Rs. 99-15-0 by Ram Lagan and Kodai Ram grandfathers of the present plaintiffs in which the necessity for the loan was recited to be the marriage expenses of a daughter, the payment of Government revenue and certain household expenses. About a year or two afterwards a simple money bond for Rs. 98 was executed by Ram Lagan under which no family property was hypothecated. This was followed by a hypothecation bond for Rs. 237 dated 30th July 1887 which was executed in

order to pay off the previous simple money bond and also to pay Government revenue and household expenses. After this, on the 5th of April 1888, a fresh hypothecation bond was executed for Rs. 199 out of which Rs. 94-0-6 were set off against an amount due under account books and the balance of Rs. 104-15-6 was said to have been required for the purpose of paying Government Revenue, household expenses and the purchase of bullocks. In the same year another hypothecation bond of the 19th July 1888 for Rs. 299 was executed under which Rs. 100 were set off against parole debts incurred in connection with some marriage and Rs. 35 for payment of Government revenue, and Rs. 164 for Gevernment revenue and household expenses.

In the next year, on the 11th April 1889, another hypothecation bond was executed under which the three previous documents of the 5th April 1888, 19th July 1888 and 30th July 1887 were discharged. No fresh sum was advanced under these documents. In the year 1890, namely, on the 27th February 1890, a hypothecation bond for Rs. 450 was executed by the same persons the recital being that the money was required for paying Government revenue and to meet certain necessary expenses. On the 4th September 1898 a simple money bond for Rs. 99-15-0 was executed under which no family property was hypothecated and the recital was to the effect that the money was required for payment of Government revenue. On the same date and for the same purpose another simple money bond for the sum of Rs. 99-15-0 was also executed.

Such was the indebtedness of the family. Part of the family property had been alienated long before 1901 under possessory mortgage deeds, and there can be no question that the mortgagees were in possession of the property. Up to the year 1901 there is no suggestion that any member of the family ever raised any protest or objection to these transfers. It was professedly with a view to recover the properties from these mortgagees that in 1901 two sale deeds which are the subject matter of the dispute in this case were executed. The first one was executed for Rs. 3,718-0-0 by Ram Lagan Rai and Kodai Rai the grandfathers of the present plaintiffs. The recitals contained in the deed clearly show that the amount due under the document dated the 11th April 1889 as well as on two other possessory mortgage deeds, the dates of which are not mentioned in the deed but under which the family property in mauza Newa had been transferred, were paid off. We have already indicated that the mortgage deed of the 11th April 1889 had been executed in order to pay off the previous documents of 1887 and 1888. One of the two mortgages referred to in this deed was probably the possessory mortgage deed of the 15th July 1876 and the other was deed of some later date which has not been produced in this case. We however have this fact that both these mortgage deeds were actually redeemed by the present defendants, as is borne out conclusively by the endorsement on the back of the document of 1876 as well as an application dated 22nd June 1915. It was by raising the money in this way that the family was able to redeem the property from the possession of the mortgagees who had remained in possession for some 20 years at least without any protest on behalf of the other members of the family. The family thus benefited considerably,

The second sale deed of the same date was executed for a sum of Rs. 1499 which was raised in order to discharge the hypothecation bond dated the 27th February 1890 and two unregistered simple bonds dated 4th September 1898. So far as these two latter documents are concerned the amount due on them was obviously an antecedent debt which the family was bound to pay and to discharge which the grandfathers of the present plaintiffs were entitled to transfer a part of the family property.

The first mentioned hypothecation bond, namely, that of the 27th February 1890 had been executed for Rs. 450 and the recital contained in the document shows that the money was required for the purpose of paying arrears of Government revenue and meeting certain necessary

expenses. This is a recital contained in a very old document of the year 1890 and there is really no ground for supposing that the recital contained in this old document was wrong. The evidence on behalf of the plaintiffs is absolutely nil; on the other hand we have the statement of the defendant Gokul Rai which proves that at the time when this deed was executed he had made thorough enquiries and was fully satisfied that the amount was required for the payment of Government revenue which was due and for meeting other family expenses. Under these circumstances, we see no reason to believe that the recital contained in this document was in any way wrong.

The 3rd sale deed is dated the 30th July 1913 and was executed by Kodai Rai and Hanuman Rai and Ramgobind Rai sons of Ram Logan Rai as well as Lalta Rai another member of the family. On the face of the document the sale consideration was the amount due under 5 unregistered documents. All these documents have been produced on behalf of the defendants and there can be no question that these were genuine documents and that the sums had been advanced on them. From the documents it is evident that the money was advanced not on the security of the family property. The amounts due under them therefore constituted, antecedent debts the payment of which was binding on the family. The third sale deed therefore cannot in any way be now questioned by the plaintiffs. We have already said that there is no suggestion put forward on behalf of the plaintiffs that these debts were in any way tainted with any illegality or immorality.

Even though therefore the burden lay on the defendants transferees to justify the alienations, we are of opinion that the circumstances of this case as well as the documentary and oral evidence on the record are sufficient to discharge this burden.

On behalf of the plaintiffs only Baijnath Rai, plaintiff No. 1, was examined who had no personal knowledge of the transactions entered into by the family. All that he stated was that he was not aware of the execution of the various mortgage deeds and that he had made some enquiry from other persons, not the members of his family, and understood that the debts had been contracted without any purpose and were spent extravagantly. On the other hand there is the statement of Gokul Rai to the effect that he had made enquiries and was satisfied that necessity existed for the loans. Gokul Rai had zemindari property along with the plaintiffs' family in the same villages and may be expected to be acquainted with the financial position of the plaintiffs' family. The various documents produced show clearly that the family was in great need of money and was regularly borrowing small sums of money for meeting ordinary household expenses and for paying arrears of Government Revenue. Even at the present time the plaintiff No. 1 has admitted that there are at least 18 persons, including women and children, in his family, and the entire profits of his estate come to Rs. 300 or Rs. 350 a year only. The transactions between the parties go back to a very early period. Evidence of the various ways in which the amounts borrowed were spent has practically disappeared and in the circumstances we are of opinion that the evidence which the defendants have been able to produce is quite sufficient; we therefore hold that the defendants have discharged the burden of proving that these were good transfers. The result is that the decree of the lower Court must be upheld. The appeal is dismissed accordingly including in this Court fees on the higher scale.

Appeal dismissed.

✱ 1924 ALLAHABAD 40.

LINDSAY AND SULAIMAN, JJ.

Mt. Mahrana Kunwar—Plaintiff—Appellant.

v.

E. V. David, Official Receiver of the property of Ram Dutt and others, Insolvents and others—Defendants—Respondents.

F. A. No. 305 of 1921, D/-3rd July, 1923 from the decree of the 2nd, Sub. J., Cawnpore, D/-25th June, 1921.

Provincial Insolvency Act (1920), S. 4 (2)—Claims by strangers to property can be gone into by Civil Courts.

Under the new Act if a question of title has been actually raised by a stranger to the insolvency and decided by the Insolvency Court the decision is final, and the question cannot be re-opened in a separate regular suit. This however does not mean that exclusive jurisdiction has been conferred on the Insolvency Court, and that the only remedy open to the aggrieved stranger is to apply to that Court. Where a person has made no attempt to bring the matter up before the Insolvency Court and there is no order of the Insolvency Court which can be pointed out as amounting to a decision within the meaning of sub-clause (2) of S. 4, he is at perfect liberty to have recourse to the ordinary Civil Courts. [P. 42 C. 2]

(b) *Provincial Insolvency Act (1920), S. 68—'May' does not mean 'must'—Jurisdiction of Civil Court not barred.*

The word "May" in S. 68 does not mean "Must" S. 68 provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it. But it is not the only remedy open to him. It is open to a third person who does not claim title through the insolvent to treat the receiver as a trespasser and maintain his claim in a Civil Court. [P. 43 C. 1]

(c) *Provincial Insolvency Act (1920), S. 28 (2)—Leave—Insolvency Court.*

There is no statutory provision under which leave is necessary to file a suit against official receiver. On the other hand whatever provision there is in the Act relating to the grant of such leave is confined to claims of creditors. Reference may be made to S. 28 sub-cl. 2. [P. 43 C. 1]

(d) *Civil P. C., S. 80—Official Receiver in Insolvency proceedings—Notice necessary.*

The utmost that can be said is that an official Receiver is a public Officer within S. 2 subclause 17 (d) C. P. C., and notice under S. 80 is necessary before filing a suit against him, [P. 43 C. 2]

(e) *Civil P. C., O. 46, R. I.—Receiver in Insolvency—Distinction.*

A receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of the Court is necessary in order that by impleading him the estate may be bound. A receiver under the Insolvency Act holds a different capacity altogether. He is more than a mere officer of the Court. Under S. 28 (2) the insolvent's estate vests in him. He alone, and no one else, represents the estate. He therefore is the proper party to be impleaded in the action. No leave is accordingly necessary for suing him. [P. 43 C. 2

(f) *Hindu Law—Property in wife's name—Presumption.*

There is no presumption that property standing in the name of a Hindu widow, even though purchased in her name, belongs to her husband. [P. 44 C. 2]

B. E. O'Conor and Ramnama Prasad—for Appellant.

K. N. Katju—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for a declaration that she is the owner in possession of a certain house situated in the city of Cawnpore; and that the insolvent defendant No. 2 had no concern with it, and it is not liable to be attached by the official receiver. The house in question was purchased on the 29th of May 1914 under a registered sale-deed in the name of the plaintiff. Some years afterwards in 1919 Chhote Lal defendant, the plaintiff's, husband, entered into a partnership with one Ram Dutt—a commission agency business-which ultimately failed in 1920. On the petition of certain creditors the firm was adjudicated an insolvent, and the official receiver took charge of the insolvent's estate. On the 6th of November 1920 he attached the house in question as property belonging to the insolvent Chhote Lal. The report of the receiver says that the present plaintiff protested and stated that the house belonged to her parents.

It is important to note that she made no attempt to seek redress in the insolvency Court, but filed this regular suit for declaration on the 21st of February 1921.

The official receiver who mainly contestd the suit pleaded that the house belonged to the insolvent and not to the plaintiff. It was further urged that the plaintiff not having raised any objection at the time of the attachment was estopped from suing; that her only remedy was to file objections in the insolvency Court within 21 days of the attachment and civil Court had no jurisdiction to try this case, and lastly that the permission of the insolvency Court was necessary before the institution of the suit.

Tho insolvent, as might be expected in either view of the matter, supported the plaintiff's claim.

The learned Subordinate Judge decided the three legal issues in favour of the plaintiff, but on the question of fact came to the conclusion that the house in dispute belonged to Chhote Lal and not to the plaintiff.

The plaintiff has come up in appeal to this Court and on her behalf the finding of fact arrived at by the Court below is challenged. The learned

Advocate for the defendant-respondent has not only supported the decree on the finding of fact, but also on the legal pleas decided against him.

As the questions of law come first in logical sequence I propose to dispose of them first.

The plea of estoppel raised in the Court below has not been pressed at all, and it may be said at once that there was manifestly no substance in it.

The points which have been very strongly pressed in appeal are (1) that under the new Provincial Insolvency Act No. 5 of 1920 exclusive jurisdiction is conferred on Insolvency Courts with the result that no regular suit on the civil side is maintainable as against the official receiver and (2) that in any case no such suit without the permission of the Insolvency Court can lie.

The argument is that an official receiver under the Insolvency Act is an officer of the Court, that therefore the act complained of must be deemed to be an act of the Court and the person aggrieved thereby should have recourse to that Court and to no other tribunal. But the present plaintiff not claiming title through the insolvent was a stranger to the proceeding and was in no way represented therein. It is difficult to see how her rights can in any way be prejudiced by an act done by the receiver in spite of her protest. It is suggested that the policy of the Act is to expedite matters and not to permit claims to be brought after a number of years, and it is argued that it was with this object in mind that S. 4 was enacted which in effect means that the question should forthwith be disposed of finally by the Insolvency Court.

In my opinion S. 4 of the Act is an enabling section and confers full power on the Insolvency Court to decide all questions of title or priority or of any nature whatsoever which arise before it, or which it may deem necessary to decide. Sub-clause 2 makes "such" decision final and binding for all purposes on all claimants against him. In reality S. 5 gives to the Insolvency Court the powers of a Civil Court.

It is to be noted that prior to the passing of this Act there was a conflict of opinion between this Court and the Calcutta High Court, the view prevailing in the latter Court being that questions of title could be disposed of by a regular suit only. Obviously the enactment of S. 4 gives effect to the view which prevailed in this Court. I accept the contention of Dr. Katju that under the new Act if a question of title has been actually raised by a stranger to the insolvency and decided by the Insolvency Court the decision is final and the question cannot be re-opened in a separate regular suit.

This however does not mean that exclusive jurisdiction has been conferred on the Insolvency Court, and that the only remedy open to the aggrieved stranger is to apply to that Court. In my opinion where a person has made no attempt to bring the matter up before the Insolvency Court and there is no order of the Insolvency Court which can be pointed out as amounting to a decision within the meaning of sub-clause (2) of S. 4, he is at perfect liberty to have recourse to the ordinary Civil Courts. In the present case the plaintiff never appeared before the Insolvency Court nor put her case before it, nor was any evidence led nor any adjudication of her rights made. How then can it be said that there is a "decision" against her which precludes her from suing? The act of attachment was an act of the receiver and not necessarily an act of the Court, much less was it a "decision" by the Court.

The act of the receiver may be compared to the act of the Civil Court amin who wrongly attaches the property of a third person in execution of a decree. Such an act is done as much under the authority of the execution Court as the act of a receiver under that of the Insolvency Court. No special sanctity attaches to the acts of the receivers under the Act. It is true that in certain particulars and subject to certain conditions the decision of the Court is final and absolute against third parties also and in that way the proceeding differs from proceedings in execution where the order disallowing

the objection is not final. But in other respects the similarity certainly exists. In the absence of "such" decision the Civil Court remedy is not barred.

Reliance was also placed on S. 68 of the Act which says that if the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just. It is strongly contended that the word "May" in the section should be read as "Must" and that therefore the only remedy open to the aggrieved person is by way of an application under this section. In my judgment this contention is untenable. S. 68 provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it. It is not the only remedy open to him. Of course if a person applied under that section he would be subject to the time limit prescribed therein. But if he wanted to enforce his claim in a Civil Court under S. 9 of the Code of Civil Procedure his rights would be those of an ordinary person. I am of opinion that it is open to a third person who does not claim title through the insolvent, to treat the receiver as a trespasser and maintain his claim in a Civil Court. There is no provision in the Act other than that contained in S. 4 which in any way takes away the jurisdiction of a Civil Court to try such a suit.

In the case of *Bhairon Prasad* v. *S.P.C. Das* (1) which came under the old Act, the opinion was expressed that a stranger to the insolvency may at his option seek his redress in the ordinary Civil Court. The effect of S. 4 of the new Act has in no way been to alter the law so far as this point is concerned.

The next point urged is that before instituting the suit it was necessary to obtain the leave of the Insolvency Court. It is conceded that there is no statutory provision under which such leave is necessary. On the other hand it may be pointed out that whatever provision there is in the Act relating to the grant of such leave is confined to claims of creditors. Reference may be made to S. 28 sub-clause 2 which provides that no creditor to whom the insolvent is indebted shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose. If leave were necessary in all suits, this provision would be altogether superfluous. I may also point out that under S. 28 (6) the power of a secured creditor to realise or otherwise deal with his security remains unaffected. Much less can then the rights of a stranger who claims an independent title be prejudiced. The utmost that can be said is that an Official Receiver is a public officer within the meaning of S. 2 sub-clause 17 (d) of the Civil Procedure Code, and that notice under S. 80 is necessary. In the present case it is not disputed that such notice was sent before the institution of the suit.

It is however very strongly urged that on general principles it should be held that an official receiver is merely an officer of the Court and that no suit can be maintained against him unless the leave of the Court which appointed him has first been obtained. Reliance has been placed on some cases of the Bombay, Madras, Calcutta and Patna High Courts in support of this contention. None of the cases cited however are cases arising out of insolvency proceedings. A receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of the Court is necessary in order that by impleading him the estate may be bound. Without leave of the Court he represents nobody; after leave he represents the real beneficiary. A receiver under the Insolvency Act holds a different capacity altogether. He is more than a mere officer of the Court. Under S. 28 (2) the insolvent's estate vests in him. He alone, and no one else, represents the estate. He therefore is the proper party to be impleaded in the action. No leave is accordingly necessary for suing him.

(1) [1919] 17 A.L.J. 787—51 I.C. 113.

It should also not be overlooked that there is a distinction between the case where the plaintiff suing the receiver had been represented in the previous proceeding and where he was not represented. For instance a creditor in an insolvency proceeding, a share-holder in the liquidation proceedings of a Company or a party to a litigation is represented in the proceeding when a receiver of the property is appointed. In cases of this kind it may be that a party to that proceeding having himself submitted to the jurisdiction of the Court cannot subsequently challenge it, and start a fresh proceeding against the receiver appointed in that litigation without having first obtained the leave of that Court. The position may however be quite different where a person who was a stranger to the proceeding in which the receiver was appointed wants to sue the receiver.

In certain Acts an express provision is made that no suit shall be instituted against an officer appointed by the Court; for instance S. 171 of Act VII of 1913 so provides. It is conceded that there is no such provision in the present Act. And independently of a statutory provision I can find no rule of law under which a suit against a Receiver in insolvency can be thrown out on the mere ground that no leave of the Insolvency Court had been obtained. This disposes of the questions of law raised in the appeal.

Coming to the merits of the case I can say without hesitation that it is impossible to uphold the finding of the Court below. The learned Subordinate Judge recorded a finding that the property in dispute belonged to Chhote Lal and not to the plaintiff. The question whether the plaintiff has succeeded in proving that the property belongs to her I shall consider presently. But there can be no question that there is no evidence whatsoever on the record to support the finding that the property in dispute belonged to Chhote Lal. Undoubtedly as the plaintiff came to Court asking for a declaration of title, the burden lay on her to establish a *prima facie* case that the property belonged to her. But after she had proved that the title deeds stood in her name, that her name was entered in the Municipal registers and she had been paying the Municipal rates and taxes and had been assessed as owner, and that for all practical purposes she was the ostensible owner of the property, then if the defendant wanted to prove that she was a mere benamidar the burden shifted on to him to show that the purchase money had been found by her husband. I wholly disagree with the view expressed by the Court below that there is a presumption that property standing in the name of a Hindu widow, even though purchased in her name, belongs to her husband.

In this case as I have already remarked the sale-deed of the 29th of May 1914 stood in her name. There had been a number of previous transfers which need not be mentioned except the mortgage deed dated the 13th of May 1913 executed by Kali Charan and *Mst.* Alpi, the previous owners, in favour of Dip Chand and Shimbhu Dat for a sum of Rs. 900/-. When the sale-deed of 1914 was executed the amount due under this document was left in the hands of the vendee for payment to the previous mortgagees. Shimbhu Dat one of the mortgagees was an attesting witness to the sale-deed and he also admittedly received the mortgage money after the sale had been executed.

The plaintiff has produced a building permit dated the 5th of May 1918, which shows that an application for making some new erections was made by her to the Municipal Board and permission was granted on that date. There are also receipts for payment of water and house taxes standing in the plaintiff's name. At the time when the receiver went to attach this house the plaintiff admittedly was occupying a part of the house, the other portion being let out to certain tenants. These circumstances in themselves make out a sufficient *prima facie* case in favour of the plaintiff. In addition to these pieces of documentary evidence, the plaintiff produced a number of witnesses in support of her claim. She herself went into the witness-box and stated that the house had been purchased by her father and uncle some seven years

ago. Then she said that the money was paid by her father and the sale transaction was carried out by Mathura Prasad. In a later portion of her statement she said that the money was given to the vendee by Mathura Prasad. In paragraph 1 of the plaint she had alleged that the house was purchased by her father with his own money. One of the points pressed on behalf of the contesting defendant is that there is a gross inconsistency in these statememts. In my opinion there is no inconsistency or contradiction whatsoever. It is an admitted fact that the plaintiff's father and uncle were members of a joint family. The plaintiff's mother died when she was an infant and she was brought up in the house of her father and uncle. If the property was purchased with the money belonging to the family the money may be said to have belonged to either of the two or to both. She next stated that on account of some quarrel with the relations of her husband she had to leave her husband's house, and this was why her father and uncle thought of getting a house for her.

Her father was dead when the suit was brought. Her uncle Mathura Prasad went into the witness-box and swore that he had provided the money for the purchase of this house. Mathura Prasad owns some *zemindari* property, he also carries on some business, and is a *lambardar* in one of the villages. He stated that he had Rs. 1000/- in the village and brought the amount to the city for payment to the vendee. It is true that he said that there were no account books kept by him and that he was not in a position to produce any documentary evidence to prove the payment. He produced two witnesses Mahadeo and Hanuman to show that he actually brought the money from the village. It is unnecessary to comment on the evidence of these witnesses who are men of no status. But there is the evidence of Babu Chhote Lal, Vakil, a distant relation of the plaintiff, to the effect that before the sale-deed in question was executed Mathura Prasad had gone to him and shown him some papers relating to the house and consulted him. His evidence certainly shows that Mathura Prasad was in some way or other connected with the transaction. Two witnesses Gaya Din and Raghunath were examined to prove that the rents were paid to the lady by them, and that the house taxes were also paid by the plaintiff. The evidence on behalf of the defendant receiver is practically nil. No circumstances are shown which would make it at all probable that Chhote Lal was the real purchaser and that the property had been obtained fictitiously in the name of the plaintiff. For instance it is not shown that in the year 1914 Chhote Lal had any motive to enter into a *benami* transaction or that he was contemplating the starting of any business and it was with a view to cheat the future creidtors that the property was purchased in the name of his wife. In fact it was many years after the sale that he entered into the parnership business which failed. The oral evidence produced by the defendant consists of three persons Gur Dayal, Kanhaiya Lal and Jhabu Lal whose statements are mainly to the effect that Chhote Lal was in a position to advance Rs. 1000/- towards the acquisition of this house. They also tried to prove that Chhote Lal after the sale-deed was executed made some statements alleging himself to be the real owner. Such a statement even if true is of no value against the plaintiff. Gur Dayal is a general attorney of one of the petitioning creditors. The sale-deed was not executed in his presence nor is he able to say where the purchase money came from. Kanhaiya Lal is himself a creditor. In the presence of neither of these the sale transaction took place. In my opinion therefore the evidence adduced by the defendant is wholly insufficient to overweigh that adduced by the plaintiff. The documentary evidence is entirely in favour of the plaintiff and there are no circumstances which in any way throw any suspicion on the transaction. The burden which lay on the plaintiff of establishing a *prima facie* case was sufficiently discharged by her evidence and no rebutting evidence worth the name has been adduced on behalf of the defendant. In

this view of the matter the finding of the learned Judge must be overruled. I would therefore allow the appeal, set aside the decree of the Court below and decree the plaintiff's suit with costs.

Lindsay, J.—I agree with my learned colleague that this appeal should be allowed. There are no merits in the case of the respondent. I wish however to say a few words regarding the legal points which have been raised in the case. The questions which arise for decision are simple questions of the interpretation of Act V of 1920 and it does not appear to me necessary to resort to any previous decision or authority for the purpose of construing the relevant sections.

So far as S. 68 is concerned it cannot in my opinion be maintained on the language of that section that a person who is aggrieved by any act of a receiver is under an obligation to apply to the Court for relief. What the section says is that such a person "may apply" to the Court and it is further provided that if he exercises his option of applying to the Court he must make an application within 21 days from the date of the act complained of. On the face of it the language of the section is permissive, not mandatory. The person aggrieved has the choice either of applying to the Court or of seeking his ordinary remedy under the Civil law.

It is argued that because of the provisions of S. 4 of Act V of 1920, whereby jurisdiction has been conferred upon insolvency Courts to determine questions of title arising in insolvency cases, it must necessarily follow that any person who has a question of title to raise must apply to the insolvency Court; in other words it must be assumed from the provisions of S. 4 that because these powers of deciding questions of title have been conferred upon insolvency Courts therefore the insolvency Court has exclusive jurisdiction. That appears to me to be a deduction which cannot be made from the language of S. 4. All that the section intended to provid was that if a question involving title is raised before an insolvency Court then the insolvency Court is to be deemed to have power to decide that question of title. It must not be taken to subscribe to the view that has been expressed by my learned colleague regarding what follows if an aggrieved person does elect to make an application to the insolvency Court. I am not prepared to take the view that a decision under sub-section (2) of S. 4 would be binding upon a stranger, like the plaintiff in the present case, who in my opinion is not making any claim against the debtor or the debtor's estate. What the plaintiff in the present suit is saying is that the property about which the dispute exists does not belong to the debtor's estate and never did belong to it and so I cannot see how it can be said that she in the present proceedings is claiming against the debtor or his estate. That question, however, does not arise for decision and these observations are consequently *obiter*. I have only made them in order that I may not be supposed to hold the opinion that a decision under Sub. S. 2 is binding upon all parties including parties who are entire strangers to the insolvency proceedings.

It being settled therefore that the plaintiff in the present case had the ordinary Civil remedy which was open under the law, the further question arises why she should be bound in any way to solicit the sanction of the insolvency Court before she brought the suit against the official receiver. There is no statutory provision for such sanction being asked or given and on principle I fail to see why any such authority is required. The official receiver may be an officer of the Court, but no special sanctity attaches to his office when he is brought in contact with a person who is an entire stranger to the proceedings in the insolvency Court. I can well understand the position that so far as the insolvency proceedings are concerned the receiver or official receiver stands in a peculiar relation to all parties who are interested in the proceedings, that is to say, the insolvent himself or the creditors or other persons who are seeking satisfaction out of his estate. But he has no particular

status as against parties who are entire strangers to the proceedings in the insolvency Court and if under colour of his office as receiver or official receiver he commits an act of trespass it is difficult to understand on what principle the person against whom the trespass is committed is under any obligation to ask permission of the insolvency Court to bring an action against the receiver. The remedy of the person complaining is the ordinary remedy at law and no question therefore of any sanction arises. It may of course be that in cases where the defendant has an official status notice of the suit must be given to him as required by the Civil Procedure Code. In the present case I understand that such notice was necessary and was actually given.

It is admitted as I have said that there is no statutory authority for the proposition that a person who is suing a receiver or official receiver appointed under the Insolvency Act has to obtain the permission of the insolvency Court. There have been no doubt numerous cases in which it has been laid down that proceedings against a receiver should not be taken without the leave of the Court. Where a receiver has been appointed in the course of a suit it seems reasonable enough that all parties to that suit should be bound by the order appointing him and consequently, being subject to the jurisdiction of the Court, should not be allowed to question the acts of a receiver without the Court's permission. But there is in my opinion no authority for the proposition that, where in a suit a receiver has been appointed, no person who is a stranger to the suit can question an act of the receiver without the sanction of the Court. That seems to be an absolutely untenable proposition and opposed to all principle. In the present case I am satisfied (1) that the plaintiff was under no obligation to seek any relief in the insolvency Court; (2) that she had the ordinary remedy under the Civil law against the official receiver; and (3) that for the purpose of maintaining the suit she was under no obligation to seek any sanction from the insolvency Court.

By the Court.—The order of the Court is that the appeal is allowed, the decree of the Court below is set aside and the plaintiff's suit is decreed with costs in both Courts including in this Court fees on the higher scale.

Appeal allowed.

1924 ALLAHABAD 47

RYVES AND DANIELS, JJ.

Chhammu Lal and others—Defendants—Appellants.

v.

Bhajan Lal and others—Plaintiffs—Respondents.

S. A. No. 636 of 1921, D/- 28th May, 1923 from the D. J., Farrukhabad D/- 22nd January 1921.

T. P. Act, S. 72—What are not improvements,

The improvements of ordinary convenience to tenant do not fall within S. 72. 37 All. 81 Foll. [P. 48 C. 1]

Durga Prasad—for Appellants.

K. N. Katju, G. Agarwala and *Vishun Nath*—for Respondents.

Judgment.—This appeal arises out of a suit for redemption of a usufructuary mortgage of some shops executed in 1843 by the predecessors in title of the plaintiffs. The plaintiffs claim that the principal and interest had been more than paid up by the usufruct. Various defences were raised in the suit, but it is now only necessary to consider two points. The trial Court held that the plaintiffs must pay Rs. 1099/-0/-9 plus interest at 9 per cent. per annum to the defendants for necessary repairs made by them in the premises they held, under the terms of the mortgage deed. It further held that Chhammu Lal and Ram Narain who had obtained possession of two of the shops had made certain improvements in their shops which had cost them about Rs. 109 each, and directed the plaintiffs to pay this amount to Chammu Lal and Ram Narain with interest at 9 per cent. per annum. On appeal the lower appellate Court held that the defendants were not entitled to interest on the sum of Rs. 1099 spent by them in repairs, on the ground that they had already received increased rent in consequence of these repairs which was equivalent to interest. It seems to us that this really is a finding of fact.

On the second point it held that there was no evidence to show that Ram Narain had made any improvements at all, and therefore, nothing was due to him; and as regards Chhammu Lal it found, that what he had done was to put in some iron bars into a window in order to suit a particular tenant; and that he had received increased rent accordingly. In any case it seems to us that improvements of this kind do not fall within S. 72 of the Transfer of Property Act; and in this respect we agree with the concluding remarks in *Rupan Singh* v. *Champa Lal* (1). The result is that the appeal fails and is dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

(1) [1915] 37 All. 81—13 A.L.J. 14—26 I.C. 521.

1924 ALLAHABAD 48

LINDSAY AND SULAIMAN, JJ.

Padam Singh and another — Plaintiffs—Appellants.

v.

Umrao Singh and another — Defendants—Respondents.

S. A. No. 1533 of 1921, D/- 3rd May 1923, from the Dt. J., Aligarh, D/- 30th August 1921.

Mahomedan Law—Pre-emption — Mortgagee in possession not a Co-sharer.

Although for certain fiscal purposes a mortgagee in possession is treated under the Land Revenue Act as a co-sharer he cannot be deemed a co-sharer for the purpose of pre-emption. [P. 48 C. 2]

B. K. Mukerji—for Appellants.

E. A. Howard—for Respondents.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for pre-emption. The Court of first instance had decreed the plaintiff's suit, but on appeal after some further evidence had been taken the learned District Judge dismissed it. His findings are that the plaintiff and the vendor are co-sharers in the same mahal in which the property in dispute is situated and that a custom of pre-emption exists in the village. There is a further finding that the defendant vendee is recorded as a mortgagee in possession of some share in the same mahal. On this latter finding the learned District Judge was of opinion that the defendant himself was a co-sharer and that therefore the plaintiff had no preference over him. The entry as to the custom of pre-emption in the *wajib-ul-arz* is as follows :—

Every owner of a patti will have the right of transferring his share in the property first in favour of *bhai haqiqi ek jaddi* (own brothers descended from a common ancestor) and in case of their refusal to other co-sharers in the village.

It seems to us that even after having made a mortgage of his share a co-sharer would have a proprietary interest left in him so as to entitle him to bring a suit for pre-emption. In the same way the mere fact that a person has taken a possessory mortgage of a share in the village would not give him proprietary interest in it. If the true interpretation of the *wajib-ul-arz* were that a mortgagee in possession was to be deemed a *sharik deh* then the result would be that the right of pre-emption would be defeated by making a mortgage on one day followed by a sale to the mortgagee the next day. It is true that for certain fiscal purposes a mortgagee in possession is treated under the Land Revenue Act as a co-sharer but we are of opinion that he cannot be treated as a proprietor of the village. Under the Muhammedan law there can be no doubt that it is only a person having an absolute interest in the property who has the right of pre-emption. The entry in the *wajib-ul-arz* does not show that a mortgagee is to be deemed a co-sharer for the purpose of pre-emption. In this view of the matter we think that the defendant mortgagee could not resist the claim for pre-emption on the ground that he was himself a person entitled to an equal right with the plaintiff. We accordingly allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs including in this Court fees on the higher scale.

Appeal allowed.

1924 ALLAHABAD 49

LINDSAY AND SULAIMAN, JJ.

Mt. Ballo—Plaintiff—Appellant.

v.

Ram Kishan and another — Defendants—Respondents.

S. A. No. 918 of 1921, Decided on 19th April 1923, from the D. J., Meerut, D/- 4th March 1921.

Hindu Law— Custom—Adoption of Daughter's son is allowed among Agarwala Vaishyas.

In support of the alleged custom the defendant examined some 33 witnesses. Thirty of these spoke of the general custom permitting the adoption of a daughter's son prevailing among the Agarwala Vaishas and they were able to cite at least 34 witnesses out of which 20 instances were accepted as being instances where adoption either of a daughter's son or a sister's son had taken place. Out of these 20 instances 11 were instances of the adoption of a daughter's son.

Held : the custom set up by the defendant was satisfactorily established. [P. 49 C. 2]

Ibni Ahmad—for Appellant.

S. C. Das and *S. N. Sen*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for recovery of possession of a house and some landed property with mesne profits. The plaintiff who is one of the daughters of Kesrimal deceased, alleged that on the death of Kesrimal his estate was inherited by his widow Musammat Sohani who died on the 6th of May 1918, and that the plaintiff being the poorer of the two daughters was entitled to inherit the estate in preference to Musammat Sunder, the mother of Ram Krishna the principal defendant. On behalf of the defendant it was pleaded that he had been adopted by Kesrimal in his lifetime some 24 years ago and that there was a custom prevailing among the Agarwala Vaishas to adopt a daughter's son, and further that the present claim was barred by time.

Both the Courts below have found that the adoption did in fact take place and have also accepted the defendant's evidence as establishing the existence of the alleged custom. The plaintiff comes here in second appeal and urges that the evidence adduced to prove the custom permitting such adoption is legally insufficient.

In support of the custom the defendant had relied on contracts of *wajib-ul-arzes* relating to some 13 villages in which a general custom to adopt a daughter's son or a sister's son was recited, but there was no specific reference to Agarwala Vaishas in them. That evidence has not been relied on by either of the Courts below. In addition to this there were three judgments. In the first one the custom was found not to have been established. In the second one the trial Court found that the custom had been proved but on appeal the High Court decided the case on another ground. In the third and the last case the learned additional Subordinate Judge of Saharanpur in an elaborate judgment found that the custom had been fully established. He cited 45 instances which had been proved in that case. In the present case the defendant examined some 33 witnesses. Thirty of these spoke of the general custom permitting the adoption of a daughter's son prevailing among the Agarwala Vaishas and they were able to cite at least 34 instances out of which 20 instances have been accepted by the Courts below as being instances where adoption either of a daughter's son or a sister's son had taken place. Out of these 20 instances 11 are instances of the adoption of a daughter's son.

Both the Courts below have accepted this evidence and are of opinion that it satisfactorily establishes the custom set up by the defendant. We in second appeal are unable to hold that this evidence was legally insufficient to prove the custom or that the Courts below were not justified in accepting it.

The result is that the appeal fails and is dismissed with costs including fees on the higher scale.

Appeal dismissed.

1924 ALLAHABAD 50

BANERJI AND GOKUL PRASAD, JJ.

Panna Lal and another—Defendants-Appellants.

v.

Bohra Panna Lal and others—Plaintiffs—Respondents.

S. A. No. 1398 of 1921 Decided on 5th April 1923 from the Dt. J., Mainpuri, D/-19th August 1921.

Easement—Prescription—Origin of user permissive—No easement is creeated.

Where it was found that when the procession first passed over defendant's land it was with the permission of the defendant,

Held: no question of any right of easement could arise; as the user, if any, was, permissive. [P 50 C 2]

Baleshwari Prasad and *Badri Narain*—for Appellants.

G. Agarwala—for Respondents.

Gokul Prasad, J.—This is an appeal by the defendants arising out of suit brought by some Managers of the Ram Lila Committee for a declaration of a right of easement and for the demolition of certain building erected by defendant No. 2 with the permission of defendant No. 1 on a plot of land No. 607. The plaintiffs also claimed an injunction.

The point raised by the plaintiffs was that the Hindus of Karhal used to hold Bharatmilap and in order to get to plot Nos. 604 and 606 they used to pass over plot No. 607 and that because of that user they had acquired a right of easement of passage over plot No. 607.

The contention of the defendant was that Bharatmilap processions after passing over the public road passed over plot No. 608 and from that to the Chabutra in No. 604. The defendants did not contest the plaintiff's right to celebrate the Bharatmilap on plot No. 604 or 606, what they said was that the plaintiffs or their predecessors had not acquired any right of easement over plot No. 607 but that there was already a passage which they could use for the procession.

The suit has been decreed by both the Courts below. The defendants come here in second appeal. The dispute in this suit was a very small one i. e. about the passage of the Bharatmilap and we thought that this was eminently a case which should be settled amicably and we gave the parties time for the purpose. Although several adjournments were obtained nothing was done and we have therefore to decide the appeal on the merits. As regards plot No. 607 over which the plaintiffs respondents assert a right of way for the passage of the Bharatmilap the finding of the lower appellate Court is that the way of the Bharatmilap procession lay through plot No. 607. This was not the case of either of the parties and it is tantamount to a denial of the right of passage over plot No. 607 claimed by the plaintiffs. It has also been found that when the procession first passed over defendant's land it was with the permission of the defendant. No question of any right of easement can therefore arise; the user, if any, was permissive. Therefore the plaintiff's claim on the ground of easement, customary or otherwise, fails and on this ground the claim should have been dismissed. The defendant No. 1 Shrimati Rameshari Debi is the Zamindar of the plots and the plaintiffs have, in our opinion, failed to prove any right in them to limit her user of plot No. 607. The suit ought to have been, strictly speaking, one on behalf of the Hindu community. The Courts below have allowed the plaintiffs to proceed as if the suit had been one of that nature. We do not think it necessary to enter into that question. Mr. Baleshwari Parsad the learned vakil for the defendants appellants has however stated to us that his client, the Zamindar, is willing to give the plaintiffs a fifteen feet wide passage over plot No. 608 for going from plot No. 609, the public road, to 604 and 606. This we think is very reasonable offer and the plaintiffs would have done well to have accepted it. However as the defendant Zamindar is still willing to make that concession in favour of the plaintiff's we allow this appeal in part and discharge the decrees of the lower Courts. We make the above reservation in plaintiff's favour. In other respects we dismiss the plaintiffs' suit and we make no order as to costs. *Appeal allowed*

1924 ALLAHABAD 51

RYVES AND DANIELS, JJ.

Jagesor Pande and another—Plaintiffs—Appellants.

v.

Deo Dat Pande and another—Defendants—Respondents.

S. A. No. 1579 of 1921 Decided on 28th May 1923, from the Sub. J. Basti, D/-9th July 1921.

Hindu Law—Arbitration by father as manager—Reversioner has no power to challenge voidable deed not challenged by full owner.

The reversioner has no right to challenge an alienation made by the father as manager of a joint Hindu family which the son, who had a right to challenge it, did not challenge during the father's lifetime,

An alienation by the manager of a joint Hindu family without necessity is not absolutely void. It is voidable at the instance of the persons whose interests are affected by it, namely, the co-parceners in the property.

[P 51 C 1,2]

N. Upadhia—for Appellants.

P. L. Banerji—for Respondents.

Daniels, J.—This case has been referred to a Bench because the precise point has not been previously decided. The question is whether the reversioner has a right to challenge an alienation made by the father as manager of a joint Hindu family which the son, who had a right to challenge it, did not challenge during the father's lifetime. The facts are these. Mahabir Pende and his minor son Bansgopal constituted a joint Hindu family. Mahabir Pande, on 2nd February 1917 made a gift of the suit property to his wife Musammat Ramraji. The deed of gift purported to constitute her full owner of the property. Mahabir died shortly after making the gift. Bansgopal died in November 1917. On 3rd May 1920, Mt. Ramraji executed a deed of conditional sale in favour of the defendant for a sum of Rs. 316. The plaintiffs who are the next reversioners sue, on the assumption that Mt. Ramraji held only the estate of a Hindu widow or a Hindu mother, for a declaration that the deed of conditional sale is not binding on him after Mt. Ramraji's death.

The question therefore is whether the plaintiffs are entitled to challenge the deed of gift. If Mt. Ramraji had a good title under the deed of gift she was entitled to deal with the property as she liked. If the plaintiffs can claim the same right as Bansgopal had to challenge the gift, then the defendant will have to justify it on the ground of legal necessity. It has been found by the Court below that there was legal necessity to the extent of Rs. 259 out of Rs. 316, but both the Courts below have dismissed the suit on the ground that the plaintiffs are not entitled to challenge the deed. With this finding we agree. No authority for the right claimed by the plaintiffs has been shown to us either in the Hindu texts or in the decided cases. There is ample authority for the view that an alienation by the manager of a joint Hindu family without necessity is not absolutely void. It is voidable at the instance of the persons whose interests are affected by it, namely, the co-parceners in the property. This has been held in two recent Madras cases *Subba Goundan* v. *Krishnamachari* (1) and *Sankara Variar* v. *T. K. Ummer* (2). The point was of importance, as on it depended whether the persons setting aside the alienation were entitled to mesne profits from the date of the alienation, or only from the date of repudiation. There is authority of this Court to the same effect in *Sheo Ghulam* v. *Badri Narain Lal* (3).

The interests of the plaintiffs were in no way affected by the deed of gift when it took place. They had no right in the property whatever during the lifetime of either Mahabir or his son. It would be giving a great and unwarranted extension to the rights of reversioners as hitherto understood to allow them the right to challenge alienation under the circumstances

(1) 1922 Mad. 112—45 Mad. 449—42 M.L.J. 372—15 M.L.W. 537—(1922) M.W.N. 269-30 M.L.T. 217-68 I.C. 869.

(2) 1923 Mad. 46—46 Mad. 40—16 M.L.W. 684-43 M.L.J. 721—(1922) M.W.N. 634—32 M.L.T. 3—70 I.C. 787.

(3) [1913] 11 A.L.J. 798—19 I.C. 560.

found in the present case. In our opinion the decision of the Courts below is correct, and we accordingly dismiss the appeal with costs.

Appeal dismissed.

1924 ALLAHABAD 52

LINDSAY AND SULAIMAN, JJ.

Balwant Singh — Defendant — Appellant.

v

Mare Singh (Plaintiff) and *Bhagwant* (Defendant)—Respondents.

S. A. No. 1695 of 1921 Decided on 3rd May 1923 from Dt. Judge, Meerut D/-10th August 1921.

Pre-emption — Wajib-ul-arz is good evidence unless otherwise rebutted.

An entry as to the right of the pre-emption recorded in a wajib-ul-arz is certaily good *prima facie* evidence of the existenee of the custom unless there is internal evidence in the wajib-ul-arz itself or some other evidence or circumstance to rebut it. [P 52 C 2]

where the wajib-ul-arz contained an express statement as to the existence of a right of pre-emption in favour of *bhai haqiqi* and then *qaribi*, then pattidars and then co-sharers in other patt s as against strangers, but also contained a statement that an issueless co-sharer shall have no right to make a gift of his property in favour of a person not entitled (*gair mustahaq*) and if such a transfer takes place then on the death of the co-sharer his legal heirs would be the owners of the property,

Held : that an entry, which lays down that a right exists which cannot be based on a custom having the force of law, is valueless as evidence to prove such custom. [P 53 C 1]

N. C. Vaish—for Appellant.

K. C. Mital—for Respondents.

Sulaiman, J.—This is a defendant vendee's appeal arising out of a suit for pre-emption. The defendant had denied the existence of any custom and the Court of first instance dismissed the suit. On appeal the learned District Judge set aside the decree of the first Court and decreed the suit, holding that the custom of pre-emption alleged by the plaintiff had been established.

The evidence as to the existence of the custom produced by the plaintiff consists of an entry in the *wajib-ul-arz* of 1870 as well as decrees of the years 1885 and 1916. As against that the defendant relied on the judgment and decree of the year 1913.

An entry as to the right of pre emption recorded in a *wajib-ul-arz* is certainly good *prima facie* evidence of the existence of the custom unless there is internal evidence in the *wajib-ul-arz* itself or some other evidence or circumstance to rebut it. In the present case although it appears that there was an earlier *wajib-ul-arz* of 1860 in existence none was filed. We have only the entry in the *wajib-ul-arz* of 1870 which in the early portion of it does contain an express statement as to the existence of a right of pre-emption in favour of *bhai haqiqi* and then *qaribi*, then pattidars and then co-sharers in other pattis as against strangers. The clause in the *wajib-ul-arz* containing this recital however contains a large number of other matters over a dozen in number.

It has been contended very strongly on behalf of the defendant appellant that reading the clause as a whole this entry cannot be a record of custom. The test to be applied in such cases was laid down by the Special Bench in *Fazal Husain* v. *Muhammad Sharif* (1) where it was pointed out that if a *wajib-ul-arz* was of an unusual nature and in the very same clause in which reference was made to pre-emption, reference was also made to a number of other matters which could not possibly have been matters of custom the presumption would be rebutted. This case has been followed in a number of other cases, vide the case in *Surajbali Singh* v. *Muhammad Nasir* (2) where the right of one co-sharer to redeem a mortgage made by another co-sharer, was held not to be a possible record of custom.

In the present case it is not necessary for us to give in detail all the matters recited in the clause which may or may not be the record of custom. We need only to refer in particular to that portion of it which says that an issueless co-sharer shall have no right to make a gift of his

---

(1) [1914] 36 All. 471—12 A.L.J. 800—24 I. C. 464 (F.B.)

(2) [1918] 16 A.L.J. 879—48 I.C. 220.

property in favour of a person not entitled (*gair mustahaq*) and if such a transfer takes place then on the death of the co-sharer his legal heirs would be the owners of the property.

It is obvious that this is an unreasonable restraint on an owner's power of alienation, and even though intended for the benefit of his relations it cannot possibly be enforced in a Court of law. An entry, which lays down that a right exists which cannot be based on a custom having the force of law, it is valueless as evidence to prove such custom. This being so we are of opinion that the presumption which would ordinarily arise from an entry of a right of pre-emption in the *wajib-ul-arz* has in this case been sufficiently rebutted, and that there is internal evidence in the clause itself to show that the recitals contained therein are not all records of custom.

In addition to this *wajib-ul-arz* the plaintiff relied on a decree for pre-emption of the year 1885. It is however to be noted that the settlement of 1870 had not expired by that year and that the right of pre-emption, even if based on contract, was then enforceable. In that judgment the question of custom was neither raised nor decided. The decree of the year 1916 is a mere compromise decree. Although it is certainly evidence of an assertion of the right of pre-emption on the part of the co-sharers, it cannot be conclusive inasmuch as the question of the existence of any custom was not gone into by the Court and decided. As against this we have the Munsif's judgment of the year 1913 where the plaintiff's case that a custom existed had been found not to have been established. Our conclusion therefore is that in this case the plaintiff has failed to establish that there is a custom of pre-emption under which he is entitled to pre-empt the property. The result is that this appeal must be allowed. We accordingly set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs including in this Court fees on the higher scale.

Appeal allowed.

1924 ALLAHABAD 53

RYVES AND DANIELS, JJ.

Kesho Dass—Defendant--Appellant

v.

Hanuman Pandey—Plaintiff—Respondent.

S, A. No. 1773 of 1921, Decided on 16th May, 1923 from the Dt. J., Ghazipur, D/13th June 1921.

Agra Tenancy Act S., 4—Land turned into grove.

As soon as the zemindar allows the grantee to convert the land into grove it would cease to be land held for agricultural purposes within the meaning of the definition. [P. 54 C. 1]

H. K. Mukherji—for Appellant.

Haribans Sahai—for Respondent.

Daniels, J:—This was a suit under S. 158 of the Tenancy Act for a declaration that the plaintiffs had acquired under-proprietary rights under that section on the ground that the land in suit had been held rent-free for over 50 years and by two successors of the original grantee. The suit has been decreed by both the Courts below. The land is admittedly covered by a grove and the contention of the appellant is that Chapter X of the Agra Tenancy Act in which S. 158 occurs does not apply to groves.

The land in suit is said to have been granted to the predecessor of the plaintiff under a written "*danpatra*" about 100 years ago. Both the Courts have found that the grant is genuine.

The terms of the grant are reproduced in paragraph 1 of the plaint. They give the grantee the right either to use the land for cultivation or to plant it with a grove. The grantee did in fact plant a grove on it. Both in the plaint and the written statement the land is described as grove, and the finding of the Court below is that the land is admittedly grove land and has been held as such from the time of the last revision of records, which was between 30 and 40 years ago.

Land as defined in S. 4 of the Tenancy Act is limited to land which is let or held for agricultural purposes, and it has been held in several decisions of this Court that this definition does not include areas occupied

by groves. It is unnecessary to refer to the earlier decisions as the question has been finally set at rest by the Full Bench decision in *Kesho Prasad Singh* v. *Sheo Pragash Ojha* (1).

The learned District Judge gets out of this difficulty very summarily. He says that the land was not let to be turned into a grove but was let for agricultural purposes and therefore it is "land". It is difficult to see how the learned Judge could say this in face of the express terms of the title deed which is the basis of the plaintiff's claim and of the plaintiff's own admission in para 1 of the plaint. But even if it had been correct it would not dispose of the case. As soon as the zemindar allowed the grantee to convert the land into grove it would cease to be land held for agricultural purposes within the meaning of the definition. But assuming that we hold that on the pleadings and the plaintiff's title deed it was not open to the District Judge to come to this finding, the respondents are prepared to support the decree on the ground that the restricted definition of "land" contained in the present law was not to be found in the Rent Act of 1881. Uuder that Act "land" included groves. They rely on S. 30 of that Act and contend that they had acquired under-proprietary right under cl. (d) before the present Tenancy Act came into force. This is a new case put forward for the first time in second appeal and the answer to it is that in order to succeed under S. 30 (d) of the Rent Act of 1881 it was necessary for the plaintiffs to show that land had been held rent-free and by at least two successors to the original grantee for 50 years prior to the 22nd December, 1873. It has not been found by either Courts that this was the case and we have not been referred to any evidence on which such a finding could be based. We think therefore that the appeal must succeed and it is not necessary to go into the further point urged by the appellant that even on the finding of the Court below the land is not really held rent-free. It is no doubt shown in the papers as grove not assessed to rent (*bila lagani*) but it is also found by the Court below that according to the *wajib-ul-arz* all groves not assessed to rent pay half their produce to the proprietor. There is on the record a judgment of this Court in Civil Revision No. 31 of 1912 between the defendant and the father of the plaintiff upholding a decree in favour of the former for a claim to produce of the grove by way of rent.

We allow the appeal and setting aside the decree of the Court below dismiss the suit with costs in all Courts.

Appeal allowed.

(1) 1922 All.301—44 All. 19—19 A. L. J. 749—64 I. C. 248 (F. B.)

1924 ALLAHABAD 54

MEARS, C. J. AND PIGGOTT, J.

Ruhul Amin—Plaintiff—Appellant.

v.

Shanker Lal and others—Defendants—Respondents.

L. P. A. No. 3 of 1922, connected with L. P. A. Nos. 1 and 2 of 1922, Decided on 7th June 1923 from the judgment of Stuart, J. D/-6th December 1921.

Civil P. C., O. 4 R. 1—Plaintiff a major—Plaint signed by a person as next friend is not valid.

Where the plaintiff had attained majority prior to the institution of the suit, and the plaint was signed and verified on his behalf by a next friend, namely the father's sister's son of the plaintiff.

Held that the plaint was not valid in law and that there had been no valid presentation of the plaint. 22 A. 55 Dist. [P. 55 C. 1; P. 56 C. 1]

Iqbal Ahmed—for Appellant.

Damodar Das—for Respondents.

Piggott, J.--The three connected appeals before us arise out of one single suit. This was filed by Ruhul Amin, the appellant before us, as long ago as the 24th of March 1916. The object was to set aside a transfer purporting to have been effected by a sale deed of November 16, 1906, executed by various persons and amongst others by the mother of the plaintiff, who purported to act on behalf of the plaintiff, then a minor, as his natural guardian. There was

a long array of defendants including numerous subsequent transferees of the property concerned. In the written statements of at least two of these defendants the point was taken that the plaintiff had attained majority prior to the institution of the suit, and that the plaint purporting to be signed and verified on his behalf by a next friend, namely the father's sister's son of the plaintiff, was not valid in law, and that there had been no valid presentation of the plaint. It is impossible for us to say why the trial Court ignored these pleadings at the time of the settlement of the issues. Both parties are to blame for not having insisted upon an issue being struck on a pleading of this nature which went to the very root of the case. The plaintiff in particular finding it alleged against him that the suit was not even lawfully before the Court, should have in our opinion taken prompt action. He could either have accepted the plea regarding his majority as true in fact and asked permission to present the plaint formally to the Court himself after making the trifling amendment which would have been necessary, or if he desired to stand by the allegation of his minority he should have asked for an issue on the point. In the result the trial Court went into the merits of the case and decreed a part only, though a substantial part, of the plaintiff's claim.

There were three appeals filed, one by the plaintiff himself, and one by each of two sets of defendants who were dissatisfied with the decision of the trial Court. The defendants who appealed again made it a ground of objection in the lower appellate Court that there had been no valid plaint presented to the trial Court, and that the whole of the proceedings of that Court were vitiated by this defect. The lower appellate Court entertained this plea. It went into the facts of the case, and it found that the plaintiff had actually been born in the year 1890, so that he was over 25 years of age when the plaint was filed on his behalf by his father's sister's son. The learned Additional District Judge upon this state of facts held that there was an incurable defect in the whole of the proceedings in the trial Court, that the decree of that Court in favour of the plaintiff was a bad decree. He dismissed the plaintiff's appeal, allowed the appeals filed by the two sets of defendants and dismissed the suit.

It is unnecessary to enquire whether the lower appellate Court could or could not have substituted for the decree of the trial Court an order returning the plaint to the plaintiff, to be presented again after proper amendment. There is some authority for the adoption of this course in a decision of the Madras High Court, which has been laid before us; but there is no decision of this High Court lending support to such a view of the law. If there was never any valid plaint before the Court, the proper order would seem to be one rejecting the petition tendered as a plaint and leaving it to the plaintiff to take such further action as he might think proper. In the present circumstances the question hardly arises, because by the time the learned Additional District Judge came to dispose of the appeals before him the period of limitation, even reckoned from the date given in the plaint, had expired.

The suit having thus been dismissed the plaintiff filed three appeals in this Court which were disposed of by a learned Judge of this Court in a single judgment. The learned Judge held that the question of law sought to be raised was concluded, so far as this Court is concerned, by the decision in the case of *Sheorania* v. *Bharat Singh* (1). He dismissed the appeals accordingly.

Various points have been raised in argument before us. The first was with reference to a later decision of this Court in the case of *Basdeo* v. *John Smith* (2). There are expressions in the judgment in that case which are inconsistent with some of the principles on which the decision in *Sheorania* v. *Bharat Singh* (1) appears to proceed; but the two cases

(1) [1898] 20 All. 90—(1897) A.W.N. 203.
(2) [1899] 22 All. 55—(1899) A.W.N. 172 (F. B.)

are in their essence quite distinct. In *Basdeo's* case the learned Judges were at pains to point out that there was before the Court a plaint which had been validly presented by an Advocate of the Court, in whose favour there existed a clear presumption that he had authority to present the plaint. This being so, the only question was whether an alleged defect in the matter of signature or verification was or was not curable under the provisions of S. 578 of the then Code of Civil Procedure corresponding with S. 99 of the present Code. In the case before us the point taken against the plaintiff essentially was, and is, that his plaint had never been validly presented to the Court. That it had not been so presented seems obvious upon reference made to the provisions of Order 4 rule 1 and Order 3 rules 1 and 2 of the Code of Civil Procedure. A defect of this sort can scarcely be regarded as a defect in proceeding in a suit within the meaning of S. 99 of the Code of Civil Procedure; and in any case it is a plea which affects the jurisdiction of the Court. The trial Court had no jurisdiction to entertain the suit at all, except upon a plaint properly presented; and it ought to have gone into the question of the presentation of the plaint and determined it before it proceeded to try the suit.

The next substantial point argued before us is with reference to a petition, presented on behalf of the plaintiff to the trial Court, through counsel purporting to be duly authorised on his behalf. The date of the presentation of this petition appears to have been the 13th of November 1917, though it is stated as the 13th of April 1917 in the order under appeal. The petition was to the effect that the plaintiff, having now attained majority, desired to prosecute the suit in his own name, and asked the Court to pass the formal orders necessary to enable him to do so. It was within the knowledge of the trial Court that a certificate of guardianship had at one time been granted by the District Judge in favour of the plaintiff's mother in respect of the person and property of the plaintiff. One of the incidental difficulties in the case is that the plaintiff's age was grossly understated in the application on which this certificate of guardianship was ordered to issue. This however does not seem to have any essential bearing on the questions of law before us. What we are now taking note of is the fact that the issue of this certificate of guardianship had been brought to the notice of the trial Court. When therefore that Court received the plaintiff's application to be permitted to prosecute the suit as a major, it passed an order that the plaintiff should produce for the inspection of the Court the certificate of guardianship, or a certified copy of the same. The plaintiff took no further action and never produced the paper called for by the Court. The suit therefore went on to trial in the Court of first instance in a wholly irregular manner, without this important application on the part of the plaintiff having been formally disposed of either one way or the other. We are far from satisfied with the procedure followed by the learned Subordinate Judge who tried this suit in the first instance. But we are nonetheless satisfied that, a considerable degree of blame attaches to the plaintiff or to his legal adviser in that Court, for not prosecuting his own case with due diligence, and not obtaining proper orders from the trial Court upon essential points. Under the circumstances we do not think it possible to give the plaintiff any relief at this stage.

It has been suggested to us that the plaintiff's petition of the 13th of November 1917 might be treated as a presentation of the plaint on his behalf by counsel properly authorised by him. But we are of opinion that under the circumstances it would be stretching the law too far in the plaintiff's favour to take such a view of that proceeding. The presentation of that petition might have had an effect equivalent to a fresh presentation of the plaint, or might have led to some further proceeding or order on the part of the trial Court, which would have had that effect, if it had been properly followed up by

the plaintiff. But as the case stands we are unable to take this view.

The result is that this and the connected appeals fail and we dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

1924 ALLAHABAD 57

MEARS, C. J. AND PIGGOTT, J.

Hawal Rai and others—Plaintiffs—Appellants.

v.

Har Prasad Rai and others—Defendants—Respondents.

L. P. A. No. 11 of 1922 Decided on 8th June 1923 from the judgment of Stuart, J. D/-13th January 1922.

Co-sharers—Partition—Private partition is valid.

The co-sharers in a mahal have a right to effect a partition by private arrangement amongst themselves, and it may be the most convenient method of effecting such a partition to assign the entire holding of a particular tenant to a particular group of co-sharers. The only difference between a partition effected by private arrangement and one properly carried out under the orders of the Court is that the incidents of the private partition are difficult to prove, and that confusion and litigation may arise afterwards owing to the preparation of village records which are at variance with the actual facts. [P, 58 C. 3.]

M. L. Agarwala—for Appellants.

J. M. Banerjee and *Haribans Sahai*—for Respondents.

Piggott, J.—One Ram Naresh was the occupancy tenant of a certain holding. He mortgaged the same with possession to one Dukhit Misir, at a time when such mortgages were not forbidden by law. Dukhit accordingly entered into possession of the holding lawfully with the status of a mortgagee. Ram Naresh died in the year 1913. Dukhit remained for a time in possession as a tenant-at-will. His rights as mortgagee had been determined, because Ram Naresh had left no heir entitled to succeed to the tenancy. Dukhit has let into possession Har Prasad Rai and others who are co-sharers in the village, and we may take it as found that he has let them into possession in return for a money payment made in recognition of his rights as mortgagee. The plaintiffs came into Court alleging that they were the sole proprietors of the land which formed the occupancy holding of Ram Naresh. They claimed that Dukhit was their tenant-at-will, and that they were entitled to eject him under the ordinary procedure prescribed by the Local Tenancy Act, No. II of 1901. Along with Dukhit they claimed to eject Har Prasad Rai and others, who have been described as persons let into possession by Dukhit. In reply to the suit Dukhit said that he was no longer in possession, and had no longer any concern with the land, that he had been paid off by Har Prasad Rai and others, and that the plaintiffs might settle accounts with them. Har Prasad Rai and others pleaded that they were not merely co-sharers in the village, but co-sharers along with the plaintiffs in the proprietary rights over the particular land in suit. They claimed, therefore, that having induced Dukhit, no matter by what means, to surrender the land into their possession and occupation, they became entitled to hold the same as their *khudkasht*. In any event they contended that the plaintiffs had no right to sue them for an ejectment in a rent Court. The Assistant Collector who tried the case seems to have gone very carefully into the evidence and to have framed proper issues. There has been some controversy before us whether, on the pleadings of the two parties, S. 199 of the Tenancy Act did or did not apply; if it did apply, then the question of proprietary title was tried by the Assistant Collector, and there has been no contravention of the provisions of that section. The conclusion arrived at by the Assistant Collector was that, although according to the village records both the plaintiffs and the contesting defendants, Har Prasad Rai and others, held proprietary rights in respect of the land in suit, nevertheless there had been a private partition amongst the co-sharers, not carried out through the agency of a Revenue Court, and not recognised in the revenue papers, according to

which private partition the plots of land in suit constituting the occupancy holding of Ram Naresh had been assigned wholly to the plaintiffs. On this finding principally, the Assistant Collector decreed the suit for ejectment. There was an appeal by Har Prasad Rai and his co-defendants to the Court of the District Judge. The District Judge, affirming the findings of the Assistant Collector, dismissed the appeal, On a second appeal being brought to this Court, a learned Judge of this Court has reversed the findings of both the Courts below, and has dismissed the suit. We are not quite clear as to the attitude of the learned Judge of this Court with regard to the finding of the lower appellate Court on the question of the separate title of the plaintiffs. He treats that finding as amounting to no more than this, that there had been an arrangement for convenience of collection amongst the various co-sharers of the mahal, by which the right to collect rent from Ram Naresh had been assigned to the plaintiffs alone. He clearly intends to hold that such an arrangement would not amount to a partition of the land amongst the various co-sharers, or to a surrender on the part of Har Prasad and others of their interests in the proprietary rights over the land in suit, in return for a similar surrender on the part of the plaintiffs of their interests in the proprietary rights over other lands forming part of the same mahal.

We do not think however that the finding of the learned District Judge can be interpreted in the way in which it has been in this Court. The finding itself is embodied in the words :—" I hold that under a private partition the plaintiffs respondents are the proprietors in exclusive possession of plot No. 879 and that they are entitled to eject the defendants appellants." Moreover, this finding is to be read in connection with the judgment as a whole, and also with the judgment of the Assistant Collector which was then under appeal. We think that both the trial Court and the lower appellate Court intended to find, and did find, that there had been a private partition of the mahal, by virtue of which the land in suit had been assigned exclusively to the plaintiffs.

It will hardly be contested that the co-sharers in a mahal have a right to effect a partition by private arrangement amongst themselves, and that it may be the most convenient method of effecting such a partition to assign the entire holding of a particular tenant to a particular group of co-sharers. The only difference between a partition effected by a private arrangement and one properly carried out under the orders of the Court is that the incidents of the private partition are difficult to prove, and that confusion and litigation may arise afterwards owing to the preparation of village records which are at variance with the actual facts. We cannot, however, in this case allow the clear finding of the lower appellate Court in favour of the plaintiffs on this question of partition to be disregarded.

The other point taken by the learned Judge of this Court is that in any event the defendants Har Prasad Rai and others are not tenants of the plaintiffs, and he seems to think that there was something dishonest in the procedure adopted by the plaintiffs in bringing the present suit, as a suit for ejectment of tenants, in the rent Court, instead of proceeding against Har Prasad Rai and others as rival claimants to the proprietary rights, by a corresponding suit instituted in a Court of Civil jurisdiction.

It seems to us at least doubtful whether, in the events of the plaintiffs having adopted the course suggested by the learned Judge of this Court, Har Prasad Rai and his co-defendants would not at once have taken shelter behind Dukhit and set up the plea that unless and until Dukhit's tenancy were extinguished no suit for ejectment would lie elsewhere than in the rent Court. At any rate, the position of the plaintiffs is in our opinion clear and maintainable on the facts alleged by them and found in their favour. Apart from the provisions of S. 34 of the Tenancy Act, when once the Court has found in favour of the exclusively proprietary title of the plaintiffs, there

remains the fact, alleged in the pleadings and not seriously controverted, that Har Prasad Rai and his co-defendants were left into possession by Dukhit. Either they are transferees of whatever rights Dukhit possessed under his mortgage, in which case they are just as much the tenants-at-will of the plaintiffs as Dukhit himself was, or they are in the position of sub-tenants who have paid Dukhit a premium instead of an annual rent. This has been made still clearer by pleadings entered by Har Prasad Rai and his co-defendants in the 3rd paragraph of their written statement. We think the learned Judge of this Court was wrong and that he should not have interfered with the decision of the lower appellate Court. We set aside the decree of this Court and restore that of the lower appellate Court, allowing the plaintiffs their costs of both hearings in this Court, including fees on the higher scale.

Appeal allowed.

1924 ALLAHABAD 59

WALSH AND KANHAIYA LAL, JJ.

Muiz-ud-din—Decree-holder — Appellant.

v

Mohammad Ikhlaq and another—Judgment-debtors—Respondents.

E. F. A. No. 92 of 1922 Decided on 1st May 1923 from the decree of the Dt. J., Farrukhabad.

Mahomedan Law — Wagf — No proper nomination of mutwalli—Mutwalli de facto *was appointed.*

When there was no proper nomination of a Mutwalli, a *de facto* mutwalli was allowed to take charge of the trust subject to any suit, by the person interested for his removal.]P 59 C 2]

S. N. Sen—for Appellant.

Mustaq Ahmad (*for S. N. Sulaiman*)—for Respondents.

Kanhaiya Lal, J.—The question for consideration in this appeal is whether Sheikh Muiz-ud-din is entitled to obtain a refund of the money due to Bashir-ud-din, the late *de facto mutwalli* of the trust. It appears that a suit was filed by certain persons to dislodge Bashir-ud-din from the position of the *mutwalli* of the trust. That suit was decreed by the trial Court, and a Board of Trustees was appointed, to whom Bashir-ud-din was directed to pay certain trust money and costs. Subsequently that decree was set aside by this Court, which came to the conclusion that Bashir-ud-din had acted as a *de facto mutwalli* of the trust sufficiently long to be entitled to remain in possession of the trust property as such. By virtue of the decree of this Court Bashir-ud-din became entitled to claim a refund of the trust money and costs, which he had meanwhile paid to the judgment-debtors. A portion of the said money was realised by Bashir-ud-din in the life-time. An application was now made by his son, Muiz-ud-din, for the recovery of the balance. His allegation is that he was appointed by Bashir-ud-din, the late *mutwalli*, as his successor to the office, but the evidence adduced by him on that point was disbelieved by the Court below, and we are not prepared to differ from that view.

It appears, however, that on the death of Bashir-ud-din, Muiz-ud-din succeeded in getting mutation of names effected in his favour in respect of the trust property, and that he has since then been in possession of the trust property as the *de facto mutwalli* of the trust. In that capacity we think he is entitled to claim a refund of the monies, provided he agrees to credit the same to the trust and to duly account therefor to the person or persons who may hereafter be declared lawfully entitled to the *mutwallishiip*. It is urged on behalf of the judgment-debtors respondents that the payment of the money to Muiz-ud-din should be withheld, till the question of *mutwallishiip* is finally decided by a competent Court. The judgment-debtors cannot be allowed to hold back the trust moneys; but in the interest of the trust, we consider it advisable that we should not allow Muiz-ud-din to withdraw the money, which may be realized by execution, if the opposite party take steps within a reasonable period to get the question of the *mutwallishiip* to the trust adjudicated in a proper Court.

We allow the appeal accordingly and setting aside the order of the Court below, allow the execution to proceed subject to the condition that the money realized by execution or paid into Court shall remain in deposit until adequate security is filed to the satisfaction of the Court below for a refund of the same to the person entitled or for a period of 6 months in order to enable the judgment-debtors to contest the right of Muiz-ud-din to act as the lawful *mutwalli* of the trust in succession to his father Bashir-ud-din. If no suit is filed within the period to contest the validity of that office, Muiz-ud-din will be entitled to withdraw the money from Court without such security. If a suit is filed, the money shall remain in deposit till such security is filed or the question of the right of Muiz-ud-din to succeed to the office of *mutwalli* is determined in due course. The parties will, under the circumstances, bear their own costs of this appeal.

Appeal allowed.

✱ 1924 ALLAHABAD 60

LINDSAY AND SULAIMAN, JJ.

Bhairo Tewari—Defendant—Appellant.

v.

Ramnath Rai (Plaintiff), and *Deokali Kuer* (Defendant)—Respondents.

S. A. No. 100 of 1922, Decided on 5th July 1923, against the Dt. J., Ghazipur, D/- 17th September, 1921.

Pre-emption—Perpetual lease—Premium, almost equal to value, and small rent do not constitute sale.

Where a perpetual lease was sought to be pre-empted on the ground that the lease was in fact a sale.

Held: that the relation of the premium paid to the value of the property and smallness of the rent would not in themselves be sufficient to prove that the transaction was a sale and not a lease. 33 A. 104 Dist, 16 A. L. J. 333 Ref. [P 61 C 2]

M. L. Agarwala—for Appellant.

U. S. Bajpai—for Respondents.

Sulaiman, J.—This is a defendant's appeal arising out of a suit to pre-emt two transactions dated the 18th June 1919 and the 16th September, 1919 in the form of perpetual leases. It was conceded on behalf of the plaintiff that there was no custom of pre-emption with respect to leases but his case was that these transactions were in effect sale deeds in the garb of leases and were therefore liable to pre-emption.

On behalf of the defendant it was denied that these transactions were sale transactions. It may now be taken as undisputed that if these transactions were sale transactions then the defendants admit that they were liable to pre-emption,

Both the Courts below however came to the conclusion that these two transactions were sale transactions and not leases. They accordingly decreed the suit.

The defendant Bhairo Tewari has come up in appeal to this Court and on his behalf the finding referred to above is challenged.

Both these documents are similar in their nature and it will be quite sufficient for our purposes to consider any one of these.

The first one purports to be a perpetual lease of 5 bighas 5 biswas and 8 dhurs for a premium of Rs. 493/-, the rent reserved being Rs. 5/5/-. The lease goes on to provide that the lessee, generation after generation, shall be entitled to remain in possession of the leased property as *pattadar* and would have the right to have his name recorded in the revenue papers as tenant and perpetual *pattadar*; that he would be liable to pay the rent reserved year after year and instalment after instalment; in the event of the rent falling in arrears the lessor would have all the rights of an owner with respect to its realisation, but that there would be no right to have the lease cancelled, the rent enhanced or to eject the lessee.

According to the calculation made by the lower appellate Court the Government revenue came to about 12 annas per bigha and rent reserved at Re 1/- per bigha. It was on this calculation that the Courts below were of opinion that the rent reserved was a nominal one.

In our opinion it is impossible to construe these documents as sale deeds.

It is clear that the lessor and his representatives would, for all time to come, have the right to recover the rent reserved though it may be small. They would also under the law have the right of reversion in case the line of the lessees became extinct. As under the terms of this document the proprietary interest of the lessor has not ceased, there could possibly be no escheat to Government. The liability to pay Government revenue rests on the lessor, and it is difficult to see how he can escape it. It is inconceivable how at any future time it could be open to any of the representatives of the lessee to deny that the transaction was anything other than a lease or to refuse to pay rent. In spite of the direction as to non-enhancement of the rent, it is clear that if at the next settlement the Government revenue were to be increased the lessee would be bound under S. 49 of the Agra Tenancy Act to submit to an enhancement of the rent or to allow the lease to be avoided. So long as these rights are reserved to the lessor it is impossible to hold that this transaction is an out and out sale. It cannot be said that this document amounts to a deed of sale without also saying that the provision as to the payment of rent was unenforceable. But it is not permissible for the lessee to urge this as it will be tantamount to pleading an agreement in variation of the terms of the registered document which S. 92 of the Indian Evidence Act prohibits.

The learned Vakil for the plaintiff has strongly relied on the case of *Lalji Misir* v. *Jaggu Tewari* (1). The decision in that case however turned on the word "*intiqal*" which was held to be comprehensive enough to include leases. In the course of the judgment there was a remark that the transaction was in reality a sale. It is possible that the Court did not thereby mean anything more than that for all practical purposes it was a sale.

In the case of *Muhammad Niaz Khan* v. *Muhammad Idrees Khan* (2) the main consideration which influenced the judgment was that although the question had been raised in the pleadings, and there was a clear finding by the first Court that the disputed transaction was a sale, the lower appellate Court omitted to consider it. The case is really an authority for the view that a Court is bound on the issue being raised to consider the real nature of the transaction. We do not think that it could have been intended that the relation of the premium paid to the value of the property and the smallness of the rent would in themselves be sufficient to prove that the transaction was a sale and not a lease. In England pepper corn rents are well-known.

Of course, it is possible to conceive of a case where for instance, soon after the lease, there is a subsequent registered agreement giving up the right to recover rent or where the lease is followed by a surrender. The Court may then come to the conclusion that the two agreements were part and parcel of one and the same transaction, namely, a sale. There may also be cases where a sale is clothed in the garb of a usufructuary mortgage, the money advanced being equal to the value of the property and the terms such as to allow interest to go on accumulating so that year after year it becomes more and more impossible to redeem it. Then again there may ostensibly be deeds of gift, where consideration is paid privately. It is obvious that in all such cases the finding that the transaction amounted to a sale does not involve any variation of the terms of the registered contract.

The only ground on which the lower appellate Court has proceeded is the circumstance that a large premium has been paid and the rent reserved is very small. There are no other circumstances on which reliance has been placed. The inference drawn by the lower appellate Court that the document must be construed as a deed of sale cannot therefore be treated as a finding of fact.

(1) [1911] 33 All. 104—7 A. L. J. 1022—7 I.C. 930.
(2) [1918] 40 All 322—16 A.L.J. 233—44 I.C. 227.

We accordingly allow this appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs including in this Court fees on the higher scale.

Appeal allowed.

1924 ALLAHABAD 62

WALSH AND KANHAIYA LAL, JJ.

Har Prasad and another—Judgment-debtors—Appellants.

v.

Raghubar Dayal — Decree-holder — Respondent.

E. F. A. No. 255 of 1922, Decided on 14th May 1923 against the decree of the Sub. J., Pilibhit, D/- 5th April 1922.

Civil P. C., S. 151—Executing Court cannot go behind the decree.

A deeree was passed in terms of an award. There was a clear mistake in the map filed with the award. The executing Court examined the head arbitrator who deposed that the map was incorrect.

Held : that the procedure adopted by the executing Court was wrong and his order passed thereon must be set aside,

G. W. Dillan—for Appellants.

Iqbal Ahmad—for Respondent.

Judgment.—In this case in the course of an application in execution to enforce a decree passed in terms of an award, the learned judge has gone into the merits, and finding on the evidence that a mistake had been made in the demarcation of a dividing line as shown upon a map which became a part of the decree, he has endeavoured to amend the mistake by giving effect to what he considers the real intention of the Arbitrators. It is quite clear that no execution Court has any jurisdiction to do anything of the kind. It may be that by an unfortunate chapter of accidents, the decree-holder has suffered loss by reason of the decree not in fact representing the true intention of the Arbitrators, and at first sight it may seen illogical for a Court of justice to refuse to remedy a mistake of that kind, but when the matter is carefully considered it is clear that no such icrticism can really be made. The decision of Arbitrators is final. If there is, on the face of the award, a patent inconsistency, such as a flat contradiction in measurement, or a mistake of arithmetical calculation, it is open to the Court to which application is made for filing the award, on a patent error of that sort being pointed out, to send the award back to the Arbitrators to correct it before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings and there is therefore a preliminary objection to the order of the barned Judge in any case. In this case a description of the dividing line is to be found in the language of the award itself and a further demonstration of the dividing line has been shown upon a map accepted by the Arbitrators and made part of the award ; therefore it is extremely doubtful whether a Court would have jurisdiction to go into the question whether the line as shown by the map was correct. That would mean really rehearing the arbitration on the merits so far as this particular point is concerned. The vice of the Court taking upon itself the decision of such a question as that is illustrated in this case by the learned Judge having taken the evidence of what is called the head Arbitrator, who says, looking at the map, that he accepted it in a hurry and that in his opinion, now looking at the terms of the award, the map is incorrect. But whatever his opinion may be to-day, it by no means follows that that opinion so expressed by him, after looking at the document, was the unanimous opinion of the Arbitrators, and therefore in any case it would appear that the only course open to a Court, under such circumstances, would have been to set aside the award and to send it back to the Arbitrators to rehear and to re-decide the question of this dividing line. However it is not really necessary to express a final opinion on that point, because this award including the map was filed by the judicial act of a competent

Court after all the parties had been heard. A decree was passed and the map now in question became a part of the decree. It is quite clear that such a decree including the map can not be altered by the Court exercising jurisdiction in execution. The appeal therefore must be allowed and the order set aside with costs including fees on the higher scale.

Appeal allowed.

1924 ALLAHABAD 63

RYVES AND DANIELS, JJ.

Mathura Prasad—Defendant—Appellant.

v.

Mt. Anandi Kunwar Plaintiff *and Mt. Jagrani* Defendant — Respondents.

S. A. No. 386 of 1922 Decided on 14th May 1923 from the Add. Dt. J., Cawnpore D/-19th December 1921.

(a) *Evidence Act, S. 115—Deliberate act causing change in status creates estoppel.*

A person who deliberately by his own act got the name of another entered as owner of half the property cannot subsequently plead that he really was the owner of the whole property. [P 64 C 1]

(b) *T. P Act, S 41—Revenue records are sufficient data for inquiry.*

Where the property stood in the name of the vendor in the revenue records,

Held: the purchaser need not have made further enquiry as to the vendor's interest in the property. [P 63 C 2, P 64 C 1]

K. Varma and Badri Narain—for Appellant.

Gulzari Lal—for Respondents.

Ryves, J.—In our opinion this appeal must succeed. The facts very briefly are as follows. Mathura Prasad on the 20th November 1917 in execution of a simple money decree held by Kashi Prasad against Musammat Jagrani Kunwar purchased the property now in suit which was recorded in her name. Two years subsequently this suit was filed by the plaintiff Musammat Anandi Kunwar for a declaration that Mathura Prasad had acquired no title by his purchase because the property did not belong to Musammat Jagrani Kunwar at all, but to herself, the plaintiff. Mathura Prasad among other pleas, pleaded that the plaintiff had held out that Musammat Sheorani Kunwar was the owner of an eight annas share in Mauza Kaendipur in which the property in suit is situated and that her claim was barred "by the principle of estoppel and under S. 41 of the Transfer of Property Act." Both Courts have decreed the suit.

The defendant Mathura Prasad appeals on the ground that on the findings of fact the suit should have been dismissed. The findings arrived at by the lower Court may be summarised briefly as follows that Bhairon Prasad was the last surviving male owner of the property in suit. During his life-time however his mother, Musammat Munna Kunwar and her two sisters were recorded as owners of 1/3rd each. He died in 1884 leaving Musammat Anandi Kunwar his widow. Instead of her name being recorded that of his mother, Musammat Munna Kunwar and two of her sisters' remained recorded as owners of one-third each of the property Both these sisters died before Musammat Munna Kunwar and she was eventually recorded as the sole owner. She died in 1907. Thereupon a dispute arose between Musammat Sheorani Kunwar the mother of Musammat Jagrani Kunwar and the plaintiff in the mutation proceedings and ultimately on the admission of Musammat Anandi Kunwar herself Musammat Sheorani Kunwar was recorded as owner of half the property. Musammat Sheorani Kunwar died in 1914 and then Musammat Jagrani Kunwar was entered as owner of the half in place of her mother.

This was the position of things when in 1917 Mathura Prasad, who lived in another village and had no connection with the family, bought the property at the execution sale It seems to us that there was really nothing to put him on inquiry. The property had been entered in the name of Musammt Jagrani Kunwar and her mother ever since 1907. If he had looked at the mutation proceed-

ings he would have seen that Musammat Anandi Kunwar was a party to those proceedings. It seems to us that as there was nothing to put him on inquiry the principle underlying S. 41 of the Transfer of Property Act would apply. But in any case we think it is not open to Musammat Anandi Kunwar, who in 1907 deliberately by her own act got the name of Musammat Sheorani Kunwar entered as owner of half the property now to plead that she really was the owner of the whole property. In our opinion she is estopped from doing so. We therefore allow the appeal and dismiss the plaintiff's suit so far as it concerns the property entered as no. 1 in the schedule attached to the plaint, with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

1924 ALLAHABAD 64

DANIELS, J.

Chhuttan and another—Objectors—Appellants.

v.

Jwala Prasad — Decree-Holder—Respondent.

Ex. S. A. No. 1051 of 1922 Decided on 5th April 1923 from the D. J., Bareilly, D/-13th May 1922.

(a) *Appeal—Decision wrong as being under S. 144—Appeal lies.*

Where one of the issues, which the Judge of the Court below had to decide, was whether the case was covered by section 144 C. P. C. and he applied his mind to the question and decided it.

Held: that the appellant cannot be deprived of his right of appeal because one of his grounds for challenging the decree is that the decision on this issue was wrong. [P 65 C. 1.]

(b) *Civil P. C., S. 145—Court cannot call on Supuratdar to produce property in a different suit.*

A Court cannot call on supurtdar to produce property in a suit in which he was not appointed supurtdar. [P. 65 C. 2.]

(c) *Civil P. C., S. 144—Applicability.*

S. 144 only applies where a decree has been set aside in appeal or otherwise. [P. 65 C. 2.[

U. S. Bajpai—for Appellants.

N. P. Asthana—for Respondent.

Judgment.—This appeal is brought against an order which purports to be made under S. 144 C. P. C. in suit No. 789 of 1907 filed by the respondent Jwala Prasad against Sewa Singh and certain other defendants. In that suit Jwala Prasad caused the produce of 37 plots to be attached. The present appellant Sheikh Chhuttan asked that the sale of the crops might be stayed on account of a declaratory suit which he was filing. He did file such a suit against Jwala Prasad and certain third parties on 13th April 1920 for a declaration that the crops in dispute were not liable to sale under Jwala Prasad's decree but were the property of tenants cultivating from him on a *batai* rent so that he, Sheikh Chhuttan, was entitled to half the crops. Sheikh Chhuttan's suit was decreed by the Court of first instance. While this suit was pending an application was made by him to have the crops made over to a *supurtdar* and they were made over to two persons, Khumani who was a servant of Sheikh Chhuttan and one Sewa Singh. In some way which is not explained the crops were subsequently entrusted to Sheikh Chhuttan's son the second appellant Kalim-ud-din. After Sheikh Chhuttan's suit was decreed Kalim-ud-din made over half of the crops to his father and the other half to the tenants. This was about October 1920. On 28th July 1921 Sheikh Chhuttan's suit was dismissed in appeal.

Jwala Prasad's application for execution of his decree had remained pending from 28th February 1920. Thereupon on 2nd May 1921 the decree-holder Jwala Prasad filed an application which is on the record asking that the grain might be brought to sale and stating that he would take separate proceedings for the loss caused to him by the wrongful suit of Sheikh Chhuttan. The Court then issued notice to the *supurtdar* to produce the property for sale. Notice seems to have been served on Kalim-ud-din for the order-sheet contains an order of the Court dated 17th December 1921 stating that he objects that he was not *supurtdar* in this case but in the case instituted by his father. The Court overruled this objection on the ground that the property was attached in Jwala Prasad's suit and

that the attachment became subject to the result of the suit subsequently filed by Sheikh Chhuttan. The Court held that Kalim-ud-din was bound to produce the property and that, being unable to do so by reason of having given it to other persons without authority from the Court, he was bound to deposit the price. Ultimately on 1st September 1922 the order out of which the present appeal arises was passed against Sheikh Chhuttan and Kalim-ud-din directing them to pay Rs. 1000 in respect of the attached crops wrongfully appropriated by them. An appeal was preferred to the District Judge. To this appeal a preliminary objection was taken that no appeal lay ; the learned Judge held that S 144 C. P. C. applied but on the merits considered that the Munsif's order was correct and declined to interfere.

The appellant's case in this Court is that the Courts below had no jurisdiction to pass an order against the appellant in execution proceedings in Jwala Prasad's suit. It is urged that neither Kalim-ud-din nor Sheikh Chhuttan was a party to that suit and further that the proceedings by which a *supurtdar* was appointed, and in which the alleged act of wrongful misappropriation was committed, took place in Sheikh Chhuttan's suit No. 231 of 1920 and not in Jwala Prasad's suit. It is therefore contended that Jwala Prasad's only remedy against the appellants was to institute a regular suit against them, as in the case of Sheikh Chhuttan he originally declared his intention of doing.

On behalf of the respondent decreeholder it is contended that Kalim-ud-din was *supurtdar* in Jwala Prasad's case and as such is liable and it is further urged that, as on the appellant's own contention the case is not covered by S. 144 C. P. C., no appeal lies to this Court.

I have no hesitation in overruling the preliminary objection. One of the issues which the Judge of the Court below had to decide was whether the case was covered by S. 144 C. P. C. He applied his mind to the question and he decided it, and the appellant cannot be deprived of his right of appeal because one of his grounds for challenging the decree is that the decision on this issue was wrong.

On the merits it is difficult to see how any proceedings under S. 144 C. P. C. could possibly be taken against the appellants in Jwala Prasad's case. Kalim-ud-din at any rate was no party to that case either in the original Court or in the execution proceedings. The order appointing him *supurtdar* was made in the suit filed by Sheikh Chhuttan. His position being substantially that of a receiver under Chapter XL of the Code the Court might in that suit have called on him to produce the crops or their value. It could not do so in a suit to which he was an entire stranger. Sheikh Chhuttan's only connection with Jwala Prasad's suit was the fact that he applied to have the sale of the crops stayed on the ground that he was going to file a separate suit in respect of them. Whatever further proceedings were taken by him were taken in his own suit. Moreover S. 144 only applies where a decree has been set aside in appeal or otherwise. The only decree which has been set aside is the decree in Sheik Chhuttan's suit. Whatever remedy the respondent had against the appellants was either by application in Sheikh Chhuttan's suit, to which the respondent was a party or by a separate suit. The present proceedings on his part were entirely misconceived. I therefore allow the appeal and set aside the decree against the appellants. As the appeal is allowed on a technical point I award no costs. The parties will bear their own costs in all Courts.

Appeal allowed.

✱ 1924 ALLAHABAD 65

RYVES AND DANIELS, JJ.

Mt. Aftab Begum and another—Plaintiffs—Appellants.

v.

Muhammad Ayub and others—Defendants—Respondents.

S. A. No. 1661 of 1922. Decided on 28th May 1923, from the Dt. J., Saharanpur, D/- 19th May 1922.

Substituted security—Doctrine does not apply in favour of strangers.

The doctrine of substituted security only applies where possession of a particular property has been awarded to one party in lieu of an undivided share in the whole property which was the subject of partition It does not apply when the entire property mortgaged belonged to the mortgagors and a person with no title has subsequently obtained possession of a portion of it behind the back of the mortgagees. [P 66 C 2]

S. N. Sen and *Mushtaq Ahmad*—for Appellants.

K. N. Katju—for Respondents.

Daniels, J.—This appeal has been argued on one single point. It relates to a shop in Landour, which together with other properties was mortgaged by the first four defendants to the defendants Nos. 5 to 12. These defendants brought a suit against their mortgagors and obtained a decree. In execution of that decree they have applied for the sale of the house in suit. The present suit was instituted by the plaintiff for a declaration that the shop was not liable to sale. The plaintiff has died during the course of the proceedings and the appellants are his heirs. The facts on which they based their claim are that in 1905. the 13th defendant instituted a partition suit against the first four defendants, and obtained a decree declaring her right over 4 sihams out of 84 in this shop and in 9 other houses and a grove. These partition proceedings were subsequent to the mortgage, and the mortgagees were not parties to them. The partition decreee is therefore not binding on the mortgagees. The plaintiff's case, and the case on which the defendant No. 13 obtained partition, was that the shop originally belonged to one Ghulam Muhammad, whose heirs were admittedly the first four and the 13th defendants. It is now found as a fact by both the Courts below that this particular shop did not belong to Ghulam Muhammad. The 13th defendant therefore had no right to any share in it, and as regards this shop had no right to the partition decree which she obtained. In the partition which was subsequently carried out she was allotted 6/7th of the shop in suit. Her rights have been subsequently transferred to the plaintiff. The appellants' contention is that the doctrine of substituted security should be applied, and that the mortgage instead of attaching to the properties mortgaged should be transferred to the properties which the first four defendants obtained in lieu of the 6/7th share given to the 13th defendant in this house This contention has been repelled by the Courts below, and in our opinion rightly so. The doctrine of substituted security only applies where possession of a particular property has been awarded to one party in lieu of an undivided share in the whole property which was the subject of partition. It does not apply when the entire property mortgaged belonged to the mortgagors, and a person with no title has subsequently obtained possession of a portion of it behind the back of the mortgagees. The mortgage when executed was a perfectly valid mortgage, and the mortgagees are entitled to take out execution against any portion of the mortgaged property. Their right cannot be affected by any subsequent transfer to the plaintiff or his predecessor-in-interest. We accordingly affirm the decision of the Court below and dismiss the appeal with costs.

Appeal dismissed.

1924 ALLAHABAD 66

MEARS, C.J. AND PIGGOTT, J.

Bu Ali Khan—Defendant—Appellant.

v.

(*Rani*) *Sujan Kuer*—Plaintiff—Respondent.

P. C. A. No. 3 of 1923, Decided on 25th May 1923.

Civil P, C., S. 110—Substantial question of law—Abatement under O. 22 R. 9—Effect—Adoption—Divesting of estate.

The question, whether a suit was not maintainable, because a previous action commenced by the predecessor in interest of the plaintiff had abated under Order 22 rule 9, is not a substantial question of law within the meaning of S, 110. [P 67 C 1]

A suit was instituted by a Hindu widow in possession of the estate of her late husband, During the pendency of the suit she adopted a son. At some stage in the trial the question was raised whether, after this adoption, it was not incumbent upon the lady to

bring upon the record as plaintiff in the suit the name of the minor boy and then to continue the action as his next freind. The contention was repelled by the trial Court. There was at the time of the adoption an agreement between the lady herself and the father of the boy the effect of which was to vest the management, at any rate, of the estate in the hands of the lady until the boy should attain majority, [P 67 C 2]

Held: the question whether the widow could be allowed to proceed with the suit was not substantial question of law, [P 68 C 1]

Haidar Mehdi—for Appellant.

P. L. Banerjee and *U. S. Bajpai*—for Respondent.

Piggott, J.—The question before us is whether we can or ought to certify that the appeal proposed to be preferred by the unsuccessful defendant appellant, against a decision of this Court, dated the 3rd of August 1922, satisfies the conditions laid down by S. 110 of the Code of Civil Procedure, so as to make it a proper case for an appeal to His Majesty in Council. As regards the value of the subject matter in dispute it is admitted that the requisite conditions are fulfilled. It is however also admitted that inasmuch as this Court affirmed the decision of the Court below, this appeal must involve some substantial question of law before we can certify it as a suitable appeal to be preferred to His Majesty in Council. We had to deal in substance with two points, and the petition laid before us to-day shows that these are the points which it is desired to raise before His Majesty in Council. Neither of these points has anything whatever to do with the merits of the case. They were both of them objections of a highly technical character, not affecting the right of the plaintiff in the action to recover the money claimed, but only the procedure adopted in the course of the action for its recovery. One contention was that the suit was not maintainable, because a previous action commenced by the predecessor in interest of the plaintiff had abated under Order 22 rule 9 of the Code of Civil Procedure. We disposed of this technical objection by an argument, also technical in its nature, the effect of which was that it was quite impossible to hold that the previous suit referred to in the pleadings had "abated" within the meaning of the rule in question. We are in no way prepared to certify that the question thus decided by us was a substantial question of law within the meaning of S. 110 of the Code of Civil Procedure.

The other point requires to be stated in some further detail. The suit was instituted by Rani Sujan Kunwar as a Hindu Widow in possession of the estate of her late husband. uring the pendency of the action she adopted a son. At some stage or other in the course of the trial the question was raised whether, after this adoption, it was not incumbent upon the lady to bring upon the record as plaintiff in the suit the name of the minor boy whom she had adopted and then to continue the action as his next friend or natural guardian. This contention was repelled by the trial Court. We pointed out, when it was raised before us in appeal, that it would have been open to the trial Court to accept the contention and to meet it by a formal order bringing the minor in question on to the record. At the same time, having regard to certain facts which were proved at the trial as to the circumstances under which the adoption was effected, we found that the Court below had not been wrong in the procedure actually adopted by it, that is to say in permitting the widow lady to continue the action in her own name. There was the time of the adoption an agreement between the lady herself and the father of the boy who was given and taken in adoption, the effect of which was to vest the management, at any rate, of the estate in the hands of the lady until the boy should attain majority. It is now contended before us that a substantial question of law is here involved, because of the general principle of Hindu law by which a widow, making an adoption to her deceased husband, at once divests herself of the estate in favour of the son so adopted. Our attention has been drawn to certain cases in which the question has been considered whether an agreement entered into at the time of the adoption, the object of which is to postpone its effect until the death of the widow, would be valid or

enforceable as against the adopted son. In the case before us the validity of the agreement is not being contested, and so far as we know has never been contested, by the adopted son. It is the plaintiff in the action, that is to say the widow, who is seeking to protect the rights of the minor by continuing this action for his benefit. She instituted it at a time when she herself represented the estate of her late husband. She has been permitted to continue it on the strength of the authority exercisable by her under the agreement entered into at the time of the adoption. We are not prepared to certify that any substantial qsestion of law of general importance is involved in our decision on this point.

The application is dismissed with costs including fees on the higher scale.

Application rejected.

1924 ALLAHABAD 68

DANIELS, J.

Devi Prasad. — Decree-holder. — Appellant.

v.

Secy. of State for India.—Objector—Respondents.

Civ. Rev. No. 14 of 1923 Decided on 19th April 1923 from the S. C. C. J. of Allahabad, D/- 26th Sept. 1923.

Civil P. C., S. 60—Provident Funds Act (IX of 1897)—The fund does not become attachable till paid.

The deposit in the provident fund does not become attachable, on the retirement of the subscriber, until that money is paid out to him.

29 B. 259; 46 C. 962 Foll. [P 68 C 2]

I. B. Banerjee.—for Appellant.

L. M. Banerjee.—for Opposite-Party.

Daniels, J.—This is a revision from an order of the learned Judge of the Small Cause Court, Allahabad. The point for decision before him was whether a deposit in a provident fund, which so long as the subscriber was in service was a compulsory deposit within the meaning of S. 2 (4) of the Provident Funds Act (Act IX of 1897) became attachable by a creditor the moment the subscriber retired. The subscriber in this case has retired but has not yet drawn his deposit. The learned Judge of the Court below has followed the decision in *Veerchand* v. *B. B. and C I. Ry.* and has held that the deposit is not attachable. The learned Judges took the view that compulsory deposit in the Act was a term with a technical meaning and that a deposit which came within the definition remained a compulsory deposit until it was actually drawn out. The subscriber's retirement made no difference to its nature. The same view, as was held in Bombay, has been taken by the High Court of Calcutta, in *Hindley* v. *Joynarain* (2), in which the Bombay case, was followed and approved. Another Bombay case, *Nagin Das* v. *Ghelabhai*, (3) has gone even further and held that the deposit is protected even after payment to the subscriber. It is not necessary to go to the length of the last mentioned decision in the present case. Against the authority of two High Courts the applicant can only cite an earlier single Judge case of the Bombay High Court which was overruled in the case relied on by the Court below. The learned pleader for the applicant has attempted to distinguish the Bombay ruling on the ground that it was optional with the subscriber in the first place whether to join the Provident Fund or not. This makes no difference in view of the definition contained in S. 2 (4) of the Act. The question, whether a deposit is a compulsory deposit, depends on whether it was repayable on demand or at the option of the subscriber. Under the Provident Fund rules which have been placed before me the deposit in this case was not so repayable. It is also urged that in certain cases an advance might be given to the subscriber out of the deposit even before retirement. This also does not affect the question of law involved, for this advance could only be given under the orders of the sanctioning authority for special cause shown and not at the option of the subscriber. The weight of authority is distinctly in favour of the view taken by the Court below and I dismiss the application with costs.

Application dismissed.

---

(1) [1905] 29 Bom. 259-6 Bom.L.R. 921

(1) [1919] 46 Cal. 962—24 C.W.N. 288—54 I. C. 439.

(2) [1920] 44 Bom. 673—22 Bom. L. R. 322—56 I. C. 449.

✱ 1924 ALLAHABAD 69

MEARS, C. J. AND PIGGOTT, J.

Kashi Nath—Applicant.

v.

King Emperor—Opposite Party.

Mis. Case No. 18 of 1923 Decided on 31st May 1923 from the Dt. and S. J., Benares, D/-3rd October 1922.

Legal Practitioners Act, S. 36—High Court can revise order under S. 36.—Decision of D. J. against the weight of evdence is no ground for interference.

The High Court in the exercise of its discretion can send for the record of an enquiry conducted by a District Judge with a view to drawing up a list of persons proved to be touts, and examine such record and thereafter issue such orders or instructions to the District Judge as might appear to be proper. High Court would not interfere in the exercise of its powers of superintendence, where the sole ground upon which interference was asked for was that the decision of the Dt. Judge was against the weight of the evidence. The intention of the Legislature was not to allow anything of the nature of an appeal against the decision of a competent Court under S. 36 of Act No. 18 of 1879. High Court cannot consider whether the circumstantial evidence relied upon by a Dt. Judge, and set forth in his order, was or was not evidence from which High Court would have drawn the same inference. [P 69 C 2]

J. M. Banerjee—for Applicant.

L. M. Banerjee—for Opposite Party.

Piggott, J.—We have before us four applications from persons in respect of whom the District Judge of Benares has passed an order under S. 36 of the Legal Practitioners' Act No. 18 of 1879, that is to say, the names of each one of these four persons have been put by the District Judge in a list of persons who are proved to his satisfaction, by evidence of general repute or otherwise, habitually, to act as touts. The word "tout", we may note, is defined by S. 3 of the same Act.. In the case of two of the persons concerned, namely Kashi Nath and Sarju Dat, notice was ordered to issue and the learned Government Advocate has appeared to support the order of the District Judge. The other two applications, namely those of Abdul Hamid and Sital Pandey, were simply ordered to be laid before this Bench, to be dealt with in such manner as this Court might see fit after hearing arguments in the other two cases. The learned Government Advocate has raised the general question of the right of this Court to interfere in revision with an order passed by the District Judge, or other competent Court, under S. 36 of Act No. 18 of 1879. That is a question which has more than once been before this Court; but the standard authority on the subject is the decision of a Bench of two Judges, one of them the then Chief Justice of this Court, passed in "*In the Matter of the Petition of Madho Ram*" (1) in the year 1899. We agree with the learned Judges who decided that case, that this Court could only interfere with an order, such as that now before us, in the exercise of the general powers of superintendence conferred upon it by what is now S. 107 of the Government of India Act. We are satisfied that those powers are extensive enough to authorise this Court, in the exercise of its discretion to send for the record of such a proceeding in a Subordinate Court, namely the record of an enquiry conducted by a District Judge with a view to drawing up a list of persons proved to be touts, and to examine such record and thereafter issue such orders or instructions to the District Judge as might appear to be proper. The question remains, however, what principles this Court should lay down to govern the exercise of its discretion in this matter. The learned Judges who decided Madho Ram's case above referred to laid down one principle of considerable importance. This was that this Court would not interfere in the exercise of its powers of superintendence, where the sole ground upon which interference was asked for was that the decision of the District Judge was against the weight of the evidence. We desire to stand by that principle. It is quite clear from the wording of S. 36 of Act No. 18 of 1879 that the Legislature intended to confer upon the Courts therein mentioned, including the Court of a District Judge, a very wide discretion in the matter. The District Judge is authorised to frame and publish a list of persons proved to his satisfaction, by evidence of general repute or

(1) [1899] 21 All. 181—(1899) A.W.N 15.

otherwise, habitually to act as touts. It has been pressed upon us that the word 'touts' as used in this section, refers back to the definition in the preceding section No. 3 of the same Act. This is undoubtedly so: but what is laid down in S. 36 is that the District Judge has discretion to frame and publish a list of persons who are proved to his satisfaction to behave in the manner set forth in the definition of the word "tout" in S. 3. The only qualifications imposed by the Act on the exercise of this discretion are that the District Judge must be satisfied by evidence of general repute or otherwise, and further that no person's name is to be included in such a list until he has had an opportunity of showing cause against such inclusion. We may say in this connection that we should certainly hold it a valid ground for interference by this Court, in the exercise of its general powers of supervision, if the District Judge had disobeyed this latter direction and had included in his list of touts the name of a person who had never been allowed an opportunity of showing cause against such inclusion. We return now to the obvious fact that it was never the intention of the Legislature to allow anything of the nature of an appeal against the decision of a competent Court under S. 36 of Act No. 18 of 1879. We cannot allow our general powers of supervision to be invoked so as, in effect, to create a right of appeal which was never intended by the Lagislature. In the cases now before us it is sought to bring the matter within the scope of the revisional jurisdiction, represented as falling somewhat short of the jurisdiction exerciseable by a Court of Appeal, by representing that the record of the enquiry conducted by the District Judge, discloses as against each of the four persons whose petitions lie before us no legal or relevant evidence to warrant the finding arrived at by the District Judge that they habitually do act as touts. The plain fact of the matter is that, as regards each of these four persons, direct evidence was wanting; but there was laid before the District Judge certain circumstantial evidence, from which the District Judge drew the inference as against each of these persons that they were habitually acting as touts. In our opinion it would be straining the powers of superintendence conferred on this Court and setting undesirable precedent, if we were to take it upon ourselves in every instance of this kind to consider whether the circumstantial evidence relied upon by a District Judge, and set forth in his order, was or was not evidence upon which we ourselves, would have drawn the same inference. We think the Legislature intended that the District Judge should be master in his own Court to this extent. The result is that we are not prepared to interfere in any one of the four cases before us, and each of the applications stands dismissed accordingly.

Application dismissed.

1924 ALLAHABAD 70

RYVES J.

Lallu Mal—Defendant—Appellant.

v.

Pandit Reoti Ram—Plaintiff—Respondent.

Civ. Rev. No. 51 of 1923 Decided on 31st. May 1923 from the Sm. C.C. J., Nagina D/-7th November 1922.

(a) *Evidence Act, S: 92—Proviso No. 2—Want of consideration for pronote could be proved.*

It is open to defendant who admitted the execution of the promissory note to plead want of consideration, 1922 All 213 Dist. [P 71 C 1]

(b) *Limitation Act S, 19—Admission of execution of pronote is not acknowledgment.*

On the back of the note there was in the handwriting of the defendant the words "Execution admitted" and the endorsement of the Munsif showing the date,

Held: the mere fact that in some other case the defendant merely admitted the execution of the document is not an acknowledgment of liability within the meaning of the section. [P 71 C 2]

M. N. Raina—for Appellant.

Durga Prasad—for Respondent.

Judgment.—This is a Civil Revision from a decree of the Court of Small Causes. The suit was based on a promissory note executed by the defendant on the 16th of April 1919. The suit was filed on the 28th of April 1922. The defendant

put in a written statement, the second paragraph of which runs as follows :—

"The plaintiff (who is a Jotshi) led the defendant to believe that he would perform adequate *Puja* which would have the effect of saving the lives of his children and they would survive the age of one year, and for this the defendant agreed to pay Rs. 30 to the plaintiff out of which Rs. 8 was paid in cash and the balance was payable after the child had survived the age of one year." It was on this understanding that the promissory note was written. The child died within a year of its birth and hence nothing was payable. The other ground taken was that the suit was barred by limitation, It appears from the record that five witnesses on behalf of the defendant were present but as a matter of fact the Court took no evidence at all holding that it was not open to the defendant who admitted the execution of the promissory note to plead want of consideration and reliance was placed on *Sri Ram* v. *Sabha Ram Gopal Rai* (1). I do not think that ruling is applicable in this case I think under the 3rd proviso to S. 92 of the Indian Evidence Act the Court should have allowed evidence to be taken on this point. But it is unnecessary to decide this as I hold against the plaintiff on the second point. On the face of it the suit is barred by limitation as it was not filed until the 28th of April 1922. In order to bring it within limitation it was pointed out that in some other suit (not between these parties) this promissory note had been exhibited and on that occasion, some time in 1920, the defendant had admitted its execution. The Court has held that the mere fact that on the back of the note there is in the handwriting of the defendant the words "Execution admitted," and the endorsement of the Munsif showing the date is a sufficient compliance of the provisions of S. 19 of the Indian Limitation Act. It seems to me that the mere fact that in some other case the defendant merely admitted the execution of the document is not an acknowledgment of liability within the meaning of the section. No evidence was taken and there is nothing but the endorsement. In my opinion it has not been shown that the suit was within limitation, it therefore should have been dismissed. I accordingly allow this application and set aside the decree of the Court below with costs.

Application allowed.

(1) 1922 All. 213 — 44 All 521 — 20 A.L.J. 315—67 I.C. 513.

1924 ALLAHABAD 71

WALSH, J.

Radhika Natha Saha—Applicant.

v.

Jotish Chandra Sahu—Respondent.

Criminal Mis. No. 72 of 1923 Decided on 21st May, 1923.

Criminal P. C, S. 526—Transfer of case pending in another province.

High Court has no jurisdiction to transfer criminal cases which are in the course of hearing in another province. 44 C, 595 Dist. nor has it jurisdiction to declare *e. g.* that a particular case is triable exclusively in Benares and not in Calcutta. [P 71 C 2 P 72 C 1]

Saila Nath Mukherji—for Applicant.

Judgment.—This is in my opinion in substance an application for transfer. It is apparently proposed to do it by indirect means, first getting a letter of request from Allahabad to Calcutta, then an order of stay or postponement out of the Magistrate at Calcutta, and then a declaration out of Allahabad that case is exclusively triable in Benares. Nobody can doubt that all that complicated machinery is really an application for transfer. As an application for transfer it is bound to fail. This Court has no jurisdiction to transfer criminal cases which are in the course of hearing in another province. Apparently Calcutta High Court thought otherwise in the case of *Charu Chandra Majumdar* v. *Emperor* (1). But

(1) [1917] — 44 Cal. 595—21 C.W.N. 320—25 C.L.J. 165 — 18 Cr.L.J. 81—37 I. C. 145 (F. B.)

the Madras High Court did not agree and I prefer the Madras view. All that will be wiped out as irrelevant, by the new S. 185 as amended by the Criminal Procedure Code of 1923 when it becomes law. Mr. Saila Nath Mukerji quite naturally objected to my describing the application as one for transfer, because as an application for transfer it was bound to fail, and I will therefore deal with it in the language in which this application is presented to this Court. This Court is asked to declare that this case is triable exclusively in Benares and not in Calcutta. This Court has no jurisdiction to make any such declaration, and I should not in any event, even if there were jurisdiction, make a declaration which was a nullity. Secondly this Court is asked to stay all further proceedings in the Second Presidency Magistrate's Court at Calcutta. This Court has no jurisdiction over the Second Presidency Magistrate's Court at Calcutta. The application is dismissed. The certified copies of the Calcutta proceedings are to be returned forthwith to Mr. S. N. Mukerji.

Application rejected.

✱ 1924 ALLAHABAD 72

WALSH AND KANHAIYA LAL, JJ.

Tara and others—Appellants.

v.

King Emperor—Opposite Party.

Criminal A. No. 81 of 1923 Decided on 15th May 1923. from the S. J., Bulandshahr, D/-22nd December 1922.

Evidence Act, S. 24--Inducement offered—Confession is inadmissible,

Where accused is told by a person in authority that if he makes a voluntary confession which is considered to be full and true, his prayer for being made an approver will receive due consideration,

Held, the confession made under such circumstances is inadmissible. [P 74 C 2; P 75 C 1]

G. W. Dillon—for Appellants.

The Asstt. Govt. Advocate—for the Crown.

Walsh, J.—This is a very difficult case which has given us a great deal of trouble, and the result of which probably involves a miscarriage of justice, but speaking for myself I have no doubt whatever as to the legal principles applicable to it, and as to the applicability of them to the peculiar circumstances of the various appellants before us. Now there are three cases, each of them involving a large number of alleged dacoits, who were tried together for participation in three separate dacoities, committed at different times, and at different places, but round about the same season and round about the same neighbourhood. Their connection arose more from the alleged co-operation of a large number of the accused in each of them, than from any other circumstance showing direct connection between the three dacoities. There were really four in all, and I desire to say at once, because I shall have something to say hereafter by way of criticism, that the police and the Sessions Judge were alike confronted with a difficult task.

We are dealing today witb one only of these dacoities, namely that committed at Sarai Chabila on the night between the 23rd and 24th of July, at the house of one Rate Ram and others in the same compound. The other appeals relate to dacoities committed on the 9th of March of the same year 1922, and on the 28th of June 1922. The 4th dacoity, which the Judge says was thought by the investigating officer to be closely connected with this dacoity by reason of its being carried out by the same participants, occured on the 20th of July.

We have not heard the other appeals, but we are told by the Assistant Government Advocate that in substance, and in respect of the characteristics which have evoked our criticisms of the judgment in this case, the other two appeals which are still pending do not greatly differ from this, and therefore although this decision does not govern the others, this case on the other hand must be considered to be a type of the others, and the result in the others when we reach them must be governed by the principles which we propose to lay down in this, and the criticisms which we propose to pass upon the procedure

unfortunately adopted in this case must be read with reference to the other cases *mutatis mutandis.*

It cannot be denied that the general characteristics in this case at any rate, and we are told both by the counsel for the defence and by the Assistant Government Advocate that the same characteristics apply to the other appeals, resemble more gang case, in which the evidence obtained by the police, mainly through approvers of association, and active participation in planning and preparation and so forth, are applicable to a class of persons varying in number who have set out to commit a series of joint crimes. The learned judge himself, as shown by his judgment experienced insuperable difficulty in avoiding reference to the other cases from time to time, and he also from time to time utilised to a quite considerable extent material which he had got, either from the police evidence, or from what seems not at all improbable also police diaries, tending to throw suspicion and afford clues which were entertained by the police generally against particular individuals before they got any definite information with regard to the commission of this or other of the dacoities which I have mentioned. Another characteristic is that there is a total absence, very unusual in a case where so many convictions have been secured in the commission of a particular dacoity in a particular village, of any attempt to obtain identification by villagers or the complainants or their households, and none of them have been called to give evidence.

Another exceptional characteristic is that, with the exception of an absconding accused to whom we shall have to refer again, no loot has been traced, and as against the 17 appellants who have been convicted there is no evidence of any loot found in their possession.

We now come to the peculiar and embarassing features of this case. One of the appellants is a man named Kishan. Somehow, it does not matter how, the police got his name and came into touch with him. He immediately informed them that he was ready to give information, He admitted (this of course is in the nature of a confession which is rendered inadmissible by law and it really ought not to have appeared upon the evidence at all) participation in the dacoities into which the police were enquiring, and he plainly intimated to the police that he was willing to tell them what he knew for a consideration. Eventually he was put up under S. 164 Criminal Procedure Code. He made an elaborate statement under that section amounting to a confession. He was put upon his trial and has been convicted and that confession has been used by the learned Judge not merely under S 30 of the Evidence Act against all the appellants as the confession of a co-accused, but it has, and this is the real difficulty in the case, formed the foundation and main structure of the whole of the learned Judge's reasoning in the judgment. No criticism could be passed upon the learned Judge for his method of dealing with the rest of the evidence, if this confession had been admissible. He has sought. and found to his own satisfaction, adequate corroboration of the confession in the case of each person whom he has convicted upon it, but the serious question is whether it was admissible at all. Both of us are satisfied beyond question that it was not only inadmissible, but that the learned Judge has really made a serious mistake in not realising from the first how clearly on his own statement it was rendered inadmissible. The Assistant Government Advocate did not attempt to combat the view which we take upon the assumption that the learned Judge meant what he said. What the learned Judge has said is this:—first Kishan was clearly asking for a pardon. He refused to give any information to the police until some *quid pro quo* could be, as he hoped, obtained. Secondly, he communicated his frame of mind to Ram Sarup, the investigating officer, Thirdly, on the morning of the 6th of August, Ram Sarup took Kishan to the Collector's bungalow for the express purpose of negotiating for a pardon. It is not suggested that Kishan took part in the negotiation.

Of course he did not. But it would be equally absurd to suppose that he was not well aware of the object of the visit to the Collector's bungalow. There was a hitch in the negotiations. Ram Sarup and Kishan were sent back to the Sub-Divisional Officer with a note and some of Kishan's statement was recorded that day. The rest of it was completed the next morning. It would not be a violent presumption to conclude that having regard to all that had passed before, Kishan, when he returned to the Sub-Divisional officer from the visit to the Collector's bungalow in the custody of the investigating officer, entertained, and had been encouraged to entertain, reasonable hope that if he told the truth, or what appeared to be a truthful story he would get a pardon in the end. The learned judge uses this language:—The meaning of this exchange of notes between the Collector and the Sub-Divisional Magistrate has been explained. The Collector apparently was at first of the opinion that Kishan should be given a pardon which was clearly what Kishan was working for. Indeed it would appear that Kishan specifically bargained for a pardon as the price of his statement. The Sub-Divisional Magistrate objected that it would be premature to make a firm offer of the pardon at that stage and the Collector eventually agreed and it was explained to Kishan that he would have to take his chance and he then made his statement. So stated the positio . is as clear as daylight. If a man prepares the ground by expressing his own position, and invites the other party to treat with him, and the other party goes so far as to consider whether he is willing to pay the price, and eventually, without refusing to do so, postpones the decis on until further examination of the article to be sold, there must remain in the mind of the proposing vendor a reasonable hope that when the purchaser sees the article he is thinking of buying he will pay the price. I have used this commercial language, because throughout, the matter was discussed by the executive authorities, and has been considered by the judge, in the light of negotiations for a bargain. How the learned judge could possibly come to the conclusion that the making of the confession by Kishan under S. 164 Criminal Procedure Code was not caused by the inducement that, if it was satisfactory, a pardon would probably be granted to him. I cannot for myself conceive, but in my opinion he has plainly found that it was so induced, and where he has failed is in not realizing that S. 24 makes a confession so induced irrelevant in a criminal proceeding. Mr. Malcomson, on behalf of the Crown preferred to take his stand upon a denial that the learned Judge meant what we think he said in his judgment, and we therefore allowed him to obtain, and tender, copies of the correspondence referred to by the judge. Any doubt lurking in the mind of anybody upon this point is entirely removed by a perusal of this remarkable correspondence. The Sub-Divisional Officer and the District Magistrate exchanged notes with the greatest candour, as indeed they might, in considering whether or not a pardon should be offered, but they went much further than that. They discussed the terms of the offer, or bargain which was to be made with the accused. The District Magistrate signed the note on the 6th of August and wrote to the Sub-Divisional Magistrate as follows:—" he may however be told that if he makes a voluntary confession which is considered to be full and true, his prayer for being made an approver will receive due consideration". How in the world any officer of experience, or anyone with any legal training at all, or acquaintance with this section, could doubt that this was an inducement to the man to make a statement, we are at a loss to understand. The very document in which the Magistrate uses that language contains a statement that the confession must be voluntary and without any inducement. The Sub-Divisional Officer in his note expressed his opinion that there was very little value in such a confession. Whether there is, or whether there is not, any intrinsic value in the statement, the law makes it irrelevant, and the

learned Judge ought to have refused to bring it on the record, and to have ruled it as irrelevant under S. 24 of the Evidence Act. The result is that it has to be struck out of this case, as well as of the other cases in which appeals are pending, and in which it has been used. We are bound to say that it really is a lamentable result of the expenditure of time and money on this case, and that the error into which both the Judge and the District Magistrate have fallen is an elementry one. Judges from time to time have exhausted themselves in endeavouring to explain the working of this section and for my own part I refer to and repeat what I said in the recent case of *Khatel* v. *Emperor*, (1) with which my learned brother entirely agrees. It really ought to be unnecessary for judges constantly to be referring to the working of this section. It looks as though we were endeavouring to lay down some new principle, when really all we do is to repeat the law as it should be known by those who have to administer it.

This, however, does not dispose of all the difficulties in this case. The learned Judge in most painstaking judgment has reviewed all the evidence, but when Kishan's confession is struck out, the balance against the remaining appellants consists of the sworn testimony and indentification made by the approver Ghafur, and, as against certain appellants, the evidence of one Musammat Ganga Dei. As a question of principle is involved in their evidence, it is necessary to consider whether, as a class those mentioned by Ganga Dei ought to be convicted, unless her evidence is corroborated by satisfactory independent testimony. Somehow or other the police got hold of this woman, and it was a creditable piece of detective work, but her husband was a notorious decoit who was absconding. According to her, he left his house on the night of the dacoity with several of the appellants, and next day returned with the loot. In any case, it is certain that her husband is a fugitive from justice. According to her testimony he is implicated in this dacoity, and probably, in the others too, and he left in his house, and probably in her custody, silver ornaments and other jewellery, the proceeds of this dacoity. She may or may not have motives of either spite or fear against specific individuals whom she has named. She may or may not have been either persuaded or frightened by the police but taking her position broadly she was placed in considerable difficulty. She had every motive for assisting the police, every motive for naming any one whom the police wished her to name. The police were in a position to put pressure upon her by the very fact of her possession of the property, and to use persuation with her by the very fact that her husband was absconding. In the case of a low class woman in this country who has very little independence, education or public spirit to influence her, it is obvious that such a person may become an easy victim to an astute police investigator, and all I can say is that if I had a jury trying this case I should unhesitatingly have told them that they should not convict a single individual on the testimony of the woman alone. It is made no better when there is added to it the testimony of the approver, who is one of the most despicable specimens of humanity one can imagine, a man steeped in crime, living at war with society, ready to commit any violence to enable him to carry out his thefts, and ready to sell his comrades if only he can get freedom for himself, and for my own part I am not prepared to accept the evidence of a worthless creature of this kind, as corroborating and almost equally worthless and particularly helpless wife of an absconding dacoit. The difficulty in this case is that having acted as the judge has done, very largely on the confession of Kishan, one does not know whether he would have been prepared to act on the residium which I have just mentioned after Kishan was withdrawn, and really the logical thing to do would be to send the case back, but we are agreed that in substance nothing is

(1) 1923 All. 352—45 All. 300—21 A.L.J. 143—73 I. C. 62.

to be gained by that, and we therefore deal with the case by final orders. In the case of four of the appellants (leaving out Kishan for the moment) we find that the evidence of Ghafur is satisfactorily corroborated by the learned Judge's view of the evidence. These four are Kallan, Nasib Khan, Aslub and Zabar Khan. In the case of these four we dismiss their appeals and confirm their convictions and sentences. In the case of the remainder, namely Tara, Dalip, Azan Kanhaiya, Bucha, Khasheru, Budhan, Khiali, Chiranji Bihu or Baba, Kallan son of Ghasita and Diwan, we are driven by force of law to allow their appeals and to direct that they be released subject to any other punishment standing against them unperformed.

This leaves only the case of Kishan. His appeal is also dismissed and we confirm his conviction and sentence. As I have already said his confession was irrelevant, but my brother pointed out during the argument and Mr. Malcomson has also argued, that in substance he confessed again before the trial, when he was examined under S. 364, before the Committing Magistrate, his previous statement under S. 164 was put to him. It ought not to have been if they knew as much about it as we do now. But he then stated that he had no hope of a pardon. He had discovered that his previous hopes were doomed to disappointment, and he said that statement was true. Whether it was or whether it was not, and the probability is that it was not, it is ample on which to convict him, and I am prepared to agree that that amounts to a fresh confession in the Magistrate's Court, which was duly proved against him at the trial, and that his conviction on that ground must stand. It may be said, if so, why is it not a confession made before the trial so as to be proved at the trial affecting the other persons who were being tried jointly with him. I think that technically it could be used under S. 30 even against his co-accused. But however satisfactory it may be as a piece of damning testimony against himself, I am not prepared to regard it as of any real value, standing alone, or even in association with the evidence of Ghafur and Ganga Dei, against the other accused. Therefore on that ground in my opinion it is still to be disregarded except as sufficient to convict Kishan. Our order therefore is that the appeals of the above five are dismissed and of the others are allowed and their convictions are set aside.

Kanhaiya Lal, J.—I agree with the order proposed.

✱ 1924 ALLAHABAD 76

KANHAIYA LAL, J.

Bansi and others—Applicants.

v.

Lakshmi Das—Opposite Party.

Criminal Mis. No. 98 of 1923, Decided on 7th June 1923.

Criminal P. C., S. 526—Applies to enquiries under Workman's Breach of Contract Act (13 of 1859.)

An enquiry under the Act 13 of 1859 is an enquiry by a Magistrate or a Criminal Court within S. 6 Criminal Procedure Code and although the object of the enquiry is merely to issue coercive orders and if necessary to enforce the same by a sentence of imprisonment, there is nothing to show that such an enquiry is excluded from the operation of S. 526 Cr. P. Code. The definition of "enquiry" given in S. 4 clause (k) which includes every enquiry other than a trial conducted under the Code of Criminal Procedure by a Magistrate or a Court, is not exhaustive so as to exclude an enquiry under the Workman's Breach of Contract Act of the nature above referred to.]P, 77 C. 1]

A. P. Dube—for Applicants.

Judgment.—This is an application for the transfer of a proceeding pending against certain labourers under S. 2 of the Workman's Breach of Contract Act (No. 13 of 1859) as amended by Act No. XII of 1920. The employer is a resident of Moradabad and carries on a stone ballast business in Shankergarh in the district of Allahabad. He advanced money to certain labourers and employed them for the purpose of working at Shankergarh. His complaint was that after working for a little while they disappeared. That complaint is being enquired into by one of the Magistrates at Moradabad. The labourers are residents of Shankergarh and desire that the complaint should be enquired into in the district of Allahabad where the

alleged breach of contract is said to have taken place. It is admitted that the advances were made at Shankergarh and that if any breach of contract took place it must have taken place at Shankergarh too. The witnesses are all said to belong to the same place. It is therefore conducive to the convenience of the parties, if the case is enquired into at Allahabad. It is urged on behalf of the employer that the Workman's Breach of Contract Act intends that such enquiry should be made at the place where the master or employer resides and carries on business. The Act does not, however, lay down the procedure which is to regulate such an enquiry. It is an enquiry by a Magistrate or a Criminal Court within the meaning of S. 6 of the Code of Criminal Procedure, and although the object of the enquiry is merely to issue coercive orders and if necessary to enforce the same by a sentence of imprisonment, there is nothing to show that such an enquiry is excluded from the operation of S. 526 of the Criminal Procedure Code. The definition of "enquiry" given in S. 4, clause (k) which includes every enquiry other than a trial conducted under the Code of Criminal Procedure by a Magistrate or a Court, is not exhaustive so as to exclude an enquiry under the Workman's Breach of Contract Act of the nature above referred to. Any enquiry by a Magistrate or a Criminal Court subordinate to this Court can therefore be transferred under S. 526 Criminal Procedure Code to any Criminal Court of equal or superior jurisdiction subordinate to its authority, if the requisite grounds set forth in the section are established. The balance of convenience is undoubtedly in favour of the transfer of the criminal proceeding from Moradabad to Allahabad. The application is therefore allowed and the proceeding transferred to the Court of the District Magistrate of Allahabad who can try the case himself or send it for trial to any Magistrate subordinate to him who may be competent to try the same.

Application allowed.

✱ 1924 ALLAHABAD 77

KANHAIYA LAL, J.

Girdhar Das—Applicant.

v.

King Emperor—Opposite Party.

Criminal Mis. No. 104 of 1923 Decided on 8th June 1923.

Criminal P. C., Ss. 179 and 185 — Accused charged with two offences—Court having jurisdiction to try one only shall try that alone.

S. 179 is controlled in respect of certain offences by S. 181 and no question of convenience or expediency can be considered under S. 185. That section deals only with questions of competency when they are involved in doubt. 44 C. 598 Foll.

Where the accused was charged under S. 420 and S. 406 I. P C. the former triable at Basti as well as at Bombay and the latter triable only at Bombay, the Basti Court was directed to proceed with the trial under S. 420 and to drop so far as that Court was concerned tho charge under S. 406 of the Code. [P. 78 C. 1]

K. N. Laghate—for Applicant.

U. S. Bajpai—for Opposite Party.

Kanhaiya Lal J.—This is an application under S. 185 of the Code of Criminal Procedure for the determination of the question of the competency of the Magistrate at Basti to try a complaint against an accused under Ss. 406 and 420 of the Indian Penal Code. The allegation of the complainant is that the accused sent notices to different persons, including the complainant, offering to act as a commission agent at Bombay for such persons as may choose to entrust their business to him and that in pursuance of that notice the complainant appointed the accused as a commission agent and advanced to him Rs 10,000 on the understanding that the accused was to purchase and sell goods at Bombay on his behalf. The complaint was that the accused had no *bona fide* intention to carry on the business of a commission agent at Bombay and that he dishonestly obtained money from the complainant under the pretext that he would carry on such business and wrongfully appropriated what was paid to him from time to time, including any profits derived from the purchase and sale of the goods on behalf of the complainant. The entire negotiation between the parties is said to have been carried on by correspondence. So far as the charge of cheating is concerned, if the

allegations made by the complainant are true, the offence, if any, is triable as much at Bombay as at Basti ; but so far as the charge of a criminal breach of trust goes, it can only be enquired into and tried by the Court within the local limits of whose jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained by the accused. The Magistrate at Basti had therefore jurisdiction to try the former charge but not the latter. The learned counsel, who appears for the complainant, states that the complainant is prepared to proceed with the former charge in the Court of the Magistrate at Basti and to drop the latter for the present. S. 179 of the Code of Criminal Procedure is controlled in respect of certain offences by S. 181 of the Code of Criminal Procedure; and as pointed out in *Charu Chander* v. *Emperor* (1) no question of convenience or expediency can be considered under S. 185 of the Code of Criminal Procedure. That section deals only with questions of competency when they are involved in doubt. There is no such doubt in this case. The Court below is therefore directed to proceed with the trial under S. 420 of the Indian Penal Code and to drop so far as that Court is concerned the charge under S. 406.

(1) [1917] 44 Cal. 595—21 C.W.N. 320—25 C L.J. 165—18 Or. L.J. 81—37 I. C. 145 (F.B.)

1924 ALLAHABAD 78

DANIELS, J.

Ghulam Hussain and others—Appellants.

v.

King Emperor—Respondent.

Cr. App. No. 163 of 1923 Decided on 12th April 1923, from the S. J., Budaun dated the 11th January 1923.

Penal Code, Ss. 37, 302 and 325—Joint attack—All are equally guilty.

If several persons jointly attack the deceased with lathis fracturing his skull and inflicting a number of other injuries they are all equally guilty even though it may not be possible to prove which of them actually inflicted the fatal blow. 35 All. 506 Ref. [P 79 C 2]

Kumuda Prasad—for Appellants.

The Govt. Pleader—for the Crown.

Judgment.—The appellants Ghulam Husain, Fida Hussian Raza Husain and Maqbul Husain are the brothers of one Musammat Chanda prostitute. They were charged under S. 304 of the Indian Penal Code with culpable homicide in causing the death of one Sukha. The learned Sessions Judge on the supposed authority of *Emperor* v. *Bhola* (1) has altered the charge to one under S. 325 and with the concurrence of the assessors as regards three of the accused has convicted them under that section. As regards Raza Husain the assessors appear to have been impressed by an *alibi* which he put forward but I agree with the learned Sessions Judge that the evidence in support of this *alibi* is of no value.

It is common ground that there was considerable previous ill-feeling between Mst. Chanda and her brothers on the one side and Sukha and the principal witness Inayet Ullah on the other. Three days before the present occurrence a youth named Tajju who belonged to the party of the deceased had been beaten by the other party near Chanda's house and a report had been made about it. On the day in question, 5th November 1922, Inayet Ullah and Sukha, according to the prosecution evidence, were passing Musammat Chanda's house. The four accused were there and Musammat Chanda incited them to attack the deceased and his companions, which they did. It is probable that there was some previous exchange of abuse or verbal quarrel which Inayet Ullah has suppressed in his evidence. However that may be, Inayet Ullah was attacked and very badly beaten. The medical evidence shows that he had at least 12 different injuries, the first and most serious of which was on the head. His companion Sukha received injuries of which he died in hospital four days later. The vault of the skull was extensively fractured and broken into 5 or 6 pieces as the result of one or more lathi blows. There were four other marks of injury on different parts of Sukha's person. The only injury sustained by any of accused's party was a contusion on the left temple and a black

(1) [1907] 29 All. 282—4 A.L J. 207—1907 A.W.N. 51—5 Cr. L.J. 130.

eye on the person of Ghulam Husain. Besides the evidence of Inayet Ullah the prosecution case is supported by three other witnesses who saw the accused beating the deceased and his companion. The story put forward on behalf of the accused and supported by three witnesses is that one Munna came from the toddy shop near by, abused Musammat Chanda and threatend to cut off her nose and to beat her brothers. Three of the accused beat him and drove him back to the shop. He then returned with five other persons including Sukha and Inayet Ullah, all armed with lathis. Inayet Ullah slapped Musammat Chanda and on Ghulam Husain remonstrating, hit him on the head knocking him down. Two of his brothers then came out and a fight ensued between them.

I should have been glad of a little more assistance from the learned Judge in the way of detailed comment on the evidence, but I agree with the conclusion at which the learned Judge has arrived that the prosecution evidence is to be preferred to that of the defence. The latter is obviously difficult if not impossible to reconcile with the medical evidence. The witnesses who support the prosecution story apart from Inayet Ullah are independent witnesses against whom no ground for partiality is established. The suggestion made on behalf of the accused to account for the complainant's party having received some 18 injuries one of which proved fatal as against two small injuries sustained by Ghulam Husain is that Sukha and Inayet Ullah were drunk. No question on this point was put to the Doctor who admitted them to hospital and the only evidence which goes in any way to support the story is a statement elicited in cross-examination from the head constable Asfandyar Khan who recorded Inayet Ullah's report. The learned Judge does not refer to this evidence but I cannot help feeling strong doubt as to the truth of the assertion. In the first place, no note of it was made at the time of recording the report and a man who was really drunk could hardly have dictated the detailed report which was made by Inayet Ullah at the time.

I am not sure the learned Judge correctly appreciated the law as regards the liability of several accused who jointly attacked the same person and inflicted fatal injuries on him. The learned Judge refers to the case of *Emperor* v. *Bhola* (1) but the judgment in that case has to be read in the light of a more recent case in *Emperor* v. *Ram Newaz* (2). If several persons jointly attack the deceased with lathis fracturing his skull and inflicting a number of other injuries they are all equally guilty even though it may not be possible to prove which of them actually inflicted the fatal below. In the present case it was quite unnecessary for the learned Sessions Judge to have altered the charge. It is however unnecessary for me to alter the conviction as no application in revision is before me and an offence under S. 325 was certainly committed. For the reasons already given I dismiss the appeal of all four accused.

Appeal dismissed.

(2) [1913] 35 All. 506—11 A.L.J. 804—14 Cr. L. J. 615—21 I.C. 663.

✱ 1924 ALLHABAD 79

RYVES AND DANIELS, JJ.

Bhagelu—Plaintiff-Appellant.

v.

Mt. Dharma and others—Defendants—Respondents.

S. A. No. 1731 of 1921 Decided on 14th May, 1923 from the Addl. Sub. J., Basti, D/30th May, 1921.

Civil P.C., O. 32 R. 2—Guardian for appeal.

Where a guardian *ad litem* to a minor defendant has once been appointed, such appointment continues for the whole of the *lis* or until it is revoked by Court, and the guardian so appointed is the only person who can file an appeal on behalf of the minor. 1922 All. 332. [P 80 C 1]

Jang Bahadur Lal and S. P. Sinha—for Appellants.

P. L. Banerjee—for Respondents.

Ryves, J:—The facts out which this appeal arises are as follows:—Bhagelu brought a suit against Musammat Dharma for restitution of conjugal rights and as Musammat Dharma was a minor her uncle Sampat was made guardian *ad litem*. The trial

Court decreed the suit. An appeal was filed in the lower appellate Court on behalf of the minor by the minor's father Manbodh. There had been no order removing Sampat from guardianship. The lower appellate Court commented on the fact that although Sampat had been appointed guardian *ad litem* in the lower Court the appeal had been filed through Manbodh. In the result the Court allowed the appeal and dismissed the suit.

On appeal before us it has been urged that there was no valid appeal before the lower appellate Court and our attention was called to the recent decision of a Bench of this Court in *Shambhu* v. *Kanhaiya* (1) which is exactly in point. It was there held that where a guardian *ad litem* to a minor defendant has once been appointed, such appointment continues for the whole the of *lis* or until it is revoked by Court, and the guardian so appointed is the only person who can file an appeal on behalf of the minor. That decision follows several other decisions of this Court which are mentioned in the course of the judgment and also a Madras case. It seems to us that we are bound to follow this course of decisions. It may be that the defendant has a remedy open to him as suggested in the case of *Bawan Das Bishnath* (2). We allow the appeal following the decisions of this Court and setting aside the decree of the Court below restore that of the first Court. We make no order as to costs.

Appeal allowed.

(1) 1922 All. 332—44 All. 619—20 A.L.J. 598.
(2) [1899] A.W.N. 203.

1924 ALLAHABAD 80

WALSH AND KANHAIYA LAL, JJ.

Jarbhandan–Defendant-- Appellant.

v.

Badri Narain (Plaintiff) & *Mt. Ram Rati* (Defendant)—Respondents.

Civ. Rev. No. 30 of 1923 Decided on 10th May 1923 from the Sm. C. C., Allahabad D/- 22nd November 1922.

Occupancy holding--Contract Act S. 24—Transfer of holding.

The defendant borrowed money from the plaintiff's father and executed a bond agreeing to repay it on a certain date. There was a further condition that if the money was not repaid on that date the creditor could enter into possession of the plaintiff's cultivatory holding as a usufructuary mortgagee.

Held. that the whole contract is not illegal within S. 24 of the Contract Act. and that the plaintiff could get money decree 35. I. C. 202 Foll

S. S. Shastry—for Appellant.

Kumuda Prasad -- for Opposite. Party.

The following is the Refering Order passed by Hon Mr. Justice Daniels.—This revision raises a question of some importance which is likely to recur. The defendant borrowed money from the plaintiff's father and executed a bond agreeing to repay it on a certain date. There was a further condition that if the money was not repaid on that date the creditor could enter into possession of the plaintiff's cultivatory holding as a usufructuary mortgagee. It is admitted that this latter covenant was contrary to the provisions of the Tenancy Act and illegal. The plaintiff sued for a simple money decree for the amount advanced by him. The defence was that the whole contract was illegal within the meaning of section 24 of the Contract Act and that the plaintiff could get no decree. Two judgments of this Court were cited before the learned Judge of the Small Cause Court. Neither of them has been reported except in Indian Cases. One of the rulings is in favour of the plaintiff, the other in favour of the defendants. Under these circumstances it seems desirable that the question of law involved should be decided by a Bench and I direct that this application be laid before a Bench.

When the case came up before a Bench of two judges the following judgment was delivered :—

Walsh, J.—We are both satisfied with the judgment of the Small Cause Court Judge which is an admirable one, and the case is really covered by the decision of the late Sir Sunder Lal in the case of *Muhammad Shakur* v. *Gopi* (1) which the learned Judge has followed. This application is dismissed with costs.

Application dismissed.

---

(1) [1916] 35 I.C. 202.

✡ 1924 ALAHABAD 81

LINDSAY AND SULAIMAN, JJ.

Shankar Lal— Defendant — Appellant.

v.

Kirari Mal and others—Plaintiffs and Defendants—Respondents.

S. A. No. 518 of 1922, Decided on 1st June 1923 against the decree of the First Addl. Dt. J., Aligarh, D/- 27th February 1922.

Pre-emption—Suit for—Strangers joined in respect of a portion of the property—Claim in respect of whole fails.

Where plaintiffs associated with them strangers to the property in respect of their claim to a portion of the property.

Held: the claim in respect of the whole property fails as suit for partial pre-emption cannot be allowed. [P. 81 C. 2]

M. L. Agarwala and *Gulzari Lal*—for Appellant.

S. N. Sen—for Respondents.

Judgment.—Suit for pre-emption. On the 7th January 1920 the 2nd and 3rd defendants sold to the 1st defendant who is the appellant here certain property situated in two mahals, Gobind Ram and Bagi Manda. The sale of these items of property was made by one deed.

Five plaintiffs brought a suit to pre-empt this sale; of these, plaintiffs 1, 2 and 3 had no share in Mahal. Bagi Manda. Plaintiffs 4 and 5 had shares in both Mahals. At the time of the purchase the vendee had no share in either Mahal and this was the state of affairs at the time the suit was brought.

During the pendency of the suit the vendee got a transfer made in his favour of certain property situated in both the Mahals. This transfer purported to be by way of gift. The Court of first instance however held that the transfer was not in reality a gift but was in fact a sale and this view has been affirmed in appeal by the lower appellate Court.

The result of the suit in the Court of first instance was that the plaintiff's claim was dismissed entirely with respect to the property situated in Mahal Bagi Manda. The Munsif found that the plaintiffs 4 and 5 had, by associating with them in their claim, strangers to the property in Mahal Bagi Manda, disqualified themselves from obtaining any decree for pre-emption in respect of this property. We have already adverted to the fact that the 1st, 2nd and 3rd plaintiffs had no share in Mahal Bag Manda.

The Munsif gave a decree to all five plaintiffs for pre-emption of the property situated in Mahal Gobind Ram.

This decree of the Court of first instance has been affirmed in appeal by the learned District Judge.

It is complained in second appeal that the learned Judge did not decide all the points which were raised before him. In fact the only question which the learned Judge has decided is that the transfer which was made in favour of the vendee during the pendency of this suit was a transfer by way of sale and not by way of gift.

The first plea of which we take notice is contained in paragraph 2 of the memorandum of appeal. The learned Counsel has contended that the suit ought to have been dismissed on the ground that no suit for partial pre-emption is maintainable.

We are of opinion that this plea ought to succeed so far as the 4th and 5th plaintiffs are concerned.

By joining in the suit persons who were strangers to the property situated in Mahal Bagi Manda these plaintiffs disqualified themselves from suing for pre-emption of the property in that Mahal and as under the law they must pre-empt the whole sale and as they have disqualified themselves from doing so, in our opinion, their suit must fail entirely.

This consideration however does not apply in the case of the plaintiffs 1, 2 and 3. They could only claim pre-emption of the property situated in Mahal Gobind Ram and this they have done.

It is next pleaded in paragraph 3 of the memorandum of appeal that there is no sufficient proof of custom. That question has not really been argued before us and indeed it appears to us that no argument is possible in view of the provisions of the *wajib-ul arz* upon which the first Court relied. We are satisfied that a custom of pre-emption does exist.

As regards the argument that the whole suit should be dismissed we have already expressed our opinion that the claim of the 1st, 2nd and 3rd plaintiff's cannot be dismissed on the facts as they stand. Further it is to be observed that the appellant, the vendee, cannot succeed on the law as laid down by this Court. He has been found by both Courts to have taken a transfer by way of sale during the pendency of the suit. He has not acquired an indefeasible title to the property by this transfer and in fact a suit for pre-emption in respect of this transfer was filed before the Munsif gave his decision. At the time of the first Court's decree the appellant had no complete title and was therefore not in a position to claim the status of a co-sharer. He was in short only a stranger and under the custom as set out in the *wajib-ul-arz* the plaintiffs have a right of pre-emption as against him in respect of the property situated in Mahal Gobind Ram.

This view of the law has been taken in the case reported in 4 A. L. J. 351. affirming the decision of Richards, J., which is reported as *Kauleshar Rai* v. *Nabihan Bibi* (1).

This ruling has been followed in other decisions of this Court and we need only refer to a decision of the present Bench dated 20th April 1923 in second Appeal 1446 of 1921.

The result of all this is that we modify the decree of the Court below by directing that the claim of the plaintiffs 4 and 5 be dismissed in respect of Mahal Gobind Ram as against the defendant appellant with proportionate costs in all Courts. The decree in favour of the plaintiffs 1, 2 and 3 with respect to Mahal Gobind Ram will remain and to this extent the appeal fails and is dismissed with costs to the plaintiffs-respondents 1, 2 and 3.

We may mention here that the order of the first Court dismissing the suit as regards Mahal Bagi Manda has become final and no appeal was filed against that order in the Court below.

Appeal allowed in part.

---

(1) [1906] 28 All. 642—3 A.L.J. 426—1906 A.W.N. 164.

☆ 1924 ALLAHABAD 82

LINDSAY AND SULAIMAN, JJ.

Baldeo Misir—Defendant — Appellant.

v

Ramlagan Shukul—Plaintiff —Respondent.

S. A. No. 1167 of 1921, Decided on 8th June, 1923, from a decree of the Second Addl. J., Gorakhpur, D/-6th May, 1921.

Pre-emption—Right to sue—right to pre-empt must exist on date of sale, date of suit and date of first Court's decree.

A plaintiff pre-emptor, in order to be able to maintain a suit for pre-emption, must establish his right to pre-empt on three important dates viz., the date of sale, the date on which the suit is brought and the date on which the case was disposed of by the first Court. The subsequent loss of the share by the plaintiff i. e., his ceasing to be co-sharer, in no way affects the right he possessed at the time when the decree in his favour ought to have been passed by the first Court. [P. 83 C. 1, *d*]

M. L Agarwala and *L. N. Tewari*—for Appellant.

Haribans Sahai—for Respondent.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for pre-emption. The main plea taken on behalf of the defendant was that the plaintiff had no preference over him. The Court of first instance dismissed the suit on the 24th July 1920. On appeal the lower appellate Court was of opinion that under the custom recorded in the *wajib-ul-arz* the plaintiff had a right of preference as against the defendant vendee though the latter was a co-sharer in the same *thok*. The decree of the first Court was accordingly set aside and the suit decreed. A second appeal was preferred to this Court on the 28th July 1921 and one of the grounds raised in the memorandum of appeal was that inasmuch as the plaintiff respondent had ceased to be a co-sharer at the time of the lower appellate Court's decree his suit should have been dismissed.

An affidavit was filed in support of the allegation implied in that ground and time was given to the opposite party to file a counter affidavit if necessary. No such affidavit was filed.

We may therefore take it that it is the appellant's case that on the 20th April 1921 the share of the plaintiff pre-emptor, on the strength of which he had instituted the suit, was sold at auction and purchased by a third party. This sale was subsequently confirmed and a sale certificate of a later date was issued a certified copy of which is produced along with the affidavit. We may therefore take it that the plaintiff respondent ceased to be a co-sharer on the 20th April 1921. This however was a date subsequent to the date of the first Court's decree. But we would like to note that although the auction purchase had taken place before the passing of the decree of the lower appellate Court the fact was never brought to the notice of that Court.

It is well settled law that a plaintiff pre-emptor in order to be able to maintain a suit for pre-emption must establish his right to pre-empt on three important dates. He must have a right of pre-emption at the time when the sale took place otherwise he would have no cause of action at all. He must also have the same right at the time when the suit is brought or else he would have no *locus standi* to sue. A possible view to take might have been that nothing which happens after the institution of a suit can alter the position of the parties. But it has been held in a number of cases by this Court that it is incumbent on the plaintiff to prove that his right to pre-empt continues up to the date when the decree ought to have been passed in his favour, namely, the date on which the case was disposed of by the first Court. It matters little whether the Court of first instance did actually dismiss or decree his suit. The date of that Court's decree is the date on which, if the plaintiff's contention is correct, the decree ought to have been passed in his favour. This principle was the basis of the decision in the following cases:—

Ram Gopal v. *Piari Lal*, (1) *Bhagwan Das* v. *Mohan Lal* (2) *Rohan Singh* v. *Bhau Lal* (3) & *Shankar Lal* v. *Karari Mal* (4) recently decided by this Bench. The last crucial date in such cases must therefore be taken to be the date of the first Court's decree. If subsequent events were allowed to alter the form of the decree it would lead to much confusion. It is impossible to hold that having regard to the position of the parties as it stood on the date of the first Court's decree any other decree could have been passed on that date. Furthermore, an appellate Court cannot take into account these subsequent events without admitting fresh evidence in appeal, which may not always be permissible.

We are therefore of opinion that the subsequent loss of the share by the plaintiff in no way affects the right he possessed at the time when the decree in his favour ought to have been passed by the first Court.

The other grounds taken in the memorandum of appeal have not been seriously pressed. The result therefore is that the appeal fails and is hereby dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) [1899] 21 All. 441—1899 A.W.N. 163.
(2) [1903] 25 All. 421—1903 A.W.N. 83.
(3) [1909] 31 All. 530—6 A.L.J. 699—3 I. C 42.
(4) 1924 All. 81.

✱ 1924 ALLAHABAD 83

KANHAIYA LAL, J.

Maharaj Prasad—Applicant.

v.

King Emperor—Opposite Party.

Civ. Rev. No 127 of 1922, Decided on 4th June 1923 against the order of the Addl. Sub. J., Barielly, D/- 24th August 1922.

Penal Code, S. 193—Retracted statements—Immediate retraction on fresh thought is no perjury.

A witness is entitled to *locus pentitentiae* and an opportunity, to correct himself and if, when he gets that opportunity, he recalls to his mind any fact about which he had made a statement which was not quite accurate, a prosecution for perjury will

hardly be desirable. No statement made by a witness in a deposition can be regarded as completed statement until the deposition is finished and corrected, if necessary, for till then it is open to the witness to qualify any statement or to correct it himself. 16 O. C. 81 Foll. [P. 84 C. 1]

J. M. Banerjee and Nihal *Chand* for Appellant.

L. M. Banerjee—for Opposite Party.

Judgment.—The order passed by the Court below is irregular and cannot be sustained. In a suit for the recovery of money due on a mortgage made by Maharaj Prasad, the mortgagor, Maharaj Prasad was examined and in the course of his deposition he made certain statements in regard to which the Court below has directed his prosecution. The main question for consideration in that case was whether the mortgage in question was made for legal necessity. Various questions were put to him about certain other transactions about which he made replies which he had subsequently to modify on a certain account, Exhibit 3 being shown to him. The Court below was of opinion that in saying what he did Maharaj Prasad had deliberately made false statements. But as pointed out in *Lachhami Narain* v. *King Emperor* (1) a witness is entitled to *locus penitentiae* and an opportunity to correct himself and if, when he gets that opportunity; he recalls to his mind any fact about which he had made a statement which was not quite accurate, a prosecution for perjury will hardly be desirable. No statement made by a witness in a deposition can be regarded as completed statement until the deposition is finished and corrected, if necessary, for till then it is open to the witness to qualify any statement or to correct it himself, as this man seems to have done, when he was confronted with a certain account. The statements relied on were moreover, statements hardly material to the issue before the Court. The order for prosecution does not specify those statements, but refers to another *rulekar*, where in a reference is made to them. Considering all the circumstances no useful purpose can be served by allowing the prosecution to proceed. The order of the Court below is therefore set aside and the proceedings, if any, started in pursuance thereof will be quashed.

Application allowed.

(1) [1913] 16 O.C. 81—14 Cr.L.J. 280—19 I.C. 712.

✱ 1924 ALLAHABAD 84

KANHAIYA LAL, J.

Chunni Lal and another—Appellants

v.

Baldeo—Respondent.

Criminal Ref. No. 171 of 1923, Decided on 16th May 1923, made by the Dist. Mag. of Aligarh, D/- the 21st February 1923.

Criminal P. C., S. 522—Conviction under S. 447 I. P. C.—No Cr. force used—Applicability.

A complaint was filed against the applicants under Ss. 447 and 323 and they were convicted under S. 447 and fined R. 5/- each. But the Magistrate disbelieved the story of any beating, and held that only an altercation had taken place. There was, therefore, no conviction under S. 323. Later on the complainant filed an application before the Court under S. 522. The Magistrate allowed this application and passed orders directing delivery of possession of the fields to the complainant.

Held that an essential ingredient of S. 522 is that the offence of which the person concerned is convicted must have been attended by criminal force, or, at the very least, by the show of criminal force and therefore S. 522 did not apply to the case. 25 A. 311 Ref. [P 85 C 1,2]

The applicants were not represented.

Assistant Government Advocate—for the Crown.

Referring Order.—This is an application for revision in connection with an order passed by the Honorary Magistrate of Sasni under S. 522 of the Code of Criminal Procedure.

The facts are as follows:—A complaint was filed against the applicants Chunni Lal and Indra, as well as two others, under Ss. 447 and 323 of the Indian Penal Code. It was alleged that the two applicants had been lawfully ejected from certain fields, but that in spite of the ejectment they still continued to cultivate the fields and when the complainant remonstrated with them, they ordered the other two accused

to give him a beating. On October the 18th, 1922 the two applicants were convicted under S. 447 and fined Rs. 5/- each. But the Honorary Magistrate disbelieved the story of any beating, and held that only an altercation had taken place. There was, therefore, no conviction under S. 323, and the other two accused were acquitted,

On October the 24th the complainant filed an application before the Court under S. 522, and on December the 14th, 1922 the Honorary Magistrate allowed this application and passed orders directing delivery of possession of the fields to the complainant.

I have heard and considered the arguments of both parties in this matter. It has deen pointed out that the action of the two applicants in still retaining possession of the fields, in spite of their conviction under S. 447, amounts to a species of contempt of Court. It has been suggested that the two applicants being admittedly rank trespassers are entitled to no consideration at the hands of the Court. They did not even appeal against their conviction under S. 447. I have also been asked to consider what is likely to happen if possession is restored to the two applicants the suggestion being that a riot is likely to take place over the crops standing in the fields. It seems to me however, that if any violence is likely to be used at all, it is just as likely to be used if possession is not restored to the applicants, as it seems clear, from the arguments before me, that the standing crops must have been sown by the applicants themselves. The applicants urge that these crops are worth Rs. 400 though this is no doubt a considerable exaggeration.

I do not think, however, that I am at present concerned with any of the above matters. The question is whether or not the order passed by the Honorary Magistrate was a legal one. There are many rulings to the effect that an essential ingredient of S. 522 of the Code of Criminal Procedure is that the offence of which the person concerned is convicted must have been attended by criminal force, or, at the very least, by the show of criminal force. An almost parallel case is to be found in fact in 25 All. 341. It is impossible to go behind the finding of the Honorary Magistrate himself to the effect that no offence under S. 323 of the Indian Penal Code was committed, and that an altercation was all that took place. In the circumstances I am of opinion that S. 522 did not apply, and that the order passed was, therefore an illegal one. Two remedies were open to the complainant; he could either have filed another complaint under S. 447 against the applicants, or else he could have sued for their ejectment in the Civil Court. What was not open to him was to apply for delivery of possession under S. 522 of the Code of Criminal Procedure.

Under S. 438 of the Code of Criminal Procedure this case will accordingly be reported for the orders of the Hon'ble High Court, with the recommendation that the order passed by the Honorary Magistrate under S. 522 should be set aside, and that possession should be ordered to be restored to the two appellants.

Judgment

Kanhaiya Lal, J.—The learned District Magistrate finds that the applicants Chunni Lal and Indra were convicted of an offence under S. 447 of the Indian Penal Code by reason of their having continued to cultivate certain fields in spite of their ejectment and that there was nothing to indicate that the offence of criminal trespass was attended by the use of criminal force. S. 522, Cr. P. C. cannot on these facts apply and the order of the learned Honorary Magistrate directing the delivery of possession of the fields in question with the crop standing thereon to the complainant cannot be sustained. The reference is therefore accepted and the order of the Honorary Magistrate passed under S. 522 of the Code of Criminal Procedure is set aside. It is open to the complainant to seek any other remedy open to him in the manner provided by law. Let the record be returned.

Reference accepted.

1924 ALLAHABAD 86

LINDSAY AND SULAIMAN, JJ.

Gayan Singh—Plaintiff—Appellant

v.

Babu Lal and another—Defendants-Respondents.

F. A. No. 148 of 1921, Decided on 13th July, 1923, from the decree of the First Addl. Sub. J., Aligarh, D/-3rd January, 1921.

Pre-emption—Custom—A mere resident can pre-empt.

A person who is merely a resident of the village and is neither a co-sharer nor a relation of the vendor can pre-empt if the *wajib-ul-arz* so provides; such a custom is not necessarily unreasonable.

S. N. Sen and *P. L. Banerjee*—for Appellant.

Panna Lal—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for pre-emption in respect of a sale deed dated the 27th February 1919 executed by the defendant No. 2 in favour of Babu Lal defendant No. 1. The plaintiff frankly confessed that he was neither a co-sharer in the village nor a relation of the vendor. His claim was based entirely on the ground that he was a resident (*bashinda*) of the village Mahwat in which the property sold was situated, It was alleged that there was a custom prevailing in this village under which, in case co-sharers refused to pre-empt, the right of pre-emption was given to residents of the village.

In the written statement the defendant vendee admitted paragraph 1 of the plaint which had stated that the plaintiff was a resident of the village in question It was however disputed that there was any such custom in existence. The plaintiff's allegation as to the incorrect recital of the sale consideration was also challenged.

The learned Subordinate Judge framed several issues, issues Nos. 2 and 3 of which directed to the question whether a custom of pre-emption in favour of a mere resident, who was not a co-sharer, was proved or could be enforced in law. He came to the conclusion that no such custom had been established by the evidence produced in this case and that in any case such a custom would be uncertain and unreasonable and therefore incapable of being enforced by a Court of law. He accordingly dismissed the suit without going into the question of the correct price of the disputed property.

The plaintiff has come up in appeal to this Court and on his behalf the findings are challenged.

The evidence produced in support of the custom consisted of a *wajib-ul-arz* of the year 1871, paragraph 15 of which contains the following recital:—

"If a share-holder wants to sell his property he should sell it first to his near co-sharer and in case he does not take it, then he should sell it to other co-sharer and if he also does not take it then he should sell it to the inhabitants of the village. In case no co-sharer and no inhabitant of the village takes it, the vendor has power to sell it to any one he may like. The rate of value will be according to the quality of the share. If any co-sharer, in order to deprive the nearer co-sharer fraudulently declares an excessive amount of price, then the matter relating to the proper amount of consideration would be settled by private partition or under an order of the officer and the amount would be caused to be given".

This *wajib ul-arz* was verified on the 8th September 1871 when the Board's circular No. 24 of 1868 was in force In paragraph 9 of this circular there was a direction that the *wajib-ul-arz* should be a record of custom and usages prevalent in the district. It is apparent that an entry relating to a right of pre-emption in the inhabitants of the village could not in all probability have been a record of contract. Inhabitants who were not co-sharers in the village were no parties to the *wajib-ul-arz*; and it is not likely that co-sharers would enter into a contract with them. Either, therefore, this entry was an entry of a custom prevailing in this village or it was a useless entry made at the desire of attesting co-sharers. It has been laid down by their Lordships of the Privy Council in the case of *Digambar Singh* v. *Ahmad Sayeed*

Khan (1) that an entry in a *wajib-zl-arz* is *prima facie* evidence of the existence of a custom. Unless, therefore, there is anything in the *wajib-ul-arz* itself which negatives the idea of such an existence or there is other evidence to the contrary or such custom is unreasonable and unenforceable the presumption would be that such a custom exists.

Another piece of evidence relied upon in the Court below was a judgment of the District Judge of Aligarh dated the 9th of May 1917. That was a suit arising out of a sale of a share in another village, Pans, which however is situated in the same parganah Etah Sakit Tahsil and district Etah where the property in the present suit is situated. There the plaintiff was not a co sharer at all, but was a blacksmith. The learned District Judge in allowing the appeal remarked that it was contended by the counsel for the respondent that the custom was unreasonable inasmuch as Bale the plaintiff pre-emptor was an artisan. He could not see anything unreasonable in the custom and saw no reason why a neighbour residing in the same village should not be given preference to one outsider, nor did he consider the fact, that no recent exercise of the right of pre-emption had taken place, to have any bearing on the case. In this view he allowed the appeal and decreed the suit.

The defendant vendee filed an appeal to this Court which was numbered as S. A. 1111 of 1917 and was disposed of by the pre-emption bench on the 15th January 1918, the judgment and decree of the District Judge being confirmed. It is apparent that on that occasion at least both the District Judge and this Court did not consider that such a custom was so unreasonable as not to be enforcible in a Court of law. This litigation, as it related to another village, is of value for this purpose only,

So far as we can find there has been only one recent sale in this village, on which according to the oral evidence Ram Sarup a co-sharer did bring a suit and got a decree. That circumstance neither helps the present plaintiff, nor does it in any way negative the existence of the custom relied upon by him,

It has been strongly contended that the custom set up is unreasonable and should not be enforced. A custom of pre-emption may either prevail in a certain locality or may govern a particular community. In the present case the plaintiff's case is that this custom governs the community which consists of the residents of a village and it prevails in the area which is defined by that village. Such a custom has once, at least, been enforced in the neighbourhood. We do not think such a custom is necessarily unreasonable or unenforcible. For the enforcement of a right of pre-emption under a custom it is not necessary that the pre-emptor should be a proprietor. In numerous cases the right of a mere relation to enforce a custom has been recognized by the Courts.

The last point urged in support of the decree was that it had not been established that the plaintiff was a resident in that very mahal, in which the share sold was situated. This was a question of fact which ought to have been raised in the Court below. The plaintiff's residence in the village was admitted in the written statement and no plea was raised that he was not a person who came within the expression *bashindgan* village as recited in the *wajib-ul-arz*. We think that this question of fact should not now be allowed to be raised.

As the learned Sudordinate Judge has disposed of the suit on a preliminary ground only and we are not prepared to uphold his finding, we allow this appeal, set aside the decree of the Court below and remand the case for disposal of the suit by decision of issue No. 4. Issue No. 1 has already been disposed of by implication. Costs here and hitherto will be costs in the cause and will abide the result. Costs in this Court will include fees on the higher scale.

Appeal allowed ; Case remanded.

(1) [1915] 37 All. 129—42 I.A. 10—13 A.L.J. 236—19 C.W.N. 393—17 M.L.T. 193—2 L.W. 303—21 C.L.J. 237—28 M.L.J. 556—17 Bom. L. R. 393—(1915) MW.N. 581—28 I. C. 34 (P. C.)

✱ 1924 ALLAHABAD 88

LINDSAY AND SULAIMAN, JJ.

Uman Shanker and another—Plaintiffs—Appellants.

v.

Mt. Aisha Khatun — Defendant—Respondent.

F. A No. 159 of 1921, Decided on 20th June, 1923, from a decree of the Sub. J., Aligarh, D/-26th January, 1921.

(a) *Hindu Law—Partition—Entry of name in Revenue record does not prove separation.*

The mere fact that the name of a Hindu widow is entered in the revenue papers does not necessarily raise the presumption that she is the widow of a separated Hindu. [P 89 C 1]

(b) *Evidence Act, S. 115—Widow—Admission as to inheriting as heir to her husband is not conclusive.*

Admissions by a Hindu widow that she had acquired the property as heir to her husband does not necessarily involve the legal inference that she was asserting only a limited interest and not her absolute right, 42 All. 152 Foll. 14 A.L.J. 913 Dist. [P 90 C 2]

P. L. Banerjee—for Appellants.

S. A. Haider, Ibni Ahmad and Iqbal Ahmad—for Respondent.

Judgment.—This is a plaintiffs' appeal arising out of a suit for recovery of possession as reversioners of Sarjiwan Lal the alleged last male owner. It was the plaintiffs' case that Sarjiwan Lal who was a separated Hindu died many years ago and on his death Mt. Dulari his widow entered into possession of his estate, that she made a transfer of the property in dispute without any legal necessity in the year 1911 to Chait Ram who in his turn on the 15th of March 1917 sold it to the defendant respondent; that Mt. Dulari died within twelve years of the suit and the plaintiffs are entitled to possession.

On behalf of the contesting defendant it was denied that Dulari's husband Sarjiwan Lal was separate from his other brothers, and it was further pleaded that Mt. Dulari without any right and title had entered into possession and remained in adverse possession for more than twelve years and had acquired title to the property absolutely. It was also pleaded that in any case there was legal necessity for the transfer.

The learned Subordinate Judge was of opinion that the evidence was insufficient to establish that Sarjiwan Lal had separated from his brothers at the time of his death. He found that Mt. Dulari had entered into adverse possession and that therefore the plaintiffs' claim was barred by time. On the question of legal necessity he found that the defendant had failed to establish it. The suit however was dismissed on the finding that the family had been joint.

In appeal it is contended that it is proved that Sarjiwan Lal was a separated Hindu and further that even assuming that he was joint with his brothers, Musammat Dulari's possession in consequence of her own admissions was never adverse and that at best she only acquired a Hindu widow's estate.

On the question of jointness or separation the documentary evidence is practically nil The earliest document which we have on the point is an application dated the 21st of March 1896 filed by Mt Dulari in the Revenue Court for a perfect partition of her share which was described as being 20 out of 54 shares in a 5 biswas share of the mahal. On the 21st of May 1896 another application on behalf of Hori Lal was also presented desiring partition. These applications were resisted by an objection dated the 28th May 1896 filed by Mt. Mano Kunwar on behalf of Kirpa Shanker and Bodh Raj. In this objection she asserted that the family had all along remained joint and that Mt. Dulari had no right to possession or to have any share separated This objection does not appear to have been pressed at all and was ultimately disallowed. The Revenue Court apparently directed the partition to be effected and Mt. Dulari's share was actually separated. Afterwards we find that on the 20th December 1898 Mt. Dulari executed a mortgage deed in favour of Maharaj Tika Ram in which she stated that the property mortgaged had belonged to her husband and was in her possession but that she was the owner of it. The amount borrowed was taken partly in order to pay off a bond of the 5th April 1897 said to have been executed in order to meet

the expenses of the Revenue Court litigation as well as for cash received at the time of registration. On the 26th April 1903 she executed a second mortgage deed in favour of the same Tika Ram in order to pay off the amount due on the previous mortgage deed of 1898 as well as some parole debts due to the mortgagee and for a further advance in order to meet certain miscellaneous debts and expenses of her food. These mortgage deeds remained unchallenged for a large number of years.

On the 13th February 1911 she executed a sale deed of the entire share in this village in favour of Chaitram for a sum of Rs. 2000. The amount was said to have been required in order to pay off the earlier mortgage deed as well as some previous debts and there was a further advance of Rs. 1200. In this sale deed she did state that the property sold was the zamindari property left by her husband. As we have already said, this was followed by the sale deed of the 15th of March 1917 which is the subject matter of dispute in this case. We can find nothing in any of these documents which would necessarily show that her husband at the time when he died had been separate from his brothers. The mere fact that the widow's name is entered in the revenue papers does not in our opinion necessarily raise the presumption that she is the widow of a separated Hindu.

Coming to the oral evidence adduced by the plaintiffs we find that that evidence too is not reliable. The learned Subordinate Judge who heard the witnesses did not believe them. The first witness is Pitambar Das who stated that all the brothers of Sarjiwan Lal lived separately. They were separate in mess, business, house and everything. He admits however that he is by relationship connected with the plaintiffs and that this alleged separation must have taken place prior to his attaining the age of discretion. It is admitted that all these brothers lived in one and the same house, some living in the upper storey and some in the lower storey. There is nothing to show that the names of these brothers were separately entered during their life-time against the zamindari property owned by them. This witness in cross-examination stated that it was 5, 6, 8 or 10 years after Sarjiwan Lal's death that the name of Mt. Dulari was entered in the revenue papers.

If this statement were to be accepted it would follow that she could not have got her name entered by right as the widow of a separated Hindu.

The next witness is Hazari Lal whose statement in examination-in chief was to the same effect, but in cross-examination he too admitted that Sarjiwan Lal and his brothers did not separate in his presence ; that they did not divide the amount of profits in his presence, and that they lived in separate portions of one and the same house. Balkishun one of the brothers lived in the upper storey and the other brothers in the lower storey. The remaining three brothers also lived in the upper storey. This witness also is related to the plaintiffs by family relationship and was not considered an independent witness by the Court below.

The third witness Kishun Narain also stated in a general way that the brothers of Sarjiwan Lal were separate from each other. In cross-examination he had to admit that he did not know who used to make the collections in respect of the zamindari property.

The fourth witness Gauri Prasad in cross-examination stated that as far as he knew Sarjiwan Lal and his brothers did no work except collecting rents from the zamindari property; that Sarjiwan Lal and his brothers did not divide the income in his presence and that Mt. Dulari obtained possession of the estate not on Sarjiwan Lal's death but on the death of Inderjit; that Inderjit died 20 or 22 years ago and as long as he was alive he himself was in possession of the property and it was he who used to give money to Mt Dulari. If this statement of the plaintiff's, own witness is to be believed it wouldd estroy the plaintiff's case and would show that Mt. Dulari never obtained possession as a Hindu widow as long as the surviving brother Inderjit was

alive; that it was somehow or other after Inderjit's death that she obtained possession of the property.

The last witness on the point is Murad Lal who stated that he had seen Inderjit and Dulari separate since 1878 but in cross-examination he admitted that he saw Inderjit and Dulari separate in mess only and in no other way. It is admitted by the other witnesses that all the branches of the family lived in one and the same house.

It is true that the oral evidence produced by the defendant is even worse. Banke Lal who was only 56 years of age stated that he had seen Sarjiwan Lal and Inderjit and found them living and dining together. He stated that he himself used to live and dine with them. In cross-examination however he could not fix the exact date. He had said originally that he was appointed patwari in 1875 and that he was living in the house of Inderjit in 1877 or 1878. In cross-examination though he repeated this statement yet he said that during the days when he was living with Sarjiwan Lal he was not a patwari at all. His statement was to the effect that Dulari lived separate from Inderjit and that it was after the death of Sarjiwan that she became separate and that she was separate also as regards food etc.

The only other witness is one Abdul Hafiz who himself has no personal knowledge of the matter.

There can be no doubt that the presumption of law was in favour of the jointness of all the four brothers. The plaintiffs who came into Court on the allegation that they were separate, had to establish it by clear and cogent evidence. The documentary evidence, we have already pointed out, is altogether inconclusive. The oral evidence also is, under the circumstances suggested above, altogether unreliable. In this view of the matter we find it impossible to differ from the view taken by the learned Subordinate Judge that the plaintiffs have failed to prove that the four brothers were separate.

It is however contended on behalf of the appellants that even assuming that the four brothers were joint, the possession of Mt. Dulari was never adverse. Reliance is placed on the statement contained in the mortgage deed of 1898 and the sale deed of 1911 to the effect that the property transferred had been acquired by the lady from her deceased husband. Although those statements profess to show the origin of her title, it does not follow that these statements necessarily imply that at that time she was not asserting her full ownership but was only putting forward a limited interest in the estate. In 1896 when she applied for partition there was no admission on her behalf that she was only a limited owner. The evidence as to when and how she obtained possession is practically nil. Some of the plaintiff's own witnesses have stated that she entered into possession many years after Sarjiwan Lal's death. One witness going so far as to say that she obtained possession after Inderjit's death. Under these circumstances, we are bound to hold that there is absolutely nothing to show how she originally obtained possession of the estate and when and how her name was entered in the revenue papers. All that we know is that in the year 1896 she was a co-sharer when she applied for partition in the Revenue Court as against the other co-sharers. From this conduct of hers no inference can be drawn one way or the other. The subsequent admissions also are not conclusive on the point. It was laid down by their Lordships of the Privy Council in the case of *Lachhan Kunwar* v. *Manorath Ram* (1). "That unless it was clearly shown that when the widow took possession she professed to do it as claiming only the limited estate of a widow it would be impossible to hold that the rights of the other claimants were not extinguished".

In the present case, we have already said, there is nothing whatsoever to show how she got into possession. It may be that she got into possession claiming adverse title to the estate or it may be that she obtained possession surreptitiously or with the consent of the other members. So long however

(1) [1895] 22 Cal. 445—22 I. A. 25—5 M. L. J, 1—6 Sar. 523 (P. C.)

as the plaintiffs have not shown that she entered into possession of the estate with an assertion of only a limited interest it seems to us impossible to hold that her possession had all along remained either permissive or qualified. Her subsequent conduct, namely, the execution of the mortgage deeds, would rather go to show that she was all along treating herself as full owner of the property. The case of *Satgur Prasad* v. *Raj Kishore Lal* (2) is somewhat similar inasmuch as in that case there were also a number of admissions of Mt. Dilla Kunwari that she had acquired the property as heir to her husband. These admissions however were not taken to necessarily involve the legal inference that she was asserting only a limited interest and not her absolute right. The learned vakil for the appellants relies on the case of *Baijnath Prasad* v. *Tej Bali Singh* (3) in particular on the observations made by one of the learned Judges at page 946. That case however was quite a different one. There the lady was not in possession of the property as a trespasser but only asserted a Hindu widow's estate. As was pointed out by the learned Chief Justice at page 936 her possession could be legally explained on the basis of a will by her late husband as well as on the basis of custom set up in the case. When the case went up in appeal to their Lordships of the Privy Council the question of adverse possession was altogether dropped. That case therefore is in our opinion no authority for the contention advanced on behalf of the appellants.

The result therefore is that in our opinion the lady must be deemed to have remained in adverse possession of the property for more than twelve years and as having asserted her full ownership. Under these circumstances the plaintiff's claim is barred by limitation. The appeal accordingly fails and is hereby dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

(2) [1920] 42 All. 152—46 I. A. 197—18 A. L. J. 235—38 M. L. J. 259—11 L. W. 384—1920 M. W. N. 3—27 M. L. T. 200—24 C. W.N. 394—20 Bom. L. R. 451—55 I. C. 486 (P. C.)

(3) [1916] 38 All. 590—14 A.L.J. 913—38 I. C. 894.

1924 ALLAHABAD 91

LINDSAY AND SULAIMAN, JJ.

Sheo Nandan and others — Defendants—Appellants.

v.

Balgobind Misra and another—Plaintiffs—Respondents.

S. A. No. 1803 of 1921, Decided on 22nd June, 1923, from a decree of the Dt. J., Benares, D/- 21st July 1921.

Agra Tenancy Act, S. 9-Applies even to disputes to which landlord is not a party—Presumption under S. 9 can be displaced by subsequent events.

Sulaiman, J.—S, 9 in terms is not confined to a dispute between landlord and tenant. The words "as against a landlord" are not there at all. The section is quite general in its scope and is applicable to all cases where a dispute as to the nature of the tenancy arises, no matter whether that dispute arises against a landlord or not. A dispute may very well arise between the rival heirs of a deceased tenant and the question of the true nature of the tenancy may have to be decided in a litigation to which the landlord is no party. In such a case it is not open to either set of these heirs to go behind the entry at the last revision of records and adduce evidence to the contrary. The presumption under S. 9 is conclusive. The only way to displace it is by producing a judicial decision in proceedings instituted before the Act, and in no other way. From this it does not, however, follow that there is a conclusive presumption under the section for all time to come that the true nature of the lands is of a certain nature. The presumption can only be that the lands were of that kind at the time when the entry was made. There is no presumption that the nature of those lands can never in future be altered and therefore evidence can be allowed to show that a new position has arisen since the settlement. 34 A. 285 (F. B.) Dist. [P 92 C 2; P 93 C 1,2]

Lindsay, J.—The scope of S 9 is strictly limited. The rule laid down in that section can only be applied in litigation arising between a landlord and tenant when the matter in issue between the landlord and tenant is the nature of a tenancy, 34 All, 285 (F.B.) Foll, [P 93 C 2]

M. A. Aziz—for Appellants.

N. C. Vaish—for Respondents.

Sulaiman, J.—This is a defendants appeal arising out of a suit for pre-emption. The vendor Gaya was a

zamindar of patti Subhao. He executed two sale-deeds in favour of defendants Nos 2 and 3 and defendant No.7 respectively. Under the first sale-deed he purported to sell his 2 annas and 8 pies share in the patti, and under the second a number of plots specified therein as fixed-rate holdings. The defendants 2 and 3 are the sons of Sheo Nandan defendant No. 1, and defendant No. 7 is his wife. The plaintiffs brought this suit to pre-empt both these transfers on the allegation that they together constituted one transaction in favour of the defendant's family. There was also some dispute as to the actual sale consideration. The plaintiffs alleged that they were co-sharers in the same patti with the vendor and under the custom prevailing in the mahal they were entitled to pre-empt the sale.

On behalf of the defendants the existence of the custom of pre-emption was denied; it was pleaded that the sale considerations were truly entered in the two documents and that these were separate transactions. It was further pleaded that the plaintiffs were precluded under the provisions of S. 9 of the Agra Tenancy Act from saying that the plots were not fixed-rate holdings but zamindari properties; and that there being no custom for pre-emption with respect to tenancy holdings the claim with respect to these plots was not maintainable.

The Court of first instance decreed the claim holding that there was a custom of pre-emption in the village, that the fixed-rate tenancies had become proprietary interests and were liable to pre emption. On appeal the learned District Judge accepted the findings of the Court of first instance and dismissed the appeal.

As there has been some dispute with regard to the constitution of this mahal I think it desirable to mention the following facts.

In the settlement of 1881 the plots mentioned in the plaint were recorded as fixed-rate holdings of Subhao's family. In the year 1893 there was a perfect partition of the entire village which was divided into three distinct mahals. Mahal Bishen Dayal consisted of 5 pattis 3 of which were real (*asli*) pattis, the other 2 being *shamlat* pattis. The evidence of the patwari, supported by the entries in the *khewat* and the *khatauni*, which are not contradicted by any other evidence makes it quite clear that all the fixed-rate holdings belonging to Subhao's family were at the partition placed in patti Subhao of which Subhao's family was the sole proprietor. The effect of the partition therefore was that the fixed rate tenants ceased to be the tenants of the other co-parceners of the mahal, and all their fixed-rate holdings were included in their own patti. The legal consequence of such a change obviously was to bring about a merger, a complete absorption of the fixed-rate tenancies into zamindari rights. After the partition of 1893, therefore, there can be no doubt that in the eye of the law the fixed-rate hoidings ceased to exist. The rights and interests of the owners were only those of ordinary proprietors. It is admitted however, that in the *khatauni* these plots continued to be recorded as fixed-rate holdings.

The contention on behalf of the defendant appellant is that it is not open to the plaintiffs to show by any evidence that these plots are other than fixed-rate holdings. Strong reliance is placed on S. 9 of the Agra Tenancy Act and the argument is that so long as the revenue papers have not been actually corrected the presumption is absolutely conclusive that these plots are fixed-rate holdings to the present day. S 9 in terms is not confined to a dispute between landlord and tenant. The words "as against a landlord" are not there at all. The section is quite general in its scope and is applicable to all cases where dispute as to the nature of the tenancy arises, no matter whether that dispute arises against a landlord or not.

It is conceivable that such a dispute may arise in proceedings to which the landlord is not at all a party. Under S. 20 (1) of the Tenancy Act the interest of a permanent tenure holder or of a fixed-rate tenant is heritable according to his personal law. Whereas other tenancies devolve according to the rule laid down in S. 22. A dispute may very well arise

between the rival heirs of a deceased tenant and the question of the true nature of the tenancy may have to be decided in a litigation to which the landlord is no party. Is t open to either set of these heirs to go behind the entry at the last revision of records and adduce evidence to the contrary? In my judgment the legislature intended that this should not be allowed The presumption under S. 9 is conclusive. The only way to displace it is by producing a judicial decision in proceedings instituted before the Act, and in no other way From this it does not, however, follow that there is a conclusive presumption under the section for all time to come that the true nature of the lands is that of a fixed-rate tenancy. The presumption can only be that the lands were fixed-rate tenancies at the time when the entry was made. There is no presumption that the nature of those lands can never in future be altered

There are many ways in which fixed-rate tenancies may come to an end *e.g.*, by surrender, ejectment, express agreement with the landlord, or, as in this case, by merger. I cannot therefore see how one can shut out evidence directed to show that a new position has arisen since the settlement. It has been suggested in argument that so long as the entries in the revenue papers remain uncorrected the presumption continues. But how can a correction be ever made after the coming into force of the Act? Whenever the Courts are moved for making the correction, the presumption, according to the appellant's contention, must stand in the way.

The Full Bench in the case of *Jai Nath Pathak* v. *Kalka Upadhya* (1) did not mean to lay down anything more than that "the entry mentioned in S. 9 is conclusive proof only as to the nature of the tenancy," and not as to the title to it; or, to be more exact, whether the person recorded *was* a permanent tenure holder, or a fixed-rate tenant *or not*.

(1) [1912] 34 All. 285—9 A.L.J. 238—13 I.C. 643 (F. B)

I must presume conclusively that in 1881 these plots were fixed-rate holdings, but I am of opinion that there is nothing in S. 9 which precludes a Court from going into the question whether the effect of subsequent events has or has not been to alter its nature. As I have already stated the effect of the partition of 1893, was to bring about a complete merger by which the fixed rate holdings were destroyed and absorbed into zamindari rights. After that the owners became full proprietors. This is the finding of the learned District Judge, which in my opinion is fatal to this appeal. The plaintiffs clearly had a right to pre-empt the sale, as the custom of pre-emption exists in the village, and the property sold was a proprietary interest in the mahal. I would therefore dismiss the appeal.

Liddsay, J:—I agree that this appeal should be dismissed but I wish to add a few words regarding the argument based upon S. 9 of the Tenancy Act. In my opinion that section could not be used in the present case for the purpose of defeating the claim of the plaintiff pre-emptor. It seems to me that the scope of S. 9 is strictly limited and that the rule laid down in that section can only be applied in litigation arising between a landlord and tenant when the matter in issue between the landlord and tenant is the nature of a tenancy.

The Tenancy Act only professes to regulate litigation regarding agricultural tenancies and in that view, it seems to me, we ought to limit the scope of a section such as S. 9 and ought not to assume that it was the intention of the legislature to lay down a rule which should be of universal application so as to govern the legal relations of persons who do not stand *inter se* as landlord and tenant.

The Full Bench case of this Court reported in 34 All. 285 seems to me to be the clearest possible authority for this view [*Jai Nath Pathak* v. *Kalka* (1)] That ruling to my mind lays down that S. 9 can only be had recourse to in cases of dispute between a zamindar and his tenant as to the nature of the tenancy and the section was framed for the purpose of providing a rule of evidence which should

govern the decision of such cases. It is clearly laid dawn in the ruling in question that the entry mentioned in section 9 is conclusive proof only as to the nature of the tenancy. In the present case no question as to the nature of tenancy arises between a landlord and his tenant. The plaintiff does not stand in the relation of landlord to the defendant appellant who is the purchaser of this property. I hold therefore that S. 9 could not be applied to the facts of the present case in order to show that the plaintiff had no right of pre-emption and that the property was still a fixed-rate tenancy and not the zamindari property of the person who sold it.

By the Court:— The order of the Court is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

1924 ALLAHABAD 91

LINDSAY AND SULAIMAN, JJ.

Hargobind Singh—Plaintiff—Appellant.

v.

Hukum Chand and others—Defendants—Respondents.

S. A. Nos. 40 and 144 of 1922, Decided on 7th May 1923 from the Sub. Judge, Agra. D/-22nd September 1921.

Civil P. C., O. 32 R. 3—Major wrongly described as minor is not a material defect.

A major defendant was wrongly described as minor and a guardian-ad-litem appointed for him. The defendant himself contested the suit through a pleader and also an appeal from the decree passed thereunder. The suit was however not amended.

Held: it was not a material defect so as to justify dismissal of the suit. 21 Mad. 167 and 28 A. 416 Ref. [P 95 C 1]

M. L. Sandal—for Appellant.

P. L. Banerjee—for Respondents.

Sulaiman, J.—Second Appeals Nos. 40 of 1922 and 144 of 1922 are connected appeals and arise out of two suits for pre-emption. On the 27th February 1919 one Anant Ram executed a sale-deed of certain shares in mauza Pawaoli in favour of Hukum Chand. Sukhdeo and Rup Singh defendants vendees. On the 25th February 1920 Har Gobind who was a co-sharer in the village instituted a suit No. 149 of 1920 for pre-emption of this property. This was followed by another suit instituted on the 27th February 1920 by Ram Dial, Bansidhar and Jagram, numbered as suit No. 159 of 1920. The two plaintiffs, Bansidhar and Jagram, have since withdrawn from the suit. These two suits were instituted in the Court of the Munsif.

A third suit was instituted in the Court of the Subordinate Judge by Ram Dial the second but we do not know the date on which it was filed. Ram Dial the second was impleaded in the two suits first mentioned but the plaintiffs of those suits were not impleaded in the suit by Ram Dial the second. The first two suits were dismissed by the Munsif on the 15th of September 1920 and the third suit was decreed on the 10th of August 920.

The Munsif dismissed the plaintiffs suit on the ground that both sets of plaintiffs had notice of the sale and had refused to purchase the property. In the Court of the Munsif Ram Dial the second, who was the plaintiff in the third suit, was impleaded as a *pro-forma* defendant He was originally alleged to be a minor and an application was made that he should be brought on the record under the guardianship of his mother. Ram Dial the second however appeared in both the suits and stated that he was of age. The Court of first instance went into the question of his minority and found that he was of age. Ram Dial the second was actually represented by a Vakil in the Court of first instance and contested the suit. No application for amendment of the plaint was however filed by the plaintiff, nor was any amendment ordered by the Court. The name of Ram Dial the second therefore continued in the plaint as a minor under the guardianship of his mother. When the plaintiffs appealed to the lower appellate Court they impleaded Ram Dial the second as major and he was again represented by a Vakil. The lower appellate Court found in favour of the plaintiffs that it had not been established that they had any knowledge of the sale or that they had refused to purchase the property. It also found that the real

sale consideration was Rs. 1000/-. Both the suits were however dismissed on the technical ground that Ram Dial had been treated in the Court of first instance as a minor whereas in fact he was of age.

We are of opinion that the decrees of the lower appellate Court cannot stand. It is true that no amendment of the plaint was made and the name of Ram Dial continued to be entered as a minor. All the same he had full knowledge of the proceedings in Court. He actually appeared in Court and was represented by his Vakil as major and was also represented as such before the lower appellate Court. Assuming that there was any irregularity it was fully cured by the conduct of both the parties. We therefore think that this ground was not sufficient ground whatsoever for dismissing the suits altogether. The case of *Ramachari* v. *Duraisami Pillai* (1) and that of *Gonga Ram* v. *Mihin Lal* (2) are authorities in fovour of the view we have taken.

It is found by the lower appellate Court that all the three pre-emptors had equal rights and none had a preferential right. They therefore are entitled each to a 1/3rd share in the pre-empted property.

We accordingly allow these appeals set aside the decrees of the lower appellate Court and decree the plaintiff's suits as directed below. In view of the circumstances however each party should bear its own costs. The decree shall be prepared in accordance with order 20 rule 14.

The claim of each of the two plaintiffs is therefore decreed for 1/3rd share of the property on payment of 1/3rd of the sale consideration as found above within 60 days from this date. In case of non-payment it would be open to the plaintiff in the connected suit to deposit that amount within an additional period of 30 days and claim that 1/3rd share also. On failure of payment by either of the two plaintiffs the appeals will stand dismissed with costs.

Appeal allowed.

(1) [1898] 21 Mad. 167.
(2) [1906] 28 All. 416—1906 A. W. N. 73—3 A. L. J. 187.

✱ 1924 ALLAHABAD 95

DANIELS, J.

Gajraj Tewari and others—Defendants—Appellants.

v.

Bhagirathi Pande and others—Plaintiffs and Defendants—Respondents.

S. A. No. 46 of 1922, Decided on 25th April 1923 against the decree of the Subordinate Judge of Basti, D/- the 30th August 1921.

Civil P. C., O. 22 R. 4—Joint decree against respondents—Failure to bring on record representative of a deceased respondent—whole appeal fails.

Where a joint decree has been given in favour of the respondents, the entire appeal fails if the appellant fails to bring the legal representatives of a deceased respondent on record (30 C.L.J. 217; 67 P.R. 1919; 1922 Patna 606 Foll.) [P. 96 C. 1.]

K. Varma—for Appellants.

N. C. Vaish—for Respondents.

Judgment.—In this case a preliminary objection is taken to the hearing of the appeal on the ground that it has abated. The facts are that two of the respondents Bhagwat Pande and Chhotkan Pande are dead and that no steps have been taken to bring their legal representatives on the record. As they admittedly died prior to 1st June last there is no doubt that the appeal has abated against them. The respondent contends however that under the circumstances of the case the appeal abated against all the respondents. Chhotkan Pande was plaintiff No. 13 in the original array of parties and was No. 19 in the list of respondents in this Court. Bhagwat Pande son of Harihar Pande is No. 7 in the list of plaintiffs respondents attached to the memorandum of appeal. As a matter of fact no such name appears either in the plaint or in the memorandum of appeal to the lower appellate Court and a comparison of the names in the plaint with those in the memorandum of appeal to this Court goes to show that this name has been written by mistake for that of Hanwant Pande son of Sheombar Pande. The name of the latter does not appear anywhere in the array of parties to the appeal.

The decree declaring them to be owners in possession of the plots in

suit has been given to the plaintiffs jointly against the defendants jointly. The plaintiffs are zemindars of one village Bitni Khurd and the defendants zemindars of another village Dippur and the dispute was in which of these two villages the lands in suit fall. The appellant relies on the language of clause (3) of rule 4 of Order 22, C. P. C. That rule says that where no application to bring the legal representatives on the record is made within limitation the *suit shall abate as against the deceased defendant*. By Rule 11 of the same order the word *defendant* includes a respondent. There is however authority for the view that notwithstanding the wording of this rule where joint decree has been given in favour of the respondents the entire appeal fails if the appellant fails to make some of the respondents a party. This has been followed by the Patna High Court in *Tej Narain Sahu* v. *Dal Ram* (1) This was held in *Baser Seikh* v. *Fazle Karim* (2) where the defendants were appealing against a decree for joint possession and failed to serve notices of appeal on two of the plaintiffs-respondents. It was also held in *Manmohan Pande* v. *Bidhu* (3) a case in which the legal representatives of one of the co-proprietors of a firm were not brought on the record. *Jamna* v. *Sarjit* (4). [This case has been followed in the later case of *Sardari Lal* v. *Ram Lal* (5)] is another case exactly on all fours with the present in which the proprietors of a village had obtained a joint declaratory decree declaring their interest in the land in dispute. The same view was taken in another case of a declaratory decree, *Kali Dayal* v. *Nagendra Nath* (6) in which the whole case law on the subject is reviewed. The ground of decision was that although Order 22 Rule 4 only provides for the appeal abating as against the deceased respondent the result of its abating against him may be in certain cases that the appeal has thereafter become imperfectly constituted, so that the appellant can no longer invite the Court to adjudicate upon the matters in controversy. The representatives of the deceased decree holders, against whom the appeal has abated, have obtained an unassailable decree declaring that they jointly with the other decree-holders are proprietors in possession of the suit land. If the appeal were allowed as against the other decree-holders the result would be two contrary declarations; one declaring that the proprietors of the respondent's village are entitled to and in possession of the land in question and the other declaring that they are not so entitled and in possession. It has been held in these cases that this is a state of things which the law does not contemplate and which cannot be allowed. That it would result in very serious inconveniences in practice is self-evident.

It has been suggested on behalf of the appellants that I should adjourn the case to give the appellants an opportunity of ascertaining and stating by affidavit whether there are any heirs of Chhutkan Pande. This is not a request which can be accepted. In the first place, it was for the appellants to bring the legal representatives on the record and they have not done so. In the second place, there must be some legal representatives even if he, in the last resort the Crown. This is not a case of an undivided Hindu joint family in which the right passes by survivorship. It is a case of an undivided zemindari village in which the proprietors are tenants-in-common. For the reasons already given I hold that the entire appeal has abated and I accordingly dismiss it with costs in favour of the answering respondents

Appeal dismissed.

---

(1) 1922 Patna 606—1 Patna 699—4 P.L.T. 170—69 I C. 624.
(2) [1915] 19 C.W.N. 290-28 I C. 703.
(3) [1918] 28 C.L.J. 268—48 I.C. 309.
(4) [1919] 67 P.R. 1919—52 I.C. 510.
(5) [1920] 1 Lah 225—1 Lah. L.J. 225—57 I.C. 199.
(6) [1919] 30 C.L.J. 217—24 C.W.N. 44—54 I.C. 822.

✱ 1924 ALLAHABAD 97

KANHAIYA LAL, J.

Sri Ram and others—Defendants-Appellants.

v

Mani Ram and others—Plaintiffs—Respondents.

S. A. No. 154 of 1922 Decided on 3rd May 1923 from the Dt. J., Meerut, D/-1st December, 1921.

(a) *Practice—Inconsistent claims.*

A suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot ofland both, rights, of ownership and of easement. [P 97 C 2]

(b) *Easements Act S. 15 .Ex. 2—Enjoyment can be without user.*

The enjoyment necessary to qualify for a right of easement, is something very different from a tual user. In order to establish a right to an easement, the enjoyment of it must continue for twenty years ; but in the case of discontinuous easements, this does not mean that the actual user is to continue for the whole period of twenty years. On the contrary, there may be days and weeks and months, during which the right may not be exercised at all, and yet during all those days and weeks and months, the person claiming the right may have been in full enjoyment of it when necessary. 30 Cal. 1077 Foll. [P 98, C 1]

Hamid Hasan—for Appellants.

S. D. Sinha—for Respondents.

Kanhaiya Lal, J.—The question for consideration in this appeal is whether the plaintiffs have acquired by prescription a right to irrigate from the wells in dispute. Their allegation was that the wells in question had been constructed by the defendants jointly with them but they failed to prove that they had contributed to the expenses of the construction of those wells The Courts below found that they have been irrigating certain fields from those wells partly from 1304 and partly from 1307 fasli, that is, for a period of twenty years prior to the suit, whenever irrigation was needed, and that they had acquired a prescriptive right to irrigate those fields from those wells. It is urged on behalf of the defendants appellants, that the plaintiffs ought not to have been granted any relief on a ground not set up in the plaint and that the evidence adduced was insufficient to establish that there was a continued enjoyment for twenty years prior to the suit. In the plaint, the allegation put down by the plaintiffs undoubtedly was that they were the joint owners of the wells in question, but they had also mentioned that they had all along irrigated the plots owned and possessed by them from the wells in dispute since the time of their construction without any obstruction or interference on the part of any of the defendants. They referred in support of their statement to the entries in the revenue records wherein the said enjoyment of the right of irrigation is said to have been noted. They further averred that they had legally acquired a right of irrigation from the wells aforesaid. Their suit was thus based practically on two different grounds, of which only the latter found favour with the Courts below. As observed in *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (1) a suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot of land both rights of ownership and of easement.

As regards the period during which the right of irrigation has been enjoyed a statement was prepared by the trial Court showing that certain plots enjoyed the benefits of irrigation from 1304 and 1307 fasli. The revenue records for all the subsequent years were not filed. But from the entries made in such records of which copies were filed, the Courts below came to the conclusion that the right of irrigation was enjoyed without any interruption or obstruction for requisite period. The lower appellate Court observed that it was not shown that if there were any temporary cessation, it was due to any action on the part of the defendants, and that it may well be that omission to take water may have been due to the fact that there may have been no need for it. Explanation II of S. 15 of the Indian Easements Act of 1882. lays down that nothing is an interruption within the meaning of that section unless there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other

(1) [1907] 34 Cal. 51—4 C. L. J. 437—11 C. W. N. 20—1 M. L. T. 364 (F. B.)

than the claimant. As held in *Koylash Chunder Ghose* v. *Sonotun Chung* (2) the enjoyment necessary to qualify for a right of easement, is something very different from actual user. In order to establish a right to an easement, the enjoyment of it must continue for twenty years; but in the case of discontinuous easements, this does not mean that the actual user is to continue for the whole period of twenty years. On the contrary, there may be days and weeks and months, during which the right may not be exercised at all, and yet during all those days and weeks and months, the person claiming the right may have been in full enjoyment of it, when necessary. In *Budhu Mandal* v. *Maliat Mandal* (3) it was similarly held that an easement may be established in respect of a right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation by means of embankments erected on the dominant tenement. It is immeterial whether the excercise of the right was continuous, provided it was excercised for the statutory period, during seasons of draught, when it could be taken advantage of. In *Ghasiram Mandal* v. *Asirbad Mahto* (4) it was similarly held that if the water of a tank was always used for irrigating the defendant's lands and there was a user by the defendant whenever it was necessary, for a period of more than twenty years, the right to irrigate from the tank would be deemed to have been substantially enjoyed for the requisite period.

The decision in *Hollins* v. *Verney* (5) is not applicable, because there the question related to a right of way and there was evidence to show that between certain intervals the way was occasionally stopped up.

The defendants have failed to show that there has been an actual interruption in the exercise of the right of irrigation or that the plots in dispute were during certain years irrigated from other sources. There may have been no irrigation because of excessive rainfall or because of the land in question having been allowed to be fallow in certain years. In any case, in the absence of any proof of interruption, the plaintiffs are entitled to a prescriptive right to irrigate their land from the wells in question, as they have been doing since 1304 and 1307 *Fasli*. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

(2) [1881] 7 Cal. 132—8 C.L.R. 281.
(3) [1903] 30 Cal. 1077.
(4) [1911] 13 C.L.J. 670—15 C.W.N. 259—9 I.C. 69.
(5) 13 Q. B. D. 304—53 L. J., Q. B. 430—51 L.T. 753—33 W.R. 5—48 J.P. 580.

1924 ALLAHABAD 98

RYVES AND DANIELS, JJ.

Mahomed Siddiq Ali Khan—Plaintiff—Appellant.

v.

Anwarul Hasan and others—Defendants—Respondents.

S. A. No. 90 of 1922, Decided on 23rd April 1923 from the Addl. Dt. J., Moradabad, D/-10th November 1921.

U. P. Court of Wards Act (IV of 1912), S. 54—Notice by transferor.

Notice given by the plaintiff's transferor does not enure for the benefit of the plaintiff. 25 All. 187 Foll. [P 99, C 1]

Iqbal Ahamd—for Appellant.

L. M. Banerjee—for Respondents.

Judgment.—The facts out of which this appeal arises are as follows:—

Ibrahim Ali Khan owned property some of which is in suit. He died leaving 3 sons and 3 daughters, one of whom was Musammat Batul-unnissa who was entitled to 1/9th of the property owned by Ibrahim Ali Khan at his death. She died leaving a son Anwar-ul-Hasan, who became entitled to 2/3rds of the 1/9th share inherited by his mother. He sold his share to Muhib Ali, who sold to Mazhar Husain, who in turn sold to the plaintiff. This is a suit by the plaintiff for declaration and for possession of the property. The defendant No. 1 is Anwar-ul-Hasan, the transferor of the property. Defendants 2 to 9 are the persons who represent the sons and daughters of Ibrahim Ali Khan. Defendants 10 to 25 are subsequent transferees from the sons of these

defendants. Nos. 22 to 25 are wards under the Court of Wards Defendants 22 to 25 alone contested the suit, on the ground that the notice required by S. 54 of the Court of Wards Act (Act No. IV of 1912 of the local legislature) had not been duly served. This plea was upheld in both Courts and an *ex parte* decree was passed against defendants 1 to 21 and the suit was dismissed as against defendants 22 to 25. The plaintiff brings this appeal on two grounds. Firstly, it is argued that, inasmuch as Mazhar Husain, who sold the property to the plaintiff had given notice of his intention to bring a suit similar to this one against the Court of Wards, that notice enured for the benefit of the plaintiff.

Secondly, that in any case S. 54 of the U. P. Court of Wards Act was not applicable, because the suit did not relate to "the property" of the wards.

With regard to the first plea it is only necessary to say that the ruling in *Bachhu Singh* v. *Secy. of State* (1) is conclusive.

On the second plea it seems to us that, on the allegation in the plaint itself in paragraph 12, the plaintiff admits that the wards have an interest in the property. The ruling on which he relies, namely, *Lal Singh* v. *Collector of Etah* (2) has no application. There the property did not belong to the ward but to the judgment-debtor of the ward, and the mere fact that the ward had attached that property did not create any right in the property in the ward. The very fact that the plaintiff has appealed from the decree of the first Court dismissing the suit against the wards shows clearly that the plaintiff himself realized that the suit does relate to the property of the wards. In our opinion the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1902] 25 All. 187.
(2) [1914] 36 All. 331—12 A. L. J. 485—25 I. C. 398.

1924 ALLAHABAD 99

RYVES AND DANIELS, JJ.

Mahabir Prasad—Appellant.

v

Kanhaiya Lal and others—Respondents.

S. A. No. 205 of 1922, Decided on 23rd April 1923 from a decree of the District Judge of Agra, D/- 2nd December 1921.

Limiation Act, Art. 181—Application for final decree—Starting point.

Where only a part of the preliminary decree is appealed against, and the appeal is directed against some defts. only, those defts. who are made respondents cannot be heard to say that the time to apply for final decree runs from the date of the decree of the first Court. 40 A. 203 foll. [P. 100, C. 1]

G. L. Agarwala—for Appellant.

N. P. Asthana—for Respondents.

Ryves, J.—Gulab Singh was the mortgagor, and Gopi Ram was the mortgagee, who is now represented by the plaintiff. Mahabir Prasad was joined as a defendant in the suit by the plaintiff for sale on the mortgage executed by Gulab Singh, as a subsequent purchaser of part of the mortgaged property. He set up among other defences that he had a prior mortgage on the property. The plaintiff's suit was decreed subject to his paying off the prior mortgage set up by Mahabir Prasad. A preliminary decree was passed on the 14th of March 1916. From that decree the plaintiff appealed against so much of the decree as directed him to pay off the prior mortgage set up by Mahabir Prasad. That appeal was decreed by the District Judge on the 2nd of June 1916. From that decree Mahabir Prasad appealed to the High Court and his appeal was dismissed on the 1st of August 1918. Then the plaintiff applied for a final decree on the 14th of April 1920. Both Courts have allowed the application. The defendant Mahabir Prasad, who is now represented by the appellant in this appeal, contended that the application was barred by limitation. Both Courts below have held that limitation began to run from the date of the High Court's decree, namely, the 1st of August 1918, and that therefore it was well within

limitation. In appeal before us it is argued that inasmuch as in the appeal by the plaintiff before the District Judge against the prior mortgage set up by Mahabir Prasad some of the defendants were not made parties, that decree must be taken to be the starting point of limitation. It seems to us that inasmuch as Mahabir Prasad himself appealed to this High Court he cannot be heard to advance that plea. Reliance has been placed on a case reported as *Gyan Singh* v. *Ata Husain* (1) but there the objection was upheld in favour of the parties who had not appealed. It seems to us that this case is covered by the authority of *Nizam-ud-din Shah* v. *Bohra Bhim Sen*, (2) which followed the Full Bench ruling in *Gajadhar Singh* v. *Kishan Jiwan Lal* (3). In our opinion the appeal must be dismissed with costs including in this Court, fees on the higher scale.

Appeal dismissed.

(1) [1921] 43 All. 320—19 A.L.J. 83—60 I.C. 817.
(2) [1918] 40 All. 203—16 A.L.J. 85—43 I.C. 870.
(3) [1917] 39 All. 641—15 A.L.J. 734—42 I.C. 93.

1924 ALLAHABAD 100

GOKUL PRASAD, J.

Gupta Nand—Defendant — Appellant.

v.

Behari Lal and others—Plaintiffs—Respondents.

S. A. No. 209 of 1922, Decided on 9th May 1923 from the First Addl. Dt. J., Aligarh, D/- 30th June 1921.

Civil P. C., O. 41 R. 31—Judgment—Points for decision and reasons must be given.

The provisions of the law are mandatory and the reason is obvious. A Judge is bound to give the points for decision and the reasons for the decision thereon in order to enable the Court of appeal to see that the judge whose findings on facts are binding on this Court, has put properly before him the points at issue and has decided them. 9 All. 26, Foll. [P. 100, C. 2]

G. Agarwala and *B. K. Mukerjee*—for Appellant.

L. Agarwala—for Respondents.

Judgment.—The facts of this case need not be detailed at length. They are rather long and would only encumber this judgment. The suit was for recovery of possession of the site of a certain house on the ground of auction purchase. The Munsif framed six issues and having dealt with them in sufficient detail gave a decree in the plaintiff's favour. The chief defendant Gupta Nand went up in appeal and contested almost all the findings of the first Court. The learned Judge of the lower appellate Court has disposed of the appeal which raised so many questions by the following judgment. "The learned Munsif has dealt with the matter exhaustively, and I can see no reason to differ from any of his conclusions. The appeal is dismissed with costs." The defendant comes here in second appeal and the first contention raised by his learned Vakil is that the lower appellate Court has not disposed of the case as it has written no judgment as is required by law. Reliance is placed on order 41 rule 31 of the Code of Civil Procedure. This ground of appeal must prevail. The provisions of the law are mandatory and the reason is obvious. A Judge is bound to give the points for decision and the reasons for the decision thereon in order to enable the Court of appeal to see that the Judge whose findings on facts are binding on this Court has put properly before him the points at issue and has decided them. This view has been consistently taken by this Court for more than a quarter of a century. Mr. Justice Straight, then Officiating Chief Justice, observed in the case of *Sohawan* v. *Babu Nand* (1). "I am of opinion that the so-called judgment of the lower appellate Court to which exception is taken was, in law, no judgment at all, because it does not satisfy the requirements of S. 574 of the Code of Civil Procedure, in not stating the points for determination raised by the pleas in appeal, the decision upon them, and the reasons for that decision." In the same case Mr Justice Mahmood observed at page 31 as follows. "I cannot but hold that S. 574 of the Code contains

(1) [1887] 9 All. 26.

one of the most salutary provisions of the law, and that considering that this Court in second appeal is bound to accept the findings of fact arrived at by the lower appellate Courts, we must insist upon a due obedience by those Courts of the mandate of the legislature contained in that section.'. The judgment pronounced in the present case might be typed and stitched to any case from a simple money suit to a suit for determination of most complicated questions of the law of mortgage. The latest case of this Court which I have been able to find in this connection is the case of *Babban Singh* v. *Jaimangal Singh* (2).

Having regard to the authorities cited above I have come to the conclusion that there has been no proper determination of the appeal by the lower appellate Court. I therefore allow the appeal set aside the decree of the lower appellate Court and remand the case to that Court under order 41 rule 23 to decide the points raised therein and to write a judgment according to law. Costs here and hitherto will abide the event.

Appeal allowed.

(2) [1906] A.W.N. 86.

1924 ALLAHABAD 101

WALSH, J.

Jwala Prasad—Petitioner.

v

King Emperor—Opposite Party.

Criminal Ref. No. 265 of 1923, Decided on 21st May 1923 from the reference by the Dt. Magistrate, Agra, D/-26th April 1923.

U. P. Excise Act (1910), S. 64 (c)—Sale in presence of one partner—Liability of the other partner—Master and servant—Partner and partner—No difference.

Two excise licensees J. and T. who were partners in a country liquor shop license had been convicted under S. 64 (c) of the U. P. Excise Act 1910 of committing a breach of the conditions of the license by selling liquor out of the prescribed hours and also by selling adulterated liquor. T. was present at the shop when these offences were detected. J. the other licensee was not present and there was no suggestion that he knew anything about the irregular sales.

Held: that J's. conviction was right, he being equally guilty as T. (24 B. 423 and 9 A L.J. 288 Ref..) The real test so far as agency is concerned is not the nature of the act but the nature of the business. The nature of the act is the test which decides the criminality. The law of partnership is merely a breach of the law of agency just like the law of master and servant, and for this purpose two partners stand to one another in the same relation as master and servant. [P. 101, C. 2]

The parties were not represented.

The following is the referring order passed by the District Magistrate of Agra:—

Two excise licensees who are partners in a country liquor shop license have been convicted under S. 64 (c) of the U. P. Excise Act, 1910 of committing a breach of the conditions of the license by selling liquor out of the prescribed hours and also by selling adulterated liquor, One of the partners Tika Ram was present at the shop when these offences were detected. It is admitted that Jwala Prasad the other licensee was not present and there is no suggestion that he knew anything about the irregular sales. The Deputy Magistrate has convicted Jwala Prasad on the strength of the ruling of the Hon'ble High Court, *Babu Lal* v. *King Emperor* (1). It has been argued before me that that ruling establishes only the liability of a master for the act of his servant, and that it does not follow that one partner is liable for the acts of the other partner. I do not accept this contention. It seems to me that one partner must be held to be liable for the acts of the other partner The second point however, urged before me in revision appears to be valid. The important point in the ruling quoted which followed the case of *Queen Empress* v. *Tayab Ali* (2) was that in order to establish the offence under the section of the Opium Act it was not necessary to prove intention, *mens rea* or knowledge, and that the mere act constituted the offence. In the present case S. 64 (c) of the U. P. Excise Act makes it an offence if any one being the holder of a license *wilfully* does or omits to do anything in breach of

(1) [1912] 34 All. 379—9 A.L.J. 288—13 Cr.L.J. 282—14 I.C. 666.
(2) [1900] 24 Bom. 423-2 Bom.L.R. 52.

any of the conditions of the license. The use of the word "wilfully" appears to me to make it clear that in order to establish this offence it is necessary to prove intention or knowledge, and on the facts found by the Deputy Magistrate there is no such proof against Jwala Prasad. I therefore forward the record for the order of the Hon'ble High Court with the recommendation that the conviction of Jwala Prasad be set aside.

Walsh, J.—I do not agree with the District Magistrate. *mens rea* has nothing to do with it. It is quite true that the section requires a wilful breach of the condition. A man may accidently commit a breach. For example if a man's watch was five minutes slow and he sold liquor two minutes to eight by his own time and it turned out to be two minutes past eight by the right time, that would not be a wilful breach. But a sale is a sale, and I have not the slightest doubt that the servant intended to sell the liquor and to take the money for it, and if he pocketed the money and refused to hand it over to his master and said that it was an accidental sale and not a wilful sale and therefore the money did not belong to the master but to the servant, the master would have been very angry. The real test so for as agency is concerned is not the nature of the act but the nature of the business. The nature of the act is the test which decides the criminality. If the sale is wilful or the breach of the licence is wilful, then the servant has committed an offence. But the question still remains whether his master is liable, and in all these quasi-Civil transactions which are really questions of contract, the view has always been held that the legislature intended th t the maxim making the superior answerable should apply to sales which are carried through in breach of the conditions of the licence by a man whom the master has put in the shop for the purpose of selling on his behalf and for his profit and therefore if the man who actually took the money and transferred the liquor to the purchaser had been a servant, Jwala would have been answerable as his master. The law of partnership is merely a breach of the law of agency just like the law of master and servant, and for this purpose two partners stand to one another in the same relation as master and servant.

This was a wilful breach of the license. It was committed by Tika Ram as agent for Jwala the other partner, and in my opinion that makes Jwala equally liable and the Magistrate was right. I see no reason to interfere and I direct the record to be returned to the District Magistrate. I may add that I agree with both the cases which have been cited, namely *Queen Empress* v. *Tayab Ali* (2) and *Babu Lal* v. *King Emperor* (1). It is hard on Jwala if he was on bad terms with Tika Ram and objected to this class of illicit dealing, but if he can prove that, he can press for the recovery of his fine from Tika Ram I think in the taking of the partnership accounts. Let the record be returned.

Reference answered in negative.

1924 ALLAHABAD 102

RYVES, J.

Khairuddin and others—Plaintiffs—Appellants.

v.

Sahu Gulab Das and another—Defendants—Respondents.

S. A. No. 243 of 1922, Decided on 1st June 1923 from the Addl Dt. J., Moradabad, D/- 16th November 1921.

Agra Tenancy Act, S. 167—Scope.

Where the suit was for a declaration under S. 95 (a) and the real object of this suit was to have a declaration against both the Zemindar and the son o' the tenant who was recorded as such that the plaintiffs were the occupancy tenants of the holding.

Held: Such a suit can only be brought in a Court of Revenue. [P. 103, C. 1]

S. Raza Ali—for Appellants.

Bhagwati Shanker and *Durga Prasad*—for Respondents.

Judgment.—Shamsi was the occupancy tenant of the land in dispute. He died leaving four sons Sher Khan, Zainuddin, Baz Khan and Khairuddin. The plaintiffs are Khairuddin and the four sons of Zainuddin who is dead

and the three sons of Baz Khan who is also dead. These plaintiffs brought this suit in the Revenue Court at Moradabad against Sher Khan and the Zamindar. The suit purported to be one under S 95 (a) of the Agra Tenancy Act. In their plaint after reciting the above facts they stated that on the death of Shamsi his four sons jointly cultivated the land but the name of Sher Khan alone was entered in the revenue papers because he was the eldest son and was the head of the family. The plaintiffs assert that they are in possession of the land as heirs of Shamsi but that inasmuch as the zemindar does not admit that they are tenants the suit was brought for a declaration under S. 95 (a) of the Agra Tenancy Act. The Assistant Collector before whom the case came held that the suit was triable by a Civil Court and dismissed it On appeal the learned Additional District Judge of Moradabad has upheld this view. The plaintiffs come here in second appeal and the only point taken is that the suit was one exclusively triable by the Revenue Court, and my attention has been drawn to the cases of *Ram Charan Rai* v. *Jinsi Ahiram* (1). *Baljit* v. *Mahipal* (2) and *Jagannath* v. *Balwant Singh* (3). It seems to me from a perusal of the plaint itself that the real object of this suit was to have a declaration against both the zemindar and Sher Khan that the plaintiffs were the occupancy tenants of the holding. Such a suit it seems to me can only be brought in a Court of revenue, having regard to the S. 167 of the Agra Tenancy Act. I therefore allow this appeal, set aside the decree of the Court below and direct that the plaint be returned through the learned District Judge to the trial Court to restore to its original number and to dispose of it according to law. Costs including in this Court fees on the higher scale will abide the result.

Appeal allowed.

(1) [1914] 36 All. 48—11 A.L.J. 1022—21 I.C. 859.
(2) [1919] 41 All. 203—17 A.L.J. 60—49 I.C. 118.
(3) [1922] All. 372 -44 All. 692—20 A.L.J. 570—68 I.C. 247.

1924 ALLAHABAD 103

KANHAIYA LAL, J.

Kamlapat Dubey and others—Plaintiffs—Appellants.

v.

Ram Raj and others—Defendants—Respondents.

S. A. No. 289 of 1922 Decided on 11th June 1923 against the decree of the Sub. J., Gorakhpur, D/- 28th November 1921.

Easement—Constructing cattle troughs on another's land—12 years user.

Where the plaintiffs claimed to be the owners of a plot and complained that the defendants had without any right constructed certain cattle troughs and fixed certain pegs for tying the cattle over a portion of the said land in the month of Bhadon preceding the suit, but the lower Courts found that the land in question belonged to the plaintiffs but the cattle troughs had been in existence for more than 12 years prior to the suit.

Held: that the plaintiffs were not entitled to have those troughs removed though the proprietary title of the plaintiffs to the land in dispute would remain unaffected. 16 B. 338 Dist. [P. 104, C. 1.]

N. P. Asthana and *K. Verma*—for Appellants.

Haribans Sahai—for Respondents.

Judgment.—The dispute in this appeal relates to plot No. 584/2 Khasra measuring 3 biswas 18 dhurs and situated in the village Mahnlia. The plaintiffs claim to be the owners of that plot and complain that the defendants had without any right constructed certain cattle troughs and fixed certain pegs for tying cattle over a portion of the said land in the month of *Bhalon* preceding the suit. The defendants on the other hand assert that the cattle troughs and pegs in question stand on their own land and have been in existence for more than 12 years prior to the suit. The Courts below found that the land in question belonged to the plaintiffs but the cattle troughs had been in existence for more than 12 years prior to the suit They dismissed the suit of the plaintiffs as barred by time.

The learned Counsel for the plaintiffs appellants relies on the decision in *Framji Cursetji* v. *Gocu'das Madhowji* (1) and contends that such

(1) [1892] 16 Bom. 338.

temporary user, even if it is of a long standing, can give the defendants no right to continue to occupy the and; but the user here is not of a emporary character. A place for the tying of cattle is one of the necessary adjuncts of an agriculturist's occupation and residence in the village. The cattle troughs in question are situated close to the house of the defendants and as the defendant's have been allowed to use the land and to maintain the cattle troughs for more than 12 years without obstruction, the plaintiffs are not entitled to have those troughs removed. The troughs do not however occupy the whole land and no question of adverse possession can therefore arise.

The appeal is dismissed except in so far that the proprietary title of the plaintiffs to the land in dispute will remain unaffected. The parties will under the circumstances bear their own costs of this Court.

Appeal allowed in part.

✱ 1924 ALLAHABAD 104

WALSH AND KANHAIYA LAL, JJ.

Mahomed Iftikhar-Ullah — Judgment-debtor—Appellant.

v.

Banke Lal — Decree-holder — Respondent.

Ex. F. A No. 303 of 1922, Decided on 14th May 1923 from the Sub. J., Moradabad, D/-13th May, 1922.

Civil P. C., O. 34 Rr. 2, 4, 10—Personal liability to pay costs does not exist before final decree.

Where no final decree has been passed, it is not open to the mortgagee decree-holder to apply for recovery of costs from the person of the judgment-debtor. 40 A. 109 and 48 I. C. 329, Ref. 17 A. L. J. 582, Dist.

K. N. Katju and *M. N. Raina*—for Appellant.

P. L. Banerjee—for Respondent.

Kanhaiya, Lal, J:—This appeal arises out of an application made by the decree-holder respondent for the recovery of certain costs awarded to him by an appellate decree of this Court from the person of the judgment-debtors. It appears that the decree-holder obtained a preliminary decree for the sale of certain property against the present judgment-debtor and other persons which provided that in the case of non-payment of the decretal money, including the costs awarded by the trial Court, the mortgaged property was to be sold. From that decree some of the heirs of the original mortgagor appealed to this Court. Their appeal was unsuccessful, and was dismissed excepting so far that the time for the payment of the money was extended; and the decree-holder respondent was awarded his costs as against them. The effect of the dismissal of the appeal with the modification mentioned above was that the decree of the trial Court as amended, merged into the decree of this Court, and until it was made final it could not be executed against the mortgaged property. The decree-holder sought in the present proceedings to recover the costs awarded to him by the decree of the appellate Court, but Order 34 rule 10 of the Code of Civil Procedure provides that in finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court *shall*, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage money such costs of the suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment. It is open to a Court of appeal to direct that such costs as it may award against the unsuccessful appellant may be recoverable from him personally, but if there is not such express direction the costs are as a matter of ordinary practice sanctioned by Order 34 rules 2,4 and 10 of the Code of Civil Procedure to be added to the mortgage money and are in the first instance recoverable from the mortgaged property after the decree is made final. That view has been recognised in the case of *Dambar Singh* v. *Kalyan Singh* (1) and *Mirza Saddiq Husain Khan* v *Mt Ummatul Fatima* (2) the Court below has relied on the decision in the case of *Amina Bibi* v. *Rama*

(1) [1918] 40 All. 109—15 A. L. J. 914—43 I. C. 557.
(2) [1918] 48 I. C. 329.

Shundar Misra (3) but in that case the decree sought to be executed was a final decree in a mortgage suit, which provided for the extension of the time for payment by the mortgagor for another six months from the date thereof and went on to direct the appellant to pay the respondents a certain sum of money. A final decree stands however on a different footing from a preliminary decree for sale. A preliminary decree is supposed to direct the taking of accounts of what would be due on the mortgage including the costs of the suit in the manner provided by Order 34 rules 2,4 and 10 of the Code of Civil Procedure A final decree is intended to give the result of the account, as it would stand on the date of that decree, showing the money due on the mortgage including the costs recoverable from the mort gaged property, and if that final decree cantains a separate direction for the payment of costs by a certain party to another, the situation becomes entirely different. In that particular case the costs in question were the costs of an unsuccessful appeal brought in the High Court by one only of several mortgagors against the final decree. In the present case no final decree has yet been prepared. The preliminary decree merely directed the taking of accounts and the payment of a certain sum of money including costs within a certain period, with a proviso that if the said amount was not so paid, the mortgaged property shall be liable to be sold. That decree merged in the appellate decree of this Court. The latter is the only decree capable of being made final; and the two decrees must be read together in order to determine the rights of the parties and the remedies at present available to them. We do not at any moment suggest that the right of the decree-holder to recover the costs from the person of the then unsuccessful appellants is altogether excluded. The remedy of the decree-holder at the present stage is to get a final decree prepared, showing the money due on the mortgage inclusive of the costs of the suit and the costs incurred subsequent to the preliminary decree for sale and when such a decree has been obtained he can execute the decree against the mortgaged property and then pursue such remedy as may be available to him, after the mortgaged property has been sold for the recovery of the rest of the money due to him on account of the decree. In that view of the matter this appeal must be allowed and the order of the Court below set aside. the result being that the application of the decree-holder will stand dismissed with costs here and hitherto including in this Court fees on the higher scale.

Appeal allowed.

(3) [1919] 41 All. 473—17 A. L. J. 582—50 I. C. 730.

✱ 1924 ALLAHABAD 105

WALSH AND KANHAIYA LAL, JJ.

(*Beti*) *Mahalakshmi Bai and another* Decree-holder—Appellants.

v.

Chaudhari Badan Singh and another—Surety-Petitioners—Respondents.

Ex. F. A. No. 309 of 1922, Decided on 23rd May 1923 from the Sub. J., Mainpuri, D/-24th April 1922.

Civil P. C., S. 145—Enforcement of security is not limited to personal liability.

The object of this section is to provide that where a person has become liable as a surety for the performance of a decree or order under the section for a party for whose benefit a security has been given may enforce the security by executing the decree or order against the surety in the same manner as if the surety had been a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. In the clause "to the extent to which he has rendered himself liable" the word "personally" was added by the present Code of Civil Procedure, but by the addition of that it could hardly have been intended to limit the enforcement of the security to a personal liability, for forms 2, 3 and 4 of the appendix G appended to the Code of Civil Procedure provide for the hypothecation of property to secure the performance of the obligation undertaken by the surety The personal or individual liability of the surety under the security bond may not, always, be as extensive as that of the judgment debtor, and the object of the above provision clearly is to limit the enforcement to the extent provided for by the security bond.

Where the security bond did not purport to have been executed in favour of the decree holder and contained an undertaking given to an appellate Court which granted the stay of execution subject to the production of such security.

Held: such a bond can be enforced by the Court in the same way as a decree 38 All. 327 and 42 All. 158 Foll. 39 All. 225 Dist.

[P. 106, C. 2 and P, 107 C. 1]

K. N. Katju and *L. P. Zutshi*—for Appellants.

Kumuda Prasad and *Gajadhar Prasad*—for Respondents.

Kanhaiya Lal, J.—This is an appeal from an order refusing to enforce a security bond, filed under Order 41 rule 5, C. P. C., by an execution proceeding. In the course of an appeal pending in this Court an order for the stay of execution of a decree for costs was obtained by the judgment debtor pending the decision of that appeal and a security bond executed by him and his surety Chaudhri Badan Singh was filed whereby the latter agreed to stand surity for Rs. 15,000 and hypothecated certain property for the payment of the same in case the money which may be found due under the decree was not realised from the judgment debtor. The security bond stated. "We the executants willingly give security for Rs 15,000 and after hypothecating the property specified below agree that if the appellate Court affirms the decree of the Court of first instance, then I, Rao Narsingh Rao, will duly carry out the decree of the appellate Court and whatever costs may be allowed under the said decree on account of the costs of the trial Court and of the appellate Court shall be paid by me (Rao Narsingh Rao) with interest irrespective of the above mentioned security for Rs. 15,000. If Rao Narsingh Rao does not do so, then the sum which may be due under the decree may be realised from the hypothecated property of the executants."

The Court below has found that no personal liability was undertaken by the surety under the above deed and that the only remedy of the decree-holder was to enforce the mortgage security by a separate suit for sale. S. 145 C. P. C. provides that where any person has become liable as a surety for the performance of any decree or any part thereof or for the restitution of any property taken in execution of a decree or for the payment of any money or for the fulfilment of any condition imposed in any suit or proceeding, the decree or order may be executed against him to the extent to which he has rendered himself personally liable in the manner provided for the execution of decrees, and such person shall, for the purposes of the appeal, be deemed a party within the meaning of S. 47. The object of this section is to provide that where a person has become liable as a surety for the performance of a decree or for any of the purposes above specified, the party for whose benefit the security has been given may enforce the security by executing the decree or order against the surety in the same manner as if the surety had been a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. S. 253 of the old Code of Civil Procedure was limited to cases where a security bond was filed for the performance of a decree and authorised the enforcement thereof against the surety to the extent to which he had rendered himself liable in the same manner as a decree could be executed against the defendant. In the clause "to the extent to which he has rendered himself liable" the word "personally" was added by the present Code of Civil Procedure, but by the addition of that word it could hardly have been intended to limit the enforcement of the security to a personal liability, for forms 2, 3 and 4 of appendix G appended to the Code of Civil Procedure provide for the hypothecation of property to secure the performance of the obligation undertaken by the surety. The personal or individual liability of the surety under the security bond may not, always, be as extensive as that of the judgment debtor, and the object of the above provision clearly is to limit the enforcement to the extent provided for by the security bond. Beyond a statement that the surety willingly gave security Rs. 15,000, there was nothing in the terms of the present bond to indicate that he undertook a personal liability. On the other hand there was a clear indication that the money which may be found due on the decree passed in appeal would be realizable in the first instance from the judgment debtor,

and that if the judgment debtor did not pay the same, it would be recoverable from the property hypothecated by the surety. There was no personal covenent by the surety to pay the same in case the hypothecated property was found to be insufficient. The only question for consideration in these circumstances is whether S. 145 C. P. C. is applicable and whether the security bond can be enforced by an application for the execution of the decree. The security bond does not purport to have been executed in favour of the decree holder. It contains an undertaking given to an appellate Court which granted the stay of execution subject to the production of such security, and as held in the case of *Janki Kuer* v. *Sarup Rani* (1) such a bond can be enforced by the Court below in the same way as a decree. In the case of *Mukta Prasad* v. *Mahadeo Prasad* (2 a similar view was taken. In the case of *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (3) their Lordships of the Privy Council allowed the security bond to be enforced in somewhat similar circumstances against the hypothecated property without a separate suit for sale.

The Court below refers to the decision in the case of *Amir* v. *Mahadeo Prasad*, (4) but in that case the equity of redemption in the hypothecated property had passed from the surety to a third person who could not be treated for the purposes of S. 145 C. P. C. as a party to the decree and against whom the security could not have been enforced except by a separate suit for sale. In the case of *Shyam Sundar Lal* v. *Bajpai Jainarayan* (5) and in the case of *Subramanian Chettiar* v. *Rajarajeswar Sethupathi*, (6) security bonds hypothecating immoveable property as security for the due performance of a decree have been allowed to be enforced by execution without a separate suit being considered necessary. Where the equity of redemption is still held by the surety, the surety is the primary person from whom the amount of security can be recovered, and S. 145 C. P. C. is intended to enable the enforcement of such security. The appeal is therefore allowed with costs in this Court on the higher scale and the order of the Court below set aside and the case is remanded to that Court with a direction to reinstate it under its original number and to proceed with the disposal of the matter in accordance with law.

Appeal allowed.

(1) [1895] 17 All. 99—1895 A.W.N. 19.
(2) [1916] 38 All. 327—14 A.L.J. 385—33 I. C. 982.
(3) [1920] 42 All. 158—22 O. C. 212—6 O.L.J. 682—38 M.L.J. 302—18 A.L.J. 263—22 Bom. L. R. 521—55 I. C. 550 (P.C.)
(4) [1917] 39 All. 225—15 A.L.J. 76—38 I. C. 33.
(5) [1903] 30 Cal. 1060—7 C.W.N. 914.
(6) [1917] 41 Mad. 327—6 L.W. 762—1917 M.W.N. 872—34 M.L.J. 84—43 I. C. 187.

1924 ALLAHABAD 107

DANIELS, J.

Prashadi Lal—Defendant—Appellant.

v.

Thakur Laiq Singh—Plaintiff—Respondent.

S. A. No. 446 of 1922, Decided on 29th June, 1923, from the decree of the Sub. J., Budaun.

Civil P. C., O. 34 R. 1—Puisne mortgagee not joined in a suit for sale—Suit should not be dismissed.

The object of order 34 rule 1 is to prevent multiplicity of suits and to secure that no injury is done to the rights of any party through his not being impleaded. The provision is expressly made subject to other provisions of the Code which include O. 1 R. 9, and it has been laid down many times that where it is possible for the Court to do justice as between the parties before it, it should do so and should not make order 34 rule 1 a ground for dismissing the entire suit. 45 B. 1009; 1922 Pat. 651, Ref. 35 A. 484 Diss.

[P. 108, C. 2]

Panna Lal—for Appellant.

P. L. Banerjee—for Respondent.

Daniels, J:—This appeal arises out of a suit brought by the plaintiff Thakur Laiq Singh for sale of the mortgaged property on the basis of

his mortgage. The mortgage was executed by Sumer Singh the original owner of the property as far back as the 1st June 1904. Sumer Singh subsequently sold his equity of redemption. The defendant appellant Parshadi Lal brought a pre-emption suit on the basis of this sale and was successful. He is therefore the owner of the property subject to the plaintiff's mortgage. He himself subsequently on 22nd October 1908. executed a mortgage in favour of one Ram Prasad who is not before the Court. The sole question for decision in this appeal is whether the whole suit should have been dismissed on account of the plaintiff's failure to implead Ram Prasad.

Both Courts have relied on this ruling in *Alam Singh* v. *Gokul Singh* (1). That was a case in which the plaintiff mortgagee omitted to implead a subsequent mortgagee who held a mortgage of part only of the mortgaged property. The Court held that it was not necessary to dismiss the entire suit but gave a decree against that portion of the property which was not covered by the subsequent mortgage.The trial Court considered that it necessarily followed from this ruling that if the subsequent mortgage covered the entire property the entire suit must be dismissed. In the appellate Court the plaintiff relied on the principle that Order 34 rule 1, which directs that all persons having an interest in the mortgaged property must be joined as parties, is subject to Order 1 rule 9 which says that no suit shall be dismissed merely on the ground of non-joinder of parties. If therefore relief could be given to the plaintiff without prejudicing the right of Ram Prasad who had not joined. Order 34 rule 1 did not necessarily stand in the way of such relief being granted. The learned Judge considered that if this object could be effected in one way it could also be effected in another according to the circumstances of the particular case. In the case cited it was effected by passing a decree for sale of part of the mortgage only. In the present case, in order that the rights of Ram Prasad should not be prejudiced, the plaintiff offered to give up his priority and to accept a decree subject to the mortgage in favour of Ram Prasad which should be treated as having preference over his own. The learned Judge of the Court below has passed a decree in these terms.

The decree under appeal does full justice as between the parties to the suit. The appellant is in no way prejudiced by it. He was bound to pay the plaintiff's mortgage. He was bound also to pay the mortgage in favour of Ram Prasad. So far as he is concerned the respective priority as between these two mortgagees is a matter of comparative indifference. He has in fact tried to take advantage of the technical ground of nonjoinder of Ram Prasad in order to escape liability for paying the plaintiff's mortgage altogether. Unless the provisions of law very clearly require it this contention ought not, on ground of justice and equity, to be accepted.

In my opinion the reasoning of the Court below is sound. The object of Order 34 rule 1 is to prevent multiplicity of suits and to secure that no injury is done to the rights of any party through his not being impleaded. The provision is expressly made subject to other provisions of the Code which include Order 1 rule 9, and it has been laid down many times that where it is possible for the Court to do justice as between the parties before it, it should do so and should not make order 34 rule 1 a ground for dismissing the entire suit. The Bombay High Court recently in the case of *Shivubai Rajaram* v. *Shiddheswar* (2) refused to allow a redemption suit to be dismissed altogether because certain heirs of the original mortgagees had not been joined. But the case which is most directly parallel to that before me is that of *Sital Prasad* v. *Asho Singh* (3). The facts of that case were exactly on all fours. The plaintiff was suing on his

(1) [1913] 35 All 484—11 A.L.J. 749—21 I. C. 271.

(2) [1921] 45 Bom. 1009—23 Bom. L. R. 405—61 I. C. 590.

(3) 1922 Pat. 651—2 Pat. 175—69 I. C. 677.

mortgage and had failed to implead a subsequent mortgagee. The contention was, as here, that the entire suit should be dismissed in consequence. The Court went further than it is necessary to do in this case and held that a decree could be passed in favour of the plaintiff without making any condition as to the absent defendants, on the ground that the decree could not in any case be allowed to operate to the prejudice of the subsequent mortgagee who was no party to it. In the present case the decree passed by the Court below does substantial justice between the parties and in my opinion the provisions of Order 34 rule 1 which must be read subject to those of Order 1 rule 9 do not have the effect of rendering it illegal. I accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

1924 ALLAHABAD 109

RYVES AND DANIELS, JJ.

Jhari Koeri—Appellant.

v.

Bijai Singh and others-Respondents.

S. A. No. 453 of 1922, Decided on 8th May 1923 from the Dt. J., Benares D/- 24th November, 1921.

Hindu Law—Widow — Execution Sale of entire estate against, is equivalent to private alienation.

An execution sale against a widow which purports to pass the entire estate stands on the same footing as a voluntary alienation by her. 45 B. 105: 1923 Pat. 122 Foll. 10 C, 985 P.C, and 1 Cal. 133 P. C. Foll. [P 110 C 2]

Haribans Sahai—for Appellant.

Iqbal Ahmad—for Respondents.

Daniels, J.–Jhari Koeri the plaintiff appellant in this case is the auction purchaser of a fixed-rate holding. The holding originally belonged to one Babu Lal and was inherited by his wife Mt. Chaurasi. Mt. Chaurasi was in possession of another holding, either a fixed rate or occupancy holding, probably the latter, which she had also inherited from her husband. A decree for arrears of rent against this latter holding was obtained against her. Instead of taking ejectment proceedings under S. 57 (a) and 61 of the Tenancy Act the land holder put to sale the fixed-rate holding now in dispute, which was already mortgaged to him, and it was purchased by the plaintiff under two sale certificates dated the 21st June 1909 and 24th November 1910. The plaintiff obtained possession of the holding. Mt. Chaurasi died about two years before the suit and on her death the defendants, who are remote reversioners of Babu Lal, managed to get possession of the holding, thereby ousting the plaintiff. The defendants set up title to the holding on the strength of having obtained a relinquishment from a son of one of the daughters of Babu Lal. As it appears that there were daughters of Babu Lal in existence who were nearer heirs, the defendants' title is not assisted by this relinquishment, and both Courts have found that they have no title. The Courts have differed as to whether the plaintiff is entitled to recover possession from them. The main point in dispute was whether the plaintiff purchased merely the life interest of Mt. Chaurasi. The trial Court held that in either case the plaintiff's title was good against all the world except the immediate reversionary heirs, and the defendants having no title the plaintiff was entitled to get back possession. The lower appellate Court considered that as the decree for arrears of rent was passed against Mt. Chaurasi the plaintiff's purchase could only be of her life interest. It further held that as the defendants were in possession it did not matter whether they had a good title or not unless the plaintiff could prove that he purchased the entire interest in the holding. Being of opinion that the plaintiff's purchase was of Mt. Chaurasi's life interest only the learned judge allowed the appeal and dismissed the suit.

The question therefore for decision in this appeal is what was the nature of the interest which the plaintiff obtained by his auction purchase in 1909-910 and whether he has a subsisting interest sufficient to entitle him to recover the property from the defendants who are in possession without any right whatever,

It was laid down by the Privy Council in the case of *Jugul Kishore*

v. *Jatendro Mohun Tagore* (1), that whether the whole estate or only the right, title and interest of the widow passes on an execution sale against the widow depends on the nature of the suit. If the suit is a personal claim against the widow only her interest passes, but if the suit is in respect of the family estate or upon a cause not merely personal against her then the whole inheritance passes by the execution sale. The decree in that particular case was for mesne profits. It is contended before us that a decree for arrears of rent must necessarily be personal whether the holding was ancestral or not, and two cases are cited in support of the argument. The first is the decision in *Jiban Krishna Roy* v. *Brojo Lal Sen* (2). The decision in that case was that in that particular case a sale in execution of a decree for arrears of rent passed against a Hindu daughter passed only her interest, but the decision was based on the circumstances of the case and the provisions of S. 64 of the Bengal Tenancy Act and is not authority for the proposition that a decree for arrears of rent must necessarily in all cases be treated as a personal liability. The second case is a decision of the Calcutta High Court in *Kristo Govind Majumdar* v. *Hem Chandar Choudhry* (3) which laid down that a decree for arrears of rent against a daughter in possession was a personal decree in which only her life interest could be sold. No reasons are given for the decision. The Court considered the case concluded by the Privy Council ruling in *Baijun Doobey* v. *Brij Bhookun Lal* (4).

An examination of this ruling does not support the conclusion which the learned Judges drew from it. The case was decided on the ground that the sale which was held did not purport to be of anything more than the widow's interest, and the earlier cases cited by their Lordships in their judgment sufficiently show that it is possible for a sale under a rent decree against a widow to pass the entire estate.

There has been no finding by the Courts below as to whether the holding in respect of which the decree was obtained was a fixed-rate or an occupancy holding. In either case the zemindar might under S. 57 (a) of the Tenancy Act have enforced it by proceedings in ejectment and had he done so the entire tenure would have been lost to the family. The difference between the two is that if the holding was an occupancy holding the reversioners could not in any case have succeeded to it on Mt. Chaurasi's death unless they shared in the cultivation during her lifetime. It appears to us however that it is unnecessary to enter into this question for this reason that it is clear from the record that what purported to be sold under the decree was the entire tenure. If it be assumed that the decretal debt was not of a nature to support a sale of the entire interest the purchasers obtained a title voidable at the instance of the reversioners on the widow's death. Until challenged by them it is a good title and cannot he treated as a nullity by any trespasser who has succeeded in getting possession of the property. On this point we agree with the learned trial judge.

If authority is necessary we may refer to two recent decisions of the Bombay and Bihar High Court respectively, *Sita Ram* v. *Khandu* (5) and *Kesho Prasad Singh* v. *Chandrika Prasad Singh* (6). In this respect an execution sale against a widow which purports to pass the entire estate stands on the same footing as a voluntary alienation by her. In this view we set aside the decree of the Court below and restore that of the trial Court with costs in all Courts.

Appeal allowed.

(1) [1884] 10 Cal. 985—11 I. A. 66—4 Sar. 553 (P. C.)
(2) [1903] 30 Cal. 550—30 I. A. 81—5 Bom. L. R. 428—7 C. W. N. 425—8 Sar. 444 (P. C.)
(3) [1889] 16 Cal. 511.
(4) [1875] 1 Cal. 133—2 I. A. 275—24 W. R. 306—3 Sar. 541—3 Suther. 207 (P. C.)
(5) [1921] 45 Bom. 105—22 Bom. L. R. 1155—59 I. C. 480.
(6) [1923] Pat. 122—2 Pat. 217—3 P. L. T. 797—68 I. C. 394.

✱ 1924 ALLAHABAD 111

RYVES AND DANIELS, JJ.

Sitla Prasad and others—Plaintiffs-Appellants.

v

Mt. Chameli Bahu and others—Defendants—Respondents.

S. A. No. 478 of 1922, Decided on 29th May 1923 from the Sub. J., Jaunpur, D/-30th November 1921.

Hindu Law—Joint family—Alienation by father—Sons cannot recover.

Hindu sons can not recover joint family property which has been sold in execution of a mortgage decree against their father without showing that the mortgage debt was for illegal or immoral purposes. 44 Cal. 524 and 42 All. 58 1923 All. 310 48 Cal. 41 Fol. [P 111, C 2]

Kumuda Prasad—for Appellants.

N. Upadhia—for Respondents.

Daniels, J.—The question in this appeal is whether Hindu sons can recover joint family property which has been sold in execution of a mortgage decree against their father without showing that the mortgage debt was for illegal or immoral purposes. The mortgage was executed by the common ancestor Parmeshar Dayal in 1908. A suit was brought for sale on the basis of the mortgage and a final decree obtained on the 29th of August 1917. The sale took place on the 20th of January 1917 and was confirmed shortly after the institution of the present suit The auction purchaser was a stranger to the suit. The suit was filed on 2nd April 1919 by the sons and grandsons of Parmeshar Dayal for a declaration that the sale was not binding on them on the ground that the mortgage debt was incurred without any legal necessity.

The Court below has dismissed the suit on the rule laid down by Sir James Colvile in *Suraj Bunsi Koer* v. *Sheo Prasad Singh* (1) that where joint ancestral property has passed out of the joint family under a sale in execution of a decree for the father's debts, his sons cannot recover that property without showing that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted", and further that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings.

The appellants' contention is that this rule has been modified by the decision in *Sahu Ram Chandra* v. *Bhup Singh* (2) and that it now only holds good when the father is dead at the time of the proceedings. In this case Parmeshar Dayal is still alive. The case is however exactly covered by the decision in the case of *Sripat Singh* v. *Prodyot Kumar* (3). This was also a case in which property was sold under a decree on a mortgage passed against the father to which the sons were not made parties. It also resembles the present case in that the father was alive at the time of suit. The case was governed by Mitakshara Law and the question for decision was whether the entire joint family property passed by the sale or only the interest of the father. The law was thus laid down by the Lord Chancellor: "The property in question was joint property governed by the Mitakshara law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment

(1) [1880] Cal. 148—6 I.A. 88—4 C.L.R. 226—4 Sar. 1 (P.C.)

(2) [1917] 39 All. 437—44 I. A. 126—21 C.W N. 698—1 P.L.W. 557—15 A. L J 437—19 Bom. L. R. 498—26 C.L.J. 1—33 M.L.J. 14—(1917) M.W.N. 439—22 M.L.T. 22—6 L.W. 213—39 I.C. 280 (P. C)

(3) [1917] 44 Cal. 524—44 I. A. 1—32 M.L.J. 133—15 A.L.J. 147—(1917) M.W.N. 193—21 C.W.N. 442—25 C. L. J. 220—21 M. L. T. 222—19 Bom. L. R. 290—39 I.C. 252 (P.C.)

obtained against the father alone". In face of this clear and recent pronouncement of their Lordships which exactly covers the facts of the present case it is useless to enter into speculations as to the inferences which may be drawn from the decision in *Sahu Ram Chandra's* case. The decision just quoted is on all fours with the facts before us; the decision in *Sahu Ram Chandra's* case is not. The same view has been taken in a number of cases of simple money decrees, in several of which *Sripat Singh* v. *Prodyot Kumar* (3) has been relied on. Such cases are;

1. *Dalip Narain Singh* v. *Parmaoti Bibi* (4); 2. *Mohan Lal* v. *Bala Prasad* (5); 3. *Madhusudan Das* v. *Iswari Dayi Debi* (6). It is impossible to distinguish these cases on the ground that they were cases of simple money decrees for the simple reason that the Privy Council case on which they relied was like the present case, a case of a mortgage decree.

For these reasons we are of opinion that the decree of the Court below is correct and we accordingly dismiss the appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

---

(4) [1920] 42 All. 58—17 A. L. J. 982.
(5) 1922 All. 310—44 All. 649—69 I. C. 754.
(6) [1921] 48 Cal. 341—24 C. W. N. 949—61 I. C. 25.

1924 ALLAHABAD 112

RYVES AND DANIELS, JJ.

Sahu Govind Prasad and others—Plaintiffs—Appellants.

v.

Kundan and others—Defendants—Respondents.

S. A. No. 1062 of 1922, Decided on 5th March, 1923, from the Sub. J., Moradabad, D/-7th April 1922.

Landlord and Tenant—Transfer of house sites in towns by tenants valid.

The presumptions which obtain in agricultural villages have no application to towns. and the occupiers of houses can freely transfer the sites as of right. [P. 112 C. 2]

Ajudhia Nath (*for S. N. Sen*)—for Appellants.

Gulzari Lal—for Respondents.

Ryves, J.—This appeal arises out of a suit brought by the plaintiffs for possession of certain sites in the town of Najibabad on the ground that the transfer of these sites to the transferees was illegal, the allegation being that the transferors were the *raiyats* of the plaintiffs who were the zamindars of the village. The main defence was that the defendants vendors were not the *raiyats* of the plaintiffs but were entitled as of right to dispose of the sites of their houses as they chose, and that the plaintiffs' suit was barred by twelve years' limitation. Both Courts have found that the muhalla of Zabtaganj which is now a part of the town of Najibabad belonged to the plaintiffs predecessors and that the plaintiffs therefore must be considered to be the zamindars; but both Courts have also found that the so-called *raiyats* are not tenants of the plaintiffs and pay them no rent and that they have exercised full proprietary rights over their houses and have transferred them freely as of right. They have accordingly dismissed the suit.

The plaintiffs in appeal really urge two points:—

(1) that it having been found that they are the zamindars, according to the well-known rule which applies to agricultural villages, the tenants have not ordinarily the rights to transfer the sites of their houses, and

(2) that in this case the evidence is not sufficient to enable the Court to find a custom in favour of the tenants.

It is proved that muhalla Zabtaganj whatever it was originally, has for more than fifty years formed part of the town of Najibabad and from 1866 has been under the control of the Municipal Board. It has been laid down in this Court that the presumptions which obtain in agricultural villages have no application to towns. We find that on the evidence on the record it was open to the Courts below to come to the conclusion to which they have, as to the right of the occupiers of houses to deal with sites, and we think there can be no doubt as to the correctness of this decision. The appeal fails and is dismissed with costs.

Appeal dismissed.

1924 ALLAHABAD 113

RYVES AND DANIELS, JJ.

Mahomed Zain Khan and others—Plaintiffs—Appellants.

v

Nurul Hassan Khan and another—Defendants—Respondents.

S. A. No. 487 of 1922, (connected with S. A. 500 of 1922) Decided on 1st June 1923, from the decree of the Addl. Dt. J., Cawnpore, D/-4th January 1922.

Mahomedan Law—Waqf—Reservation of life interest to settlor and his wife is valid.

In the case of a waqf during the lifetime of the settlor and his wife the amount to be spent on charitable and pious purposes was left entirely to their discretion, both as to the sum to be expended and as to the purposes for which it was to be spent. They were to spend as much of the profits as they deemed proper on charitable and pious purposes recognised by Mahomedan Law and the remainder for their support and no one was to have the right to call them to account. After their death the objects of the wakf were carefully specified and were proper objects, and the mutwalli was directly bound to spend the money on those objects.

Held, that the waqf was valid, 1 Fulton 345 Foll, 36 B, 214 and 17 C, 498 (P C,) Cons.

[P 114, C 1 & 2]

K. N. Katju—for Appellants.

Iqbal Ahmad and *Raza Ali*—for Respondents.

Judgment.—The question for decision in these two connected appeals is as to the validity of a deed of *wakf* executed by Abdul Ali Khan and his wife on 26th March 1909. Abdul Ali Khan died on the 7th May 1917 and his wife shortly afterwards, and the present suit was brought by his brother Mohammad Ali Khan claiming possession of his legal share of the property as his heir under Mohammadan Law. Mohammad Ali Khan has died during the pendency of the proceedings and the appellants are his legal representatives. The parties to the suit are Sunnis. Mohammad Ali Khan in his plaint denied that any *wakf* was ever dedicated and urged further that if there was a *wakf* it was fictitious and illusory. That a *wakf-nama* was ex cuted has never been seriously disputed. The trial Court, however, treated it as a *wakf* which would not really take effect until after the deaths of Abdul Ali Khan and his wife. It accordingly treated it as valid only to the extent of one third of the property covered by it and decreed the suit as to the remainder. The learned Additional District Judge however, has upheld the *wakf* as valid and dismissed the suit. His findings are.

(1) That the dedication was substantial and real.

(2) That the dedication of the *corpus* was absolute and immediate;

(3) That the reservation of a life interest in the income, even if it were the entire income, which it is not, limited to the life of the two settlors, does not render the *wakf* illusory and testamentary.

The third finding is one of law. The first two findings are findings of fact, except in so far as the reality of the dedication may be a matter of legal inference from the facts found. The points which are taken in this Court are two: (1) That the *wakf* was invalid for want of delivery of possession, and (2) That the settlor and his wife retained complete control over the income during their joint lives and that this renders the *wakf* illusory and invalid either altogether, or in the alternativ , as held by the trial Court, for the period of their lives.

The only ground on which the *wakf* is assailed under the first head is that no application for mutation of names was made by Abdul Ali Khan, though he lived for 8 years after the execution of the deed of *wakf*. On the other hand it is proved that under the deed of *wakf* he appointed himself as first *mutwalli* and expressly declared that he was holding the property henceforth as *mutwalli* and not as owner. This according to the accepted rule of Mohammedan Law, is sufficient, and it was so held by this Court in *Abdul Jalil Khan* v. *Obedullah Khan* (1). This ground of attack, therefore fails.

As regards the second plea the suggestion that the *wakf* can be treated as a testamentary *wakf* may be rejected at the outset. A will is a document which may be cancelled by the testator at any time up to his death and only comes into operation at the latter event. Here there

(1) [1921] 43 All. 416—19 A.L.J. 227—62 I.C. 725.

was an irrevocable dedication of the *corpus* of the property from the date of the deed. The provisions of the deed which are relied on as shewing that the dedication was illusory are set out in the judgment of the trial Court. They amount to this that during the lifetime of the settlor and his wife the amount to be spent on charitable and pious purposes was left entirely to their discretion both as to the sum to be expended and as to the purposes for which it was to be spent. They were to spend as much of the profits as they deemed proper on charitable and pious purposes recognised by Mohamedan law and the remainder for their support and no one was to have the right to call them to account. This state of things was, however, confined entirely to the lifetime of Abdul Ali Khan and his wife. It is not disputed that after their death the objects of the *wakf* were carefully specified and were proper objects, and that the *mutwali* was directly bound to spend the money on those objects. The question is, therefore, substantially that as stated by the learned Additional Judge, namely, whether the reservation practically amounti g to a life interest in the income as distinct from the *corpus* is sufficient to invalidate the *wakf*. This question was first raised in the case of *Jaun Bebee* v. *Abdollah Barber* (2) in the year 1838. In that case five questions were referred to the Moulvis for decision. The first question was.

"Whether according to Mohamedan Law an endowment to charitable uses is valid, when qualified by a reservation of the rents and profits to the donor himself during his life?"

The Moulvies alluded to the difference of opinion between the Imam Mohammad and the Imam Abu Yusuf on this point and agreed that the opinions of most of the learned upheld the view of Abu Yusuf who considered the *wakf* legal. Judgment was given accordingly. The same view was taken by the Bombay High Court in the case of *Cassawally Jairabhai* v. *Currimbhoy Ebrahim* (3). It was suggested that Jaun Bibee's case had been dissented from in the Full Bench case of *Bikani Mia* v. *Suk Lal Poddar* (4) but this is not the case. The judgment was cited at some length by Ghose J. (pp. 185-188) and also by Trevelyan J. (p. 223 of the report) and was distinguished from the case before them, but neither of the Judges pronounced it to be incorrect.

The appellants have also referred to the Privy Council ruling in *Mahomed Ahsanullah Chowdhry* v. *Amarchand Kundu* (5). This ruling is in no way contrary to the view taken by the Court below. The test laid down by the Privy Council for the validity of the endowment was that there must be a substantial dedication of the property to charitable uses *at some time or other*. Their Lordships also quote with approval the opinion of Kemp J. in an earlier case that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after the lapse will leave the whole property intact for the original purposes for which the endowment was made does not render the endowment invalid under the Mahomedan Law.

In this case there was admittedly an ultimate dedication of the entire property to religious and charitable uses. The weight of authority is entirely in favour of the validity of the *wakf*. We accordingly dismiss both the appeals with costs including in this Court fees on the higher scale.

Appeals dismissed.

(2) [1838] 1 Fulton 345.
(3) [1912] 36 Bom. 214—13 Bom. L.R. 717—12 I.C. 225.
(4) [1893] 20 Cal. 116 (F.B.).
(5) [1890] 17 Cal. 498—17 I.A. 28—5 Sar. 476 (P.C.)

✱ 1924 ALLAHABAD 114

RYVES AND DANIELS, JJ.

Adhar Singh and another—Plaintiffs—Appellants.

v.

Babu Ram Manohar Singh and another—Defendants—Respondents.

S. A. No. 585 of 1922, Decided on 7th May 1923, from the Dt. J., Benares, D/-26th January 1922.

Hindu Law—Widow—Surrender—Provision for maintenance does not vitiate.

A gift of an estate by a widow in possession, in favour of the next reversioner, which operates as an accelaration of the estate to the latter, is not vitiated by its containing a reasonable provision for the maintenance of the widow. 42 M. 523 P.C.; 47 Cal. 466 P.C. and 48 C. 100 P.C. Foll. [P. 116 C 1]

Iqbal Ahmad—for Appellants.

S N. Sen and *Harnandan Prasad*—for Respondents.

Daniels, J.—The point for decision in this appeal is whether a gift of an estate by a widow in possession in favour of the next reversioner, which operates as an acceleration of the estate to the latter, is vitiated by its containing a provision for the maintenance of the widow. In this case Mt. Sumera Kunwar was in possession of the estate of her husband Rameshar Singh as a Hindu widow. On the 22nd April 1909 she made a gift of the entire estate to the sole surviving daughter Mt. Ramkali Kunwar. Mt Ramkali obtained possession and after her death the estate has been taken possession of by her two sons, the respondents. The original plaintiff Jai Mangal Singh, now represented by his sons was the son of another daughter of Rameshar Singh who was dead at the time of the gift to Mt. Ram Kali. The succession having opened on the death of the latter he claims his one-third share in the property as reversioner jointly with the defendants. His claim was decreed by the trial Court which found that the deed in favour of Mt. Ram Kali operated as an acceleration and that on her death the plaintiffs and the defendants were jointly entitled. The deed was attacked in both the Courts below on three grounds.

(1) That Mt. Parbati Kunwar was alive at the time of the gift.

(2) That the entire property was not included in the deed of gift.

(3) That the deed contained a provision for the maintenance of Mt. Sumera.

The trial judge rejected all the three objections. The learned District Judge agreed with him on the first two points but held that the provision for maintenance vitiated the deed and that Mt. Sumera being still alive the succession would only open on her death. It may be noted here that it has never been contended that the provision for maintenance was in any way excessive. The argument is that the mere fact of a provision for maintenance being made operates to prevent there being a surrender of the entire estate and *ipso facto* invalidates the deed.

The matter appears to us to be settled by two recent decisions of the Privy Council. The principle that an acceleration to be valid must be of the entire estate was laid down by their Lordships of the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (1). The lower Court following a decision of the Bombay High Court has held that any provision for maintenance is inconsistent with this principle. The Privy Council has however itself laid down that this is not the case. In *Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (2) an agreement by the widow renouncing the estate and accepting maintenance for her life was held to operate as a valid surrender and to come within the rule laid down in *Rangasami's* case (1). The same view was taken in the case of *Surreshwar Missir* v. *Maheshrani Misrain* (3) where the widow surrendered the estate to the next reversioner, but the reversioner at the same time conveyed a small portion of it back to the widow as a provision for her maintenance. The former decision was relied on by the Madras High Court in the Full Bench Ruling in

(1) [1919] 42 Mad. 523—46 I.A 72—26 M.L.T. 5—36 M.L.J. 493—17 A.L.J. 536—29 C.L.J. 539—21 Bom L R. 610—23 C.W.N. 777—(1919) M.W.N. 262—10 L.W. 105—50 I.C. 498 (P.C.)

(2) [1920] 47 Cal. 466—46 I.A. 259—3 M.L.J. 513—17 A.L.J. 1036—(1919) M.W.N. 860—1 P.L.T. 1—53 I.C. 347 (P.C.)

(3) [1920] 48 Cal. 100—47 I.A. 233—39 M L J. 161—(1920) M.W.N. 472—18 A.L.J. 1069—12 L.W. 461—28 M.L.T. 154—25 C.W.N. 194—57 I.C. 325 (P.C.)

Angamuthu Chetti v. *Varatharajulu Chetti* (4), in which they also have held that a reasonable provision for the widow's maintenance does not affect the validity of surrender by her husband's death to the nearest reversioner. Even apart from authority this is we think a reasonable view to take. The widow so long as she is alive is entitled to be fed and clothed and some provision for her support must be made by the persons in possession of the estate. The matter appears to us to be concluded by the Privy Council rulings to which we have already referred. We accordingly allow the appeal, set aside the decree of the lower appellate Court and restore that of the trial Court with costs throughout including in this Court fees on the higher scale.

Appeal allowed.

(4) [1919] 42 Mad. 854-37 M.L.J. 384-(1919) M.W.N. 716—26 M.L.T. 301 11 L.W. 11--53 I.C. 386 (F.B.)

1924 ALLAHABAD 116

KANHAIYA LAL, J.

Mt. Altafan—Plaintiff—Appellant.

v.

Ibrahim—Defendant — Respondent.

S A. No. 611 of 1922, Decided on 10th July 1923, from a decree of the Dt. J., Aligarh,

(a) *Mahomedan Law—Marriage—Impotency—Meaning.*

A man may be nominally or temporarily potent, due for instance to the use of certain medicinal drugs or other cause; or he may be potent as regards some women and not potent as regards his wife. [P. 117, C. 2]

(b) *Mahomedan Law — Marriage — Consumation — Unruptured hymen — Presumption is in wife's favour.*

If the hymen is intact (not even lacerated), the probabilities, except in the case of females below the age of puberty, are very strongly in favour of virginity; and the inference of virginity becomes almost certain, if the membrane is normal in position and structure and its apperture is of small size and undilatable, and if accompanying this condition of the hymen, the other signs of virginity are present, *e.g*, the condition of the breasts, the vagina and the fourchette. [P. 118, C. 1]

(c) *Civil P. C., S. 100 — Finding based on opinion of expert is not always a finding of fact.*

A finding based on the opinions of experts is not necessarily a finding based on facts proved or directly demonstrated. The opinions of experts are relevant but not conclusive as to the matters to which they relate; and where they materially differ their value and sufficiency may legitimately form the subject of consideration and scrutiny despite the acceptance of any of them by one Court or another. [P. 118, C. 1 & 2]

(d) *Mahomedan Law —Marriage,—Dissolution on the ground of impotency—Procedure.*

An impotent person is defined by the Mahomedan Law as one who is unable to have connection with a woman, though he has the natural organs; and a person who is able to have connection with an enjoyed woman, but not with a virgin, or with some women but not with others, whether the disability be by reason of disease or weakness, or original constitution, or advanced age, or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection, (Baillie's Mahomedan Law Vol. I p. 347 Ref.) The Mahommedan Law provides that where such is the case and a woman brings her husband before a Judge, and sues him, demanding a separation on the ground of impotency, and the fact whether the woman is an enjoyed woman or a virgin is disputed, the case is to be adjourned for a year, and if after the expiry of that year the woman should allege that she is still a virgin, an inspection by women is to be ordered, and if they should declare her to be an enjoyed woman, the word of her husband is to be taken with his oath; but if they should declare her to be a virgin, her word as to non-intercourse is to be received without oath. The intention obviously is that if such a claim is brought by a wife and is contested, an opportunity should be given to the husband to show that the charge against him is unfounded or that the alleged incapacity is removeable; and the woman should be required to appear again after a year before the judge in order to establish her claim to the relief she asks for. (*Ibid* p. 348). If the husband should consummate the marriage in the interval, the petition of the wife requires to be dismissed after the lapse of the period fixed by the judge. If he however, fail in his marital obligation, the wife is entitled to a divorce (Ameer Ali's Mahommedan Law Vol. II p. 598 and Tyabji's Mahomedan Law Vol. II p. 251 Ref. See also 21 B. 77.) But the wife must allow full access to her husband at all reasonable times whether she is living in the house of her parents or elsewhere during the year. [P. 118, C. 2 & P. 119, C. 1]

M. A. Aziz—for Appellant.

Iqbal Ahmed and *Panna Lal* — for Respondent.

Kanhaiya Lal, J.—This and the connected appeal arise out of a suit brought by the husband for the restitution of conjugal rights and another brought by his wife for the annulment of her marriage with him. They were married on the 15th May 1914 when the woman was 13 years old and the husband about 3 or 4 years older. The woman lived in the house of her

husband for about 6 years; but owing to subsequent differences she came away from his house and has been living with her parents since. Her allegation is that her husband was impotent and that she came to know of that fact after her marriage. A certain amount of medical evidence was examined on either side. On a consideration of that evidence the Court of first instance came to the conclusion that the husband was impotent and that that fact was not known to the wife when she was married. The lower appellate Court, however, thought that the medical evidence produced by the husband was entitled to a greater weight; and it decreed the claim brought by the husband for conjugal rights and dismissed that brought by the wife for the annulment of the marriage

The medical evidence, adduced by the woman, consisted of two lady doctors, one of whom, Miss Massey, is an Assistant Surgeon in charge of the Dufferin Hospital at Aligarh. Her statement was that she examined the girl on the 13th July 1921 and she thought that she was a virgin, as her hymen was intact. She admitted that the presence of the hymen was not a conclusive proof of virginity in every case but she explained that the hymen of this woman was complete and not torn in any way and that there were no symptoms, such as exist in rare cases, where in spite of co-habitation the hymen remains unaffected. The other lady doctor, who was examined, was Miss Bakhsh in charge of the Singhara Hospital at Hathras. She stated that she examined the woman on the 8th August 1921 and that in her opinion she was a virgin and has had no sexual intercourse with any man. She examined other parts of her body and found that the other symptoms noticeable were consistent with that opinion. On behalf of the plaintiff Major Barber, at one time Civil Surgeon of Aligarh, was examined. He testified to his having examined the husband on the 15th June 1921 and deposed that he found no physical or mental defects in him, his genital organs perfectly formed, and his general health good; and he thought that he was capable of sexual intercourse. Lieut. Mathews, who succeeded as Civil Surgeon of Aligarh, examined the husband on the 18th July 1921 and stated that he was not incapacitated by any mental or physical disease from having sexual intercourse, that he found no malformation in his male organ and that in his opinion he was normally capable of performing the sexual act He further said that the husband had a partial erection before him. Lt. Col. Ilias, another Civil Surgeon of Aligarh, stated that he examined the husband on the 8th September 1921 and found that he was potent and quite fit for sexual intercourse. He further said that no disease or deformity was found in his male organ, that could incapacitate him from sexual intercourse, and that the man had an erection before him quite full.

Where there is so much conflict in medical opinion it is not always easy to find which opinion is to be accepted in preference to the other. A man may, however, be nominally or temporarily potent, due for instance to the use of certain medicinal drugs or other cause; or he may be potent as regards some women and not potent as regards his wife. The latter fact was acknowledged by the medical witnesses, and is also recognized by the Mahomedan Law. It is material in any circumstances to note that according to the evidence of the lady doctors, the hymen of Mst. Altafan, the wife in question, was intact and there were no conditions, such as exist in exceptionally rare cases where continual cohabitation might exist and the hymen may yet remain unaffected. If the hymen was intact and there was nothing to show that the physical conditions of the hymen were of an abnormal character, very strong evidence is needed to rebut the presumption which arises from that state of things against the consummation of the marriage by the husband in spite of the wife having lived with him for about 6 years.

In *Lewis* v. *Hayward* (1) where after a co-habitation of fourteen years, a woman presented a petition

(1) 35 L.J., Mat. 105.

for a decree of nullity of marriage on the ground of the man's impotence and the report of the Inspectors and the medical evidence showed that the woman was *virgo intacta et auta viro* and there was no apparent defect or malformation in the man and the trial Court was satisfied that the marriage had never been completely consummated but was not satisfied that the non-consummation arose from the incapacity of the man, it was held by the House of Lords that the woman was entitled to a decree that the marriage was null and void on the ground that the co-habitation had been for a much more lengthened period than was required to raise the presumption against a husband and that the onus was thrown upon the husband either of disproving the facts or of showing by clear and satisfactory evidence that the result was attributable to other causes than his own impotency.

If the hymen is intact (not even lacerated), the probabilities, except in the case of females below the age of puberty, are according to Lyons, very strongly in favour of virginity; and the inference of virginity becomes almost certain, if the membrane is normal in position and structure and its apperture is of small size and undilatable, and if accompanying this condition of the hymen, the other signs of virginity are present. (Lyon's Medical Jurisprudence, sixth Edition page 264.) One of the lady doctors examined has referred in her evidence to these signs of virginity, including the condition of the breasts, the vagina and the fourchette.

There was no allegation that the husband has had no access to the woman. On the other hand the husband stated that he has had sexual intercourse with her on numerous occassions. The condition of the hymen, however renders his story wholly improbable.

It is urged on behalf of the husband that the finding of the lower appellate Court is a finding of fact; and however erroneous, it ought not to be disturbed; but a finding based on the opinions of experts is not necessarily a finding based on facts proved or directly demonstrated. It is a finding based on an examination and balancing of the opinions and views of experts or of the impressions produced on their minds by what they may have seen, heard, or observed, and as in the case of some species of evidence about custom, the sufficiency of the facts observed or of the inferences or opinions, formed, can always be examined to ascertain and determine their intrinsic value. The opinions of experts are relevant but not conclusive as to the matters to which they relate: and where they materially differ as in this instance, their value and sufficiency may legitimately form the subject of consideration and scrutiny despite the acceptance of any of of them by one Court or another.

An impotent person is defined by the Mahommedan Law as one who is unable to have connection with a woman, though he has the natural organs; and a person who is able to have connection with an enjoyed woman, but not with a virgin, or with some women but not with others, whether the disability be by reason of disease, or weakness, or original constitution, or advanced age, or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection, (Baillie's Mahommedan Law Vol. 1 p. 347). The Mahommedan Law provides that where such is the case and a woman brings her husband before a judge, and sues him, demanding a separation on the ground of impotency, and the fact whether the woman is an enjoyed woman or a virgin is disputed, the case is to be adjourned for a year, and if after the expiry of that year the woman should allege that she is still a virgin, an inspection by women is to be ordered, and if they should declare her to be an enjoyed woman, the word of her husband is to be taken with his oath; but if they should declare her to be a virgin, her word as to non-intercourse is to be received without oath. The intention obviously is that if such a claim is brought by a wife and is contested, an opportunity should be given to the husband to show that the charge against him is unfounded or that the alleged incapacity is removable; and the woman should be required to appear

again after a year before the Judge in order to establish her claim to the relief she ask for. (*Ibid* p. 348). If the husband should consumate the marriage in the interval, the petition of the wife requires to be dismissed after the lapse of the period fixed by the Judge. If he, however, fail in his marital obligation, the wife is entitled to a divorce (Ameer Ali's Mahommedan Law Vol. II p. 593 and Tyabji's Mahommedan Law p 251).

It is contended on behalf of the appellant that the procedure enjoined by the Mahommedan Law in regard to the disposal of such a claim is not obligatory on the British Courts; but the provision aforesaid is intended to operate as a safeguard against error or a hasty or precipitate annulment of the marriage where a removal of the complaint or a disproof thereof is possible; and like the provisions relating to the preliminary demands requisite to validate a claim for the enforcement of the pre-emptive right, it must be treated as an essential part of the Mahommedan Law, regulating the annulment of marriages. In a similar case in which the parties were governed by the Mahommedan Law (21 Bom. 77) an interlocutory order was passed, postponing the annulment of the marriage for a year in order that the parties might be allowed an opportunity of resuming co-habitation during that period, if that was possible.

The right of a wife to claim a judicial divorce on the ground of the impotency of her husband is contingent on her succeeding to establish that she did not know of his impotency at the time of her marriage and that it has not since then been removed; but as pointed out by Wilson, the divorce must remain suspended for a year after the decree in order that it might be ascertained whether the defect is removable. (Wilson's Mahommedan Law 5th Edition p. 145).

A *prima facie* case having been made out, the wife can be granted a decree *nisi*, which can be confirmed after a year, in case the husband is found to be physically unable to perform the marital obligation during the interval; but she must allow full access to her husband at all reasonable times whether she is living in the house of her parents or elsewhere but not outside Aligarh. In view of the present litigation, it would be risky and undesirable to compel her to leave the protection of her parents and live in the house of the plaintiff or his relations. An adjournment of the appeal really can serve no purpose, as the final enquiry has to be made by the Court of first instance.

The appeal is, therefore, allowed and a decree *nisi* passed in favour of the plaintiff, Musammat Altafan, for the annulment of her marriage with the defendant Ibrahim; but this decree will not be made absolute till a year from this date, during which period, whether she lives in the house of her parents or elsewhere but not outside Aligarh, she should allow full access to the defendant at all reasonable times to exercise his marital rights as her husband. If after the expiry of the said period she satisfies the Court that the husband continues to be impotent and physically unable to perform his marital obligation, she will be entitled to have this decree made absolute. But if she fails to do so, the decree *nisi* will be discharged and the suit will be dismissed. An application for the above purpose will have to be made to the Court of first instance, to which the suit will be remanded for disposal in accordance with the directions above given. The costs here and hitherto will abide the result.

Appeal allowed.

✱ 1924 ALLAHABAD 119

MEARS, C. J. AND PIGGOTT, J.

Santi Lal and another—Judgment-debtors—Appellants,

v.

Raj Narain and another—Decree-holders—Respondents.

P. C. A. No. 6 of 1923, Decided on 21st June, 1923.

Civil P. C., S. 109—Final order—Order of remand merely to enquire into details is final.

In execution of a mortgage decree the decree-holder applied to the Court below for the

preparation of a decree for unsatisfied balance, under O. 34, R. 6. The judgment-debtors objected that the application for a decree under O. 34, R. 6 was statute barred. The execution Court upheld this contention and dismissed the application of the decree-holders. On appeal the High Court held that the application was within time. The order of the Court below was therefore set aside and the execution Court was ordered to re-admit the application of the decree holders on to its file of pending applications and to dispose of it according to law.

Held, that it is not certain that the order of the High Court might not fairly be described as a final order within S. 109. Certificate was granted especially since the remand order went to the root of the case. 17 All. 112 Foll. 6 A. L. J. 786 and 33 All. 391 Dist.

[P 120 C. 2 & P 121 C. 1]

M. L. Sandal—for Appellants.

N. P. Asthana—for Respondents.

Piggott, J.—This is an application for leave to appeal to His Majesty in Council against an order of this Court, dated the 4th of December 1922. There are materials on the record quite sufficient to show that the value of the subject matter in dispute between the parties in the proceedings resulting in this Court's order above referred to exceeded Rs. 10,000. This Court did not affirm the decision of the Court below. What is objected to is that the order in question is neither a decree nor a final order within the meaning of S. 109 (a) of the Code of Civil Procedure. On behalf of the applicant it is contended that the order in question is at any rate a final order within the meaning of the clause above referred to. Apart from this, it is contended that under the circumstances the case ought to be certified as a fit one for appeal to His Majesty in Council, merely on the ground that it is an appeal from an order of this Court, and any difficulty as to whether the order in question was or was not a final order could be avoided by applying the provisions of S. 109 (c) above referred to. It is necessary to examine the circumstances under which this matter came to the Court. It was an execution appeal arising out of a mortgage decree. The decree holders were the appellants in this Court. They had obtained execution of their mortgage decree in a somewhat unusual, but perfectly lawful, manner. They had exhausted the whole of the property covered by the decree, and they alleged that a very considerable portion of the decree still remained unsatisfied. They applied to the Court below for the preparation of a decree covering this unsatisfied balance, under the provisions of Order 34 rule 6 of the Code of Civil Procedure. The office report prepared at the time the application was made is on this record. It is to the effect that the amount due under the decree on the date of the said report, namely the 23rd of May 1918, was Rs. 32,179-7-6, and that the total amount realisad by sale of the mortgaged property was only 18,600. We do not say that the parties are necessarily bound by these figures. They may require further investigation in the Court below. We refer to them however as showing that *prima facie* the amount of the subject matter in dispute was considerably in excess of Rs 10,000. The judgment debtors objected that the application for a decree under Order 34 rule 6 was statute barred under the appropriate article of the Indian Limitation Act. The execution Court upheld this contention and dismissed the application of the decree-holders. On appeal, a Bench of this Court held that the application was within time. The order of the Court below was therefore set aside and the execution Court was ordered to re-admit the application of the decree holders on to its file of pending applications and to dispose of it according to law. Under the circumstances this amounted to a direction that a decree under Order 34 rule 6 should be prepared, the details of which were left for the execution Court to settle. It is against this order that the judgment debtors now desire to appeal to His Majesty in Council.

We have been referred to two cases of this Court namely *Baijnath Das* v. *Sohan Bibi* (1) and *Ahmad Husain* v. *Govind Krishna Narain* (2) in which leave to appeal to His Majesty in Council against an order passed by

(1) [1909] 31 All. 545—6 A. L. J. 786—6 M. L. T. 94—3 I. C. 967.

(2) [1911] 33 All. 391—8 A. L. J. 192—9 I. C. 932.

this Court under Order 41 rule 23 of the Code of Civil Procedure was refused, on the ground that the order sought to be appealed against in each case was neither a decree nor a final order. Authority on the other side is to be found in the case of *Mazhar Husain* v. *Mt. Bodha Bibi* (3). In that case leave to appeal was refused by this Court against an order passed under the section of the former Civil Procedure Code corresponding to order 41 rule 23 of the present Code, but special leave to appeal was granted by His Majesty in Council. The learned Judges of this Court who decided the case of *Baijnath Das* v. *Sohan Bibi* (1) distinguished *Mazhar Husain's* case (3) from the one then before them, on the ground that the order passed by this Court in *Mazhar Husain's* case (3) decided a point which went to the very root of the case, all the other defences raised being of a subordinate character. Clearly the learned Judges were of opinion that, in the case of an order of remand by this Court of which it could be said that it had determined the only really substantial question in issue between the parties, the precedent set by their Lordships in *Mazhar Husain's* case (3) ought to be followed and leave to appeal granted. The present seems to us such a case; it is clearly distinguishable from either of the two cases above referred to in which leave to appeal was refused. It is only necessary to glance at the reports in those two cases to see that the facts were materially different. In the case now before us this Court disposed of one substantial objection raised by the judgment debtors to the decree holder's application. The case was sent back to the execution Court because the steps which remained to be taken, in order that a proper decree under order 34 rule 6 might be prepared, could more conveniently be taken in that Court. We are by no means certain that under these circumstances the order of this Court might not fairly be described as a final order within the meaning of that expression as used in S. 109 of the Code of Civil Procedure. In any case we are satisfied that we ought to follow the precedence set in *Mazhar Husain's* case (3) and grant the certificate asked for. We order accordingly.

Application allowed.

(3) [1895] 17 All. 112—21 I.A. 1 (P.C.)

1924 ALLAHABAD 121

DANIELS, J.

Nannhu and others—Defendants—Applicants.

v.

Roshan Singh — Plaintiff — Respondent.

Civ. Rev. No. 31 of 1923, Decided on 20th April 1923, from the Munsiff of Shikohabad, D/-8th January, 1923.

Civil P. C., S. 115—Order under O. 23 R. 1—Order admittedly wrong—No revision lies.

Where the lower Court has applied its mind to the question whether sufficient cause under Order 23 rule 1 is established, no revision lies whether its actual decision is right or wrong. 19 A. L. J. 47 and 40 A. 612. Foll.

[P 122 C 1]

S. N. Chaube—for Applicants.

N. P. Asthana—for Opposite Party.

Judgment.—This is an application for revision of an order of the learned Munsif of Shikohabad granting permission to withdraw a suit under Order 23 rule 1 with permission to file a fresh suit. The application for withdrawal was made after a considerable amount of evidence had been recorded on both sides. The reasons given for the application were two.

(1) The non-joinder of a person who is alleged by the defendants to be a co-sharer in the holding in dispute to be a necessary party.

(2) The fact that a patwari whom the plaintiff wished to produce as a rebutting witness had been won over by the other side.

For these reasons the plaintiff alleged that the suit was liable to fail and he asked for permission to withdraw it as stated above.

The second reason was admittedly not a proper reason for allowing withdrawal of the suit. The learned Munsif however has not acted on this reason; he has acted on the first reason, saying that in his opinion

misjoinder of parties was a formal defect coming within Order 23 rule 1 and that as the defendants had themselves alleged Murlidhar the person in question to be a necessary party they were not in a position to dispute the point. On the merits I consider that the order passed by the learned Munsif was an unfortunate order. The formal defect of non-joinder of Murlidhar might easily have been cured by impleading him which could be done at any time before the case was decided. It is probable therefore that the real reason for the application was the one of which the Munsif takes no notice in his order. The question which arises in this case and which has been argued before me is whether under these circumstances any revision lies There is ample authority for the proposition that this Court has power to revise such orders where the lower Court has not exercised a judicial discretion in passing them. There is equally strong authority including the cases of *Ratan Lal* v. *Muhd. Hamid Ullah* (1) and *Jhunku Lal* v. *Bisheshar Das* (2) for the proposition that where the lower Court has applied its mind to the question whether sufficient cause under Order 23 rule 1 is established, no revision lies whether its actual decision is right or wrong. It is clear that the present case comes within the latter principle. The Court's decision may have been wrong-in my opinion it was-but the learned Munsif undoubtedly did apply his mind to the question whether there was a formal defect by reason of which the suit was liable to fail and came to the conclusion that there was. I must therefore hold that no revision lies and I dismiss the present application. Under the circumstances I make no order as to costs.

Application dismissed.

---

(1) [1921] 19 A.L.J. 47—60 I. C. 899.
(2) [1918] 40 All. 612—16 A .L. J. 495—46 I. C. 71.

1924 ALLAHABAD 122

KANHAIYA LAL, J.

Gopal Das and another—Judgment-debtors—Appellants.

v.

Gauri Shanker Prasad — Decree-holder—Respondent

E. S. A. No 38 of 1923, Decided on 13th June 1923, against the decree of the Dt. J, Benares, D/- 5th October 1922.

Civil P. C., Ss. 47 and 151 - Order as to costs of a commissioner - Proceedings to execute such order is not a proceeding between parties in execution—Proper procedure.

An order passed by the Court in favour of a commissioner for the payment of costs connected with the execution of a commission which were recoverable from the parties to the suit may be enforced by the Court under the inherent powers conferred upon it by S. 151 of the Code of Civil Procedure in such manner as may be thought proper. Any proceedings taken in enforcement of such an order is not a proceeding between the parties to a suit for the execution of a decree, within the meaning of S. 47. [P. 123, C. 2]

K. Verma—for Appellants.

K. N. Katju—for Respondent.

Judgment.—In a suit for partition a preliminary decree was passed appointing a Commissioner to make a partition and to ascertain the debts and outstanding amounts and the capital and stock-in-trade of a certain shop and to take them into account in framing his proposals. That decree was the subject matter of an appeal to this Court. While that appeal was pending, the Commissioner proceeded with his work and found that a sum of Rs. 100, settled as payable to him for executing the Commission, was insufficient in consideration of his labour. He therefore, when submitting his accounts and the list of the properties proposed to be partitioned moved the Court to award him Rs. 800 as his fees for the work he had done. The Court thereupon ordered that Rs. 600 should be paid to him by the plaintiffs and Rs. 200 by the defendant and that if the appeal from the preliminary decree was successful, the defendant would be entitled to recover the latter sum from the plaintiffs. It further ordered that a decree for the amount should be prepared in favour

of the Commissioner against the parties to the suit. This order was passed on the 22nd of March 1919; but no decree was actually prepared in pursuance of the above order in favour of the Commissioner. The plaintiffs made default in the payment, except of a small portion, of the money.

The appeal from the preliminary decree eventually succeeded and the entire claim was ultimately dismissed by the Court of first instance on the 15th of April 1920. In the closing or final decree then prepared the direction of the 22nd of March 1919 regarding the payment of remuneration due to the Commissioner by the plaintiffs was not embodied. Meanwhile the plaintiffs obtained an order, adjudicating them insolvents, on the 24th of March 1920. They subsequently obtained an order of discharge on the 26th of January 1921. During the insolvency proceeding no mention is said to have been made by them of the amount which they were liable to pay to the Commissioner and in the schedule of proved debts prepared the amount due to the Commissioner is not stated to have been shown.

An application has since been made by the Commissioner for the execution of the order of the 22nd March 1919 by the arrest of the plaintiffs. The plaintiffs opposed this application on the ground among others that having been declared insolvents and discharged they were not liable to arrest in lieu of a debt proveable in the insolvency proceeding within the meaning of Ss. 34 and 44 of the Provincial Insolvency Act (Act No 5 of 1920). When this objection came up for hearing the plaintiffs judgment-debtors stated that they were not in a position to pay any money at that time but would be able to do so after they start some business and earn some money. The Commissioner agreed to allow them time for the payment of the money due to him. The learned Subordinate Judge acceded to the request of the judgment-debtors for the time and allowed them two years to pay the money, but at the same time he disallowed their objection. The judgment-debtors appealed to the District Judge who dismissed their appeal, holding that no appeal was entertainable under S. 47 of the Code of Civil Procedure. The preliminary question for consideration here is whether S. 47 has any application to the case. As has already been pointed out there was no decree prepared in the case, in fact the person who was seeking redress was not even a party to the suit in which the order sought to be executed, was passed The order in question was virtually an order passed by the Court in favour of one of its officers for the payment of costs connected with the execution of a Commission which were recoverable from the parties to the suit. An order of that character may be enforced by the Court under the inherent powers conferred upon it by S. 151 of the Code of Civil Procedure in such manner as may be thought proper. Any proceeding taken in enforcement of such an order is not a proceeding between the parties to a suit for the execution of a decree, within the meaning of S 47 of the Code of Civil Procedure and the learned District Judge was right in holding that no appeal lay to the Court below and no appeal would similarly lie here. The appeal is therefore dismissed with costs.

Appeal dismissed.

1924 ALLAHABAD 123

LINDSAY AND SULAIMAN, JJ.

Mahomed Ali—Defendant—Appellant.

v.

Sultan Ahmad and another —Plaintiffs—Respondents,

F. A. Nos. 40 and 50 of 1923, Decided on 8th June 1923, from the order of the Sub.J., Azamgarh, D/ 15th December 1922.

Wajib-ul-arz—Evidentiary value—Presumption as to its being a record of custom may be rebutted.

Prima facie an entry in the wajib-ul-arz is to be treated as an entry of a custom. But this presumption is liable to be overthrown either by external or internal evidence. 16 A. L. J. 879 Foll. [P. 124, C. 2

A. Sanyal—for Appellant.

S. N. Sen and *U. S. Bajpai*—for Respondents.

Lindsay, J.—Both these appeals arise out of suit No. 76 of 1920 instituted in the Court of the Munsif of Azamgarh by two plaintiffs Sultan Ahmad and Iqbal Ahmad. The suit was a suit for pre-emption and various parties were impleaded as defendants. One of these parties was Sheikh Muhammad Ali who was impleaded as defendant second party. He is the purchaser of the property and he is the appellant in F. A. F. O. No. 40 of 1923. The other sets of defendants were Muzaffar Husain the vendor first party and two other parties who were rival pre-emptors and who had instituted separate suits for pre-emption.

The Court of first instance held that the plaintiffs could not succeed as no proof of a custom of pre-emption was forthcoming. The lower appellate Court reversed this decision of the Court of first instance and having done so remanded the suit for disposal on the merits.

We now have these two appeals, one by Sheikh Muhammad Ali the purchaser who was impleaded as defendant second party, and the other, namely, appeal No. 50 of 1923, by Muhammad Junaid and others, who were impleaded, as defendants third party. These last were, as we have said, rival pre-emptors.

It seems to us that the question which arises for decision in this case is covered by authority. It is not to be denied that there has been a great deal of uncertainty in the law as laid down in various decisions of this Court but an attempt has been made in order to secure consistency and it is above all things necessary in cases of the present kind to adhere as far as possible to the principle of *stare decisis*.

We have, in this case, after hearing the arguments of the learned counsel, determined that the rule of law laid down in the judgment reported in 16 A. L. J. 879 shall be followed in the present case. That rule has been applied in another case reported in 21 A. L. J. 378 and also in *Matadin Tewari* v. *Suraj Bali Singh* (1) decided by the pre-emption bench on the 16th of March last.

It seems to us that the case is for all material purposes on all fours with the case reported in 16 A. L. J. What do we find?. The plaintiffs rely upon a *wajib-ul-arz* for proof of the custom of premption and the question which has to be decided is whether this *wajibularz* affords reliable evidence of the existence of a custom. It need not be denied that *prima facie* an entry in the *wajibularz* is to be treated as an entry of a custom. That has been laid down again and again and has the authority of their Lordships of the Judicial Committee of the Privy Council. It has however always been held that this presumption is liable to be overthrown either by external or internal evidence. In the present case we find clause (14) of the *wajibularz* which sets out in some detail the various things which are to happen when a co-sharer in a village desires to transfer property either by way of an out and out sale or by way of conditional sale or by way of mere hypothecation. We have a scheme by which provision is made for pre-emption of sales and also for pre-emption in respect of mortgages. Then we are met with a clause which strikes one as being a peculiar one to find in an entry purporting to be an entry of a custom. It is laid down that in cases where a mortgage has been made by a co-sharer and where that co-sharer is unwilling to redeem the mortgage created by him at the time when redemption may be sought, other co-sharers in a certain order may come forward and demand and get redemption of the mortgage and may take over the property and keep it for themselves. We cannot put any other interpretation on the language of this document. It follows therefore that here we have a clause which provides clearly that persons who are strangers to a mortgage have a right of redemption and have a right to recover the property from the mortgagee and hold for themselves after they have paid the mortgage. It was a clause of this kind which attracted attention in the case decided in 16 A. L. J. 879. This was one reason why in

(1) 1923 All. 522.

that case it was held that the recital in the *wajibularz* should not be treated as a recital of custom. Another peculiar feature of the *wajibularz* in this case is the provision which it makes to regulate the sums which may be demanded when property is either mortgaged or sold. So far as we understand the provisions relating to this matter, it is laid down that when property is sold outright the price is to be regulated on the basis of 1 p. c. of the profits. In a case where the transfer is by way of mortgage, the sum to be advanced by way of mortgage is to be based upon a calculation of 8 annas per cent on the profits.

This is indeed a remarkable provision to be found in a record which purports to be a record of custom. It is in our opinion quite impossible that matters of this kind should form the subject of custom and it is preposterous to say that any custom which the law will recognize can grow up which prescribes for all time the prices at which immovable property in villages in these Provinces is to be sold. If there were no other ground a custom of this kind would be condemned at once on the ground that it is unreasonable.

We find therefore a close analogy between the facts of the present case and the facts of the case in 16 A.L.J. 879 and following the principle of *stare decisis* we have come to the conclusion that no custom has been established in this case. We hold therefore that the decision of the first Court was right and that the decision of the lower appellate Court is wrong. It follows therefore that these two appeals, Nos. 40 and 50 of 1923 must be allowed and the order of the Court of first instance restored. The appellants in both the cases now before us are entitled to their costs including in this Court fees, if any, on the higher scale.

Appeals allowed.

1924 ALLAHABAD 125

DANIELS, J.

Rabi Pratab Narain Singh—Defendant—Appellant.

v

Ram Prasad Bharathi—Plaintiff—Respondent.

Civ. Rev. No. 44 of 1923, Decided on 19th June, 1923, from the order of the Small Cause Court, Deoria, D/-15th November, 1922.

Agra Tenancy Act, S. 36—Landlord going to grove himself and taking mangoes—Suit lies in Small Cause Court and not Revenue Court.

A suit brought by plaintiff grove holder on the allegation that the defendant Zemindar being entitled to one-fourth of the fruits of the grove wrongfully appropriated one-half of the fruits is cognizable by Small Cause Court.

The verb 'to exact' implies something which the tenant has been compelled to pay against his will and does not apply to a case in which the landlord has gone to the grove and gathered the produce for himself.

[P 125, C 2 P 126, C 1]

Haribans Sahai—for Appellant.

N. Upadhya—for Respondent.

Daniels, J.—This application raises a question of jurisdiction. The plaintiff is a grove holder and the defendant the zamindar. The suit was brought on the allegation that the defendant being entitled to one-fourth of the fruits of the grove had wrongfully appropriated one-half of the fruits. The suit was filed in the Small Cause Court claiming the value of the fruits wrongfully appropriated. The defence was that the suit was cognisable only by the Revenue Court, being a suit contemplated by S. 36 of the Tenancy Act and that therefore the jurisdiction of the Civil Court was ousted by S. 167 of the same Act. S. 36 covers the claims by a tenant from whom any sum or produce had been exacted by his landlord in excess of the amount recoverable from him as an arrear of rent. The learned Judge of the Court below framed an issue on the question of jurisdiction but omitted to decide it. The plaintiff's answer to the objection however is that the verb "to exact" implies something which the tenant has been compelled to pay against his will and does not appy

to a case in which the landlord has gone to the grove and gathered the produce for himself. It is not disputed that the produce of a grove which the grove holder is liable to render to the zamindar comes within the definition of rent, this having been held in more than one case *e. g Raghubir Rai* v. *Matho* (1). The dictionary meaning of the verb "to exact" is in accordance with the interpretation placed on it by the respondent. The primary meaning as given in Murray's Oxford Dictionary is "to demand and enforce payment of." It does not cover the direct appropriation of produce on the spot. I have been referred to an old decision in *Gurreeboolah Puramanick* v. *Fukeer Mahomed Khiloo* (2) in which the same view was taken. I have little doubt that the intention of the framers of the Tenancy Act was to include such a case as the present within the jurisdiction of the Revenue Court, and if S. 36 as framed does not cover it, it is merely because the possibility of such a case was not thought of at the time when the section was drafted. I must however interpret the section as it stands.

In the course of the argument an alternative plea has been put forward to the effect that the suit was excluded from the jurisdiction of the Small Cause Court by Article 35 (II) or Article (43A) of the second schedule to the Provincial Small Cause Court Act. This plea is an after-thought and was not taken in the grounds of revision. Moreover after reading the plaint I do not find that the allegations made therein clearly amount to a criminal offence. The revision therefore fails and I accordingly dismiss it with costs.

Application dismissed.

---

(1) [1917] 39 All. 603—15 A. L. J. 623—41 I.C. 908.
(2) 10 Suther W.R. 203.

1924 ALLAHABAD 126

DANIELS, J.

Mithu Lal and another—Plaintiffs—Applicants.

v

Sri Lal—Defendant—Respondent

Civ. Rev. No. 54 of 1923, Decided on 19th June 1923, from the order of the Addl. Dt. J., Aligarh.

Oaths Act, Ss, 8 & 9—Decree passed on oath—Order of remand by appellate Court is a material irregularity.

In the course of the suit the defendant agreed to abide by the oath of one of the plaintiffs M. The plaintiff M took the required oath and on the basis of his evidence the learned Munsif decreed the suit. The defendant appealed to the Dt. J. who remanded the case to the Munsif to take further evidence on the facts.

Held: that the District Judge acted illegally and with material irregularity in entering into merits and in setting aside the decree of the Munsif. [P 127 C 1

Panna Lal—for Applicants.

N. C. Vaish—for Respondent.

Daniels, J.—This is an application for revision under the following circumstances. The suit was one on a pronote. In the course of the suit the defendant agreed to abide by the oath of one of the plaintiffs Mithu Lal. On a subsequent date before the oath could be administered he wished to withdraw from his application on the ground that Mithu Lal had been won over by the other plaintiff, his son, to swear a false oath. A witness was put in to prove this fact but both the Courts below have concurred in rejecting his evidence as false. The plaintiff Mithu Lal took the required oath and on the basis of his evidence the learned Munsif decreed the suit. The defendant appealed to District Judge The District Judge agreed with the Munsif as to the worthlessness of the evidence of collusion but remanded the case to the Munsif to take further evidence on the facts. On the basis of this evidence the learned judge came to the conclusion that in reality there was no consideration for the pronote and that the statement made by Mithu Lal on oath was false. From this he came to the conclusion that there must have been collusion between the two

plaintiffs. Such a procedure on the part of the District Judge cannot be supported. It has the effect of entirely nullifying the agreement made by the defendant to abide by Mithu Lal's oath. The oath to be taken was in the ordinary form and may not be specifically covered by Ss. 8 and 9 of the Oaths Act. There is authority of this Court in the cases of *Muhammad Ashgar Ali Khan* v. *Imtiaz Ali* (1) and *Kesho Ram* v. *Peare Lal* (2), that this does not affect the validity of the agreement. If the Court notwithstanding such an agreement is to be at liberty to enter into evidence as to the truth or falsehood of the statement made, the effect in substance is to wipe out the agreement altogether; it might not as well have been entered into. When a party agrees to abide by the oath of the other party or of any particular witness he clearly takes the risk of the witness swearing falsely. What he says in effect is "whatever this witness states on oath I am prepared to assent as true and to have the case decided on the basis of it" The Court below has in this case acted illegally and with material irregularity in entering into evidence on the question of consideration and in setting aside the decree of the Munsif. I accordingly allow the present application and setting aside the decree of the learned District Judge restore the decree of the Munsif. Under the special circumstances of the case I make no order as to costs in this Court.

Application allowed.

(1) [1898] A.W.N. 200.
(2) 1923 All. 443—21 A.L.J. 209—71 I C. 761.

1924 ALLAHABAD 127

MEARS, C. J. AND PIGGOTT, J.

Bishun Narain—Applicant.

v.

Mt. Bibi Ramji—Opposite Party.

Civil Rev. No. 79 of 1923, Decided on 25th May 1923, from the Sub. Judge, Allahabad, D/- 2nd October 1922,

Civil P. C., S. 152—Lower Court can effect amendment though appeal pending.

Mistakes, errors or omissions which are referred to in S. 152 can be cured by the Lower Court even though the parties have a pending appeal. [P. 127, C. 2]

D. C. Banerjee—for Applicant.

Haribans Sahai—for Opposite Party.

Judgment.—In this case, as the result of a redemption suit, a decree was passed giving the right of redemption to the mortgagor, and stating that Rs. 3 8 2 were surplus profits in the hands of the mortgagee under the terms of the usufructuary mortgage. That sum was arrived at after investigation by a Commissioner but he only took the cultivation down to the 25th of June 1920. Possession was given on the 2nd February 1922. A Preliminary decree was passed on the 18th November 1921, on which date the Commissioner had satisfied himself that there was a sum of money due from the mortgagee to the mortgagor; but he appears on that day to have been given directions by the Judge with regard to the ascertainment of certain sums. On that very date the learned Judge's attention was called to the terms of Order, 34, probably rules 7 and 8 and possibly 9 and thereupon on the order sheet he made a statement that "when the decree is prepared the account will have to be made up to date." From the moment of making that memorandum on the 18th of November 1921 the matter was overlooked, with the result that the figure of Rs. 3,812 was ultimately decided by him to be the amount of surplus profits which the mortgagee should pay to the mortgagor. The mortgagor now comes before the Court and, having quite properly laid emphasis upon the memorandum of the 18th of November 1921, says that the failure to calculate the surplus profits from the 25th of June 1920 to the 2nd of February 1922 can fairly and properly be described as one of those mistakes, errors or omissions which are referred to in S. 152 of the Code of Civil Procedure, and which can be cured even though the parties have a pending appeal to this High Court. We think that this is right, and, on a review of the whole circumstances it being obvious,

as the matter stands at present, that the Subordinate Judge was of opinion that surplus profits were due from the mortgagee to the mortgagor, that we ought to order an enquiry so that the sum of money which is finally found due from the mortgagee, to the mortgagor may be such as is contemplated by the terms of Order 34. We therefore direct an enquiry as to the surplus profits, if any which the mortgagee should pay the mortgagor for the period from the 25th of June 1920 to the 2nd February 1922 during which time the mortgagee was in possession. That enquiry should proceed in the lower Court with due expedition and if it happens that the decretal amount which at present stands at Rs. 3,812 undergoes any alteration, either party may without further application amend within 28 days of the decision of the Subordinate Court their present memorandum of appeal to this Court in any way they think fit, provided such amendment relates solely to this matter which we are deciding today. If necessary an application should be made in this Court to stay the hearing of the appeals if it should happen that the enquiry as to the amount of surplus profits, if any, is not concluded before the appeals come to this Court the object being that when the appeals do come to this Court the matters in controversy right down to the 2nd of February 1922 can be settled once and for all between the parties. The costs of this application will be costs in the cause.

As regards the second application the above order supercedes the order of stay passed on the 2nd of November 1922.

Applicationa llowed.

1924 ALLAHABAD 128

KANHAIYA LAL, J.

Jamna Prasad and others—Applicants.

v.

King Emperor—Opposite Party.

Criminal Ref. No. 178 of 1923, Decided on 16th May 1923, from the S. J., Mainpuri, D/-16th March 1923.

Public Gambling Act (III of 1867) S. 6—Legality of warrant—Presumption as to eague and indefinite warrant is not legal.

The Superintendent of Police received eredible information that a common gaming house was maintained by Puttu Lal son of Changi Mal by caste Brahmin resident of Mainpuri. He issued a warrant for the search of the house of Puttu Lal but omitted to get the boundaries of that house noted in the warrant or to enter to whom it was addressed. The caste of Puttu Lal was also misdescribed. The Sub-Inspector to whom the warrant in question was handed over waited for a suitable opportunity to make the search. He corrected the caste of Puttu Lal in the warrant with his own hand and went to the house of Puttu Lal and made a search.

Held, that the erroneous description of the caste in the original warrant may not be very material, but the omission to address it to a definite police officer and to describe the house by its boundaries or number, renders the warrant vague and indefinite, and it cannot be said that under that warrant the officer making the search was authorised to make it. The warrant in question cannot therefore be regarded as legal and the presumption authorised by S. 6 cannot be raised. [P. 129, C. 1 & 2]

Kumuda Prasad—for Applicants.

Asst. Govt. Advocate—for Opposite Party.

Kanhaiya Lal. J.—This is a reference by the Sessions Judge of Mainpuri in a case in which certain persons have been convicted of an offence under S. 4 of Act No. III of 1867 and sentenced to pay a fine of Rs. 10 each. It appears that on the 18th October 1922 the Superintendent of police received credible information that a common gaming house was maintained by Puttu Lal son of Changi Mal by caste Brahmin resident of Mainpuri. Puttu Lal was employed as a miscellaneous clerk in the Court of the Subordinate Judge f Mainpuri, but at that time he was on leave. The Superintendent of Police issued a warrant for the search of the house of Puttu Lal but omitted to get the boundaries of that house noted in the warrant or to enter to whom it was addressed. The caste of Puttu Lal was also misdescribed. The sub Inspector to whom the warrant in question was handed over waited for a suitable opportunity to make the search. On the 2nd of December 1922 he is said to have received information from Sannu, an

ekka driver, that gambling was going on in the house of Puttu Lal. He corrected the caste of Puttu Lal in the warrant with his own hand and went to the house of Puttu Lal and made a search with the result that certain instruments of gaming were found in the house and certain persons were arrested with moneys in their possession. The main question for consideration in the case was whether the warrant of search was legal. There was a further question as to how far a presumption could be raised that the house in question was used as a common gaming house. The learned Sessions Judge finds that the warrant was illegal inasmuch as the boundaries of the house to be searched were not given therein, and it was not addressed to any definite police officer. He further finds that the caste of Puttu Lal as originally entered in the warrant was misdescribed and that the Sub-Inspector who executed the warrant was not authorized to correct it on his own initiative. S. 5 of the Public Gambling Act (No. III of 1867) provides that if the Superintendent of Police has reason to believe that any house is used as a common gaming house he may either himself enter or by warrant authorise any officer of police not below such rank as the Local Government shall appoint in this behalf, to enter such a house, and to take into custody all persons who may be found therein and seize all instruments of gaming, moneys and securities reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein. Where such a warrant is issued, the law raises a presumption. until the contrary is made to appear, that such house is used as a common gaming house and that the persons found therein are there present for the purpose of gaming.

The house in question was the residential house of Puttu Lal and his brother. The erroneous description of the caste in the original warrant may not be very material but the ommissionto address it to a definite police officer and to describe the house by its boundaries or number, renders the warrant vague and indefinite, and it cannot be said that under that warrant the officer making the search was authorised to make it. The Superintendent of Police says that he does not remember who took the warrant to him for signature or to whom it was handed over by him. The warrant in question cannot therefore be regarded as legal and the presumption authorised by S. 6 of the Public Gambling Act (No. III of 1867) cannot be raised. In fact Puttu Lal who was convicted by the trying magistrate on a charge of keeping a common gaming house has already been acquitted by the learned Sessions Judge. The conviction of the other persons cannot therefore be upheld. The reference is accepted and the convictions and sentences passed on the applicants are set aside. The fines, if realised will be refunded.

Reference accepted.

1924 ALLAHABAD 129

DANIELS, J.

Firm Dwaraka Das Ajodhya Prasad—Petitioner.

v.

Firm Lachmi Narain Girdhari Lal—Opposite Party.

Civil Rev. No. 60 of 1923, Decided on 19th June 1923, from the order of Judge of Small Cause Court, Cawnpore, D/- 11th January 1923.

Negotiable Instruments Act, S. 7 — Oral acceptance—Special custom must be set up and proved.

Possibly by local custom, hundis may be accepted verbally but any such local custom must be specifically set up and proved by evidence. [P. 130, C. 1]

I. B. Banerjee—for Petitioner.

K. N. Katju—for Opposite Party.

Judgment.—This is an application for revision of a decree of the Judge of the Small Cause Court, Cawnpore, so far as it awards a sum of Rs. 59 against the applicant firm Dwarka Das Ajodhia Prasad on the basis of a hundi The hundi was drawn on the applicants and the whole question so far as their liability went was whether they accepted it or not. The learned

Judge of the Court below finds that the bundi was not accepted as required by S. 7 of the Act, namely by the drawee signing his assent on the bill, but he finds on oral evidence that the applicants did accept it verbally and on this basis he has decreed the suit against them. He relies on a statement in the fourth edition of Chalmer's Negotiable Instruments Act page 190 that. "Possibly by local custom hundis may be accepted verbally." The learned Judge has however overlooked the fact that any such local custom must be specifically set up and proved by evidence, and neither of these things was done in this case. On the findings of the Court below it appears to me that no decree could legally be passed against the applicants and I accordingly allow the revision and set aside the decree of the Court below so far as it is against the applicants. As the Court below has found that the merits of the case are largely with the opposite party I allow no costs to the applicants either here or in the Court below.

Application allowed.

1924 ALLAHABAD 130

WALSH AND KANHAIYA LAL, JJ.

Mahomed Yakub Ali—Applicant.

v.

King Emperor—Opposite Party.

Cr. Ref. No. 185 of 1923, Decided on 4th May 1923, from the J., Saharanpur.

Criminial P. C., Ss. 423 and 32–Power to vary sentence is measured by trial Court's powers.

The powers of an appellate Court to vary a sentence must be measured by those of the Court of first instance. 7 N. L. R. 109 Ref.

[C. 130, C. 2]

The Asstt. Govt. Advocate—for the Crown.

The following is the Referring Order:—This is an application for revision of an appellate order of the Joint Magistrate of Roorkee, dated 1st February 1923. The applicant was tried and convicted by a second class Magistrate on a charge under S. 406 of the Indian Penal Code and sentenced to three months simple imprisonment. The learned Magistrate on appeal affirmed the conviction, but varied the sentence passed. He altered it from one of three months' simple imprisonment to a fine of four hundred rupees. The second class Magistrate who tried the case could have imposed a fine of two hundred rupees only under S. 32 Criminal Procedure Code. It is argued that the powers of an appellate Court to vary a sentence must be measured by those of the Court of first instance. A ruling of the Judicial Commissioner's Court Nagpur. 7 N. L. R. 109—12 Cr. L. J. 444 has been referred to. I think that the argument cannot be refuted. Apart from this, six months' imprisonment must be deemed to be equivalent to two hundred rupees' fine in view of S. 32 (1) (b), and it is a moot question if the imposition of a fine of four hundred rupees would not be an enhancement of the sentence. Cf. *Empress* v. *Meda* (1). It will be noticed that in the appellate order which is attacked the imprisonment in default of the payment of this fine has been made rigorous while the original sentence was one of simple imprisonment. It was said in *Peman* v. *Empress* (2) that the imposition of solitary confinement is an enhancement even though the sentence of imprisonment be reduced. On the same principle, the substitution of rigorous imprisonment might be held to be an enhancement. But I take it that lower appellate Court, in varying the sentence, was bound by the limitations imposed by S. 32 on the trial Court. On the facts, which are seldom open to re-examination in revision, I see no good ground for interference. I would refer the order to the Hon'ble High Court, as I hold that the joint Magistrate's order was *ultra vires* and therefore illegal.

Judgment.—We accept this reference and restore the sentence to the original three months simple imprisonment given by the Magistrate who tried the case. The fine, if paid, will be refunded.

Reference answered in the affirmative.

---

(1) [1887] A.W.N. 100 Cr.
(2) [1890] A.W.N. 170 Cr.

1924 ALLAHABAD 131

DANIELS, J.

Mahadeo Prasad—Applicant.

v

The Crown—Opposite Party.

Criminal Rev. No. 202 of 1923, Decided on 1st June 1923, from the S. J., Allahabad, D/-12th December 1922.

Penal Code, S. 379—Water in pipes is subject of theft.

Water when conveyed in pipes and so reduced into possession can be subject of theft. [P 131, C 2]

Sailanath Mookerjee—for Applicant.

The Asstt. Govt. Adovocate—for the Crown.

Daniels, J.—This revision raises the question whether water in Municipal pipes can be the subject of theft. The two applicants Mahadeo Prasad and Beni Prasad are brothers and live in a house in cantonments which belongs to Mahadeo Prasad. They employed their younger brother Mangru, who was a pipe layer overseer in Military Works Service, to put a water connection from the main water pipe into their house. This was done contrary to law without the permission of, and indeed without the knowledge of, the cantonment authority and the Municipal Board. The tap being in the house no one has actually seen them taking water from it, but the Courts below were quite justified in infering that they had not gone to the trouble and expense of putting in this connection and their having it in their house for a month and a half without making use of it and taking water from it. Had they applied for permission to put in a tap in accordance with the rules they could have got permission but they would then have had to pay water rate which they were trying to escape paying by these surreptitious proceedings. They might have been convicted under the appropriate section of the Water Works Act or of the Municipalities Act or Cantonment Code, but the authorities, considering the offence as a serious one, preferred to charge them with theft of water under S. 379 I.P.C., and on this charge they have been convicted and sentenced to a fine of Rs. 300/- each. The convictions and the sentences have been upheld by the learned Sessions Judge in appeal.

It has been held both in England and in India that water when conveyed in pipes and so reduced into possession can be the subject of theft. The English case is that of *Ferens* v. *O'Brien* (1). There water was conveyed to a colliery by means of underground pipes and then supplied to the houses of the workmen by means of branch pipes to which taps were attached, the workmen being allowed to take water from taps on payment of a fixed price. The accused was seen taking water from one of the taps without having agreed to pay for it. It was held that under the circumstances he could be convicted of larceny at common law for taking this water.

In the Calcutta case of *Emperor* v. *Sheikh Arif* (2) it was held that water flowing in an open, though an artificial channel, could not be the subject of theft, and *Ferens* v. *O'Brien* (1) was distinguished on the ground that in the latter case the water was confined in pipes and thereby reduced into the possession of the water company which supplied it.

Chockalingam Pillai v. *Emperor* (3) was a case in which the water had been cut off from the natural source and conveyed through pipes, and thus reduced into effective possession. It was held both with reference to the English authority and to the definition of theft contained in S. 378 I. P. C. that it could be the subject of theft.

The present case is even stronger against the accused inasmuch as the water had not only been pumped, filtered and conveyed through pipes by the Municipal Board but was then, as I am informed at the hearing, sold by the Municipal Board to the

---

(1) [1883] 11 Q.B.D. 21—52 L.J.,M.C 70— 31 W.R. 643—15 Cox. C.C. 332—47 J.P. 472.

(2) [1908] 35 Cal. 437—12 C. W. N. 534—7 Cr. L.J. 367.

(3) [1912] M. W. N. 119—13 Cr. L. J. 131—11 M.L.T. 162—13 I.C. 819.

cantonment authority, for supply to persons in cantonments, at a price depending on the amount of water supplied.

After considering the authorities I am of opinion that the water in this case was in the possession of the cantonment authority and that the accused's act in taking it comes within the definition of theft.

I have also been asked to interfere on the ground that the sentences were excessive, but in the judgment of the appellate Court it is expressly stated that no plea on the question of sentence was urged in that Court. The applicants are therefore not entitled to urge in revision that the sentences are too severe. I accordingly dismiss the applications of both accused.

Applications dismissed.

1924 ALLAHABAD 132

MEARS, C. J. AND PIGGOTT, J.

Suraj Narain—Petitioner.

v.

Jang Bahadur and others—Opposite Party.

Civ. Mis. Nos. 211, 212 and 213 of 1923, Decided on 1st June, 1923, from the Commissioner of Allahabad, D/-23rd April 1923.

U. P. Municipalities Act (II of 1916) Ss. 20 and 22--Presentation to Joint Magistrate in pursuance of custom, instead of to the Collector is valid-Who can apply under S. 20--Verification not necessary.

Where there is a practice for the petitions to be presented to the Collector to be handed over to a joint Magistrate who makes them over to the Collector on his arrival, presentation of petition made to the joint Magistrate is valid presentation to the Collector if made in time. But where there is no such pratice established, and the petition reaches the Collector out of time the petitioner must suffer under the provisions. Petition can be lodged only by a candidate in whose favour votes have been recorded and who claims in the petition to be declared elected in place of the person whose election is questioned, that is, a person who went through the contest, in whose favour votes were recorded and who alleges that by strict scrutiny of votes and striking off the names of people who should not have voted or by reason perhaps of disqualification of the person who has been elected he himself will be the person who will become the elected member in the event of the petition being enquired into and upheld. A petition under the Act need not be verified. [P. 133, C. 2 & P. 134 C. 1[

K. N. Katju—for Opposite Party.

Mears, C. J.—The Municipal elections were held in Cawnpore in March, 1923. Suraj Narain was a candidate, as was also, one Muhammad Siddiq Hafiz. Both of these men were defeated by an opponent who secured a large number of votes. Both of these gentlemen thought they had a case for unseating their opponents and each of them proposed to proceed under the Municipalities Act, Local Act No. 11 of 1916 and lodged petitions. S 20 prescribes the form and the manner in which the petition shall be presented, and it also defines who are the persons who are permitted by law to present a petition. S. 22 defines who is to hear petitions and clause (2) of that section lays down how the proceedings may start by presentation.

Taking the case first of all of Suraj Narain, Miscellaneous Case No. 211 of 1923, the material dates and facts are as follows:- The election was held on March 20th, 1923, and on the 23rd of March Suraj Narain attended the Court of the Collector. The petition which he had with him was, as regards formal parts, in proper form; that is to say it was headed as being a matter which would be dealt with in the Court of the Commissioner (it was stated to be presented "through the Collector, Cawnpore District") and recited that it was a petition under S. 19 of the United Provinces Municipalities Act No. II of 1916. When Suraj Narain reached the Court the Collector had not arrived; but the Joint Magistrate was sitting and Joint Magistrate in answer to and enquiry by petitioner has recorded in a letter of April 7th, that a practice does exist in that Court, which undoubtedly is for the convenience of the public, whereby petitions intended for the Collector are received by the Joint Magistrate and made over to the Collector on his arrival. Suraj Narain relying upon that practice in fact handed to the Joint Magistrate the petition, and the Joint Magistrate in pursuance of that practice handed over to the

Collector the document. That was done on the 23rd of March. So that Suraj Narain who had originally 15 days within which to deliver to the proper authorities a proper petition-in fact had got that petition into the hands of the proper authority, namely the Collector by the 23rd of March. It is suggested that we are bound to construe Ss. 20 and 22 so strictly as to hold that no presentation of a petition can avail the petitioner unless the petitioner himself personally comes face to face personally with the Collector and delivers it into the Collector's hands That undoubtedly is the safest and wisest thing to do. But the position as regards the Collector's Court at Cawnpore was that in reliance upon the practice Suraj Narain was content to follow that practice of handing documents intended for the Collector to the joint Magistrate. Inasmuch as the petition reached the Collector well within time, we are of opinion that it was a proper presentation and that petition ought to have been heard and disposed of upon the merits.

The next case with which we propose to deal is that of Muhammad Siddiq Hafiz, because there is some similarity in the facts. We will deal with the case of Durga Shanker later.

The elections for this particular ward in Cawnpore were held on the 19th of March, and that gave Muhammad Siddiq Hafiz up to the 3rd of April within which to be in time for the lodgement of his election petition. Fifteen days is specified by the Act, and the first broad question appears is, did he by any means whatever get into the hands of the Collector by 3rd of April the petition? The answer is that he did not do so, and that in our opinion makes a material difference in this case. On the 3rd of April, which was the last day, we are told that he presented the petition to a Deputy Collector by name Mr. Ashfaq Husain. There is not in the papers relating to this case any evidence which suggests that there was any practice whereby this Deputy Collector was authorised, or was accustomed short of actual authorization, to receive petitions of that nature and was a recognised official channel for their transmission to the Collector. That being so, we think that the petitioner in this case took the risk. If it happened that the Deputy Collector had forwarded the document to the Collector within time and the Collector had chosen to accept it from the Deputy Collector, that might possibly have been a good presentation. We do not say that it would have been a good presentation that matter would have to be enquired into with some care and might depend to some extent on whether we believed that there was in existence a recognised practice. However we are satisfied that in the absence of any evidence of that character, the petitioner when he handed the document to the Deputy Collector, who no doubt gave him an assurance that it would be forwarded to the Collector, took risk of its reaching the Collector within time. It did not reach the Collector within time and was not received by him until the 4th of April. In these circumstances we hold that as regards the petition of Muhammad Siddiq Hafiz that petition was not presented within time and is one which should not be entertained.

We now come to the petition of Durga Shanker. He like Muhammad Siddiq Hafiz handed the petition to a Deputy Collector, and again there is no evidence on this record that the Deputy Collector was a recognised channel for the transmission of these documents. We need not decide whether that petition was properly presented for this reason, that we are unable to understand how Durga Shanker comes before the Court as a petitioner. It appears that he was one of several candidates and that at a meeting it was considered desirable that there should not be so many candidates but that the choice of the two gentlemen who should contest the ward was left to the decision of a gentleman of high standing, who was regarded by the seven candidates as being likely to make the best selection. Two gentlemen were in fact selected. Durga Shanker was amongst the five whose names were pasessed over; and he having the belief that a candidate who was thus declared elected could be unseated on

various grounds, conceives that he has a right to come forward and raise that question. These petitions can be lodged by a candidate in whose favour votes have been recorded and who claims in the petition to be declared elected in the room of the person whose election is questioned-that is a person who went through the contest, in whose favour votes were recorded and who alleges that strict scrutiny of votes and striking off the names of people who should not have voted or by reason perhaps of disqualification of the person who has been elected-that he himself will be the person who will become the elected member in the event of the petition being enquired into and upheld. That is the only one person who can present a petition; but body of men, ten or more electors, may join together and present a petition. Durga Sanker's position in this case has no *locus standi* in the matter of law, and on that ground was incompetent to present a petition and on that ground his petition must be rejected.

Mr. Stowell, the Commissioner, also enquires whether a petition must be duly verified in accordance with the rule applicable to plaints. We think not. When the petition has been duly presented the hearing follows along the lines prescribed for a Civil suit. The Act is silent as to the verification of the petition and it is only after due presentation of the petition that the civil suit procedure rules operate.

We are therefore of opinion that a petition need not be verified.

Order accordingly.

1924 ALLAHABAD 134

MEARS, C. J. AND PIGGOTT, J.

Sultan Baksh and others—Applicants.

v.

Abdul Hamid—Opposite Party.

Civil Mis. No. 217 of 1923 Decided on 1st June 1923 from the Commissioner, Allahabad, D/- 27th April 1923.

U. P. Municipalities Act (II of 1916)—Bye-laws under Rule 36 (2)—Candidate can withdraw during polling.

Where for one seat there are two candidates and one of them withdraws during the progress of polling, an immediate declaration that the other candidate is duly elected is valid.

It is quite clear that just as a candidate can withdraw before the time for polling arrives, so he can withdraw during the polling, so also can he withdraw as soon as he is elected or he can withdraw at any time after the election. [P. 135 C. 1]

Gulzari Lal—for Applicants.

S. Raza Ali—for Opposite Party.

Mears, C. J.—This is a reference to the High Court under Order 46 of the Code of Civil Procedure read with S. 23 (c) of the Municipalities Act No. II of 1916. In Ward No. 4 of the Fatehgarh Municipal elections five candidates were nominated for the Moslem constituency. Three of them withdrew before the polling day. On that day two candidates were opposed to each other by name Omrao Khanand Abdul Hamid. There being only one seat the poll was duly opened and voters commenced to record their votes in favour of one or the other candidate. At some time whilst the polling was open and continuing Omrao Khan went to the Returning Officer and told him that he no longer desired to contest the seat. Thereupon the Returning Officer satisfied that that was the determination of Omrao Khan, closed the poll and declared that the one remaining candidate Abdul Hamid was duly elected to the one vacancy. It is suggested in the petition that the withdrawal of Omrao Khan was due to some political manouvering: but be that as it may we can only deal with what were the facts relating to the procedure. The fact was that the poll opened with two candidates for one vacancy, and before the time came for the poll to close and votes to be counted and the Returning Officer to declare who was elected there was only one candidate and that one candidate a candidate for the one vacancy. We think in the circumstances the Returning officer acted with propriety and common sense and that he acted quite reasonably. Rule 36 (1) of the

Municipal Rules and By-laws of this particular Municipality, provide that a poll shall be taken on the day for the election when the number of duly nominated candidates who are entered in the schedule and who have not withdrawn their candidature before time fixed for the poll exceeds that of the vacancies. When you have got duly nominated candidates in excess of vacancies you have got to have an election. Rule 36 (2) provides: If the number of such candidates is equal to the number of vacancies, all such candidates shall be deemed to be elected. Therefore if there are three candidates and three vacancies, all such candidates shall be deemed to be elected: similarly two; similarly one. Now it is true that in terms Rule 36 (2) does not contemplate, nor is there anywhere any provision which contemplates the withdrawal of a candidate during the few hours during which the polling is in progress; but by analogy to the duties of the Returning Officer before the opening of the poll, we have no doubt that it was the proper course for the Returning Officer to act in conformity with rule 36 (2) and, finding only one candidate left for the one vacancy, to declare that man duly elected.

Dr. Sen voicing no doubt to some extent the suggestion thrown out by the Commissioner, said that the poll ought to remain open and in the end the Returning Officer should declare the remaining candidate duly elected. The difficulty about that is that if the poll remains open, votes are being recorded for a candidate who has withdrawn his candidature and is no longer one of the contestants. It is quite clear that just as a candidate can withdraw before the time for polling arrives, so he can withdraw during the polling, so also can he withdraw as soon as he is elected or can withdraw at any time after his election. A man does not bind himself that he will not withdraw either as a candidate or as a member of a Municipality. He is entitled to withdraw at any moment. In the circumstances we are of opinion that the Returning Officer acted in the circumstances legally and properly and rightly in accordance with his duties and dealt with the matter in proper way. We are of opinion that his declaration that Abdul Hamid was duly elected was a proper decision and in accordance with the law. This is our answer to the reference. The costs of this hearing including fees actually certified by counsel on both sides will be dealt with by the Commissioner in his discretion in disposing of the election petition.

Order accordingly.

1924 ALLAHABAD 135

MEARS C. J. AND PIGGOTT, J.

Mahomed Baksh and another—Petitioners.

v.

Muhammad Abdul Baqi Khan and others—Opposite Parties.

Civ. Mis. Case No. 219 of 1923, Decided on 18th June, 1923, from the Commissioner of Allahabad D/-30th April. 1923.

U. P. Municipalities Act, S. 16 (3) (c)-"Place of profit" do not include ordinary commercial contract.

In the Municipal election held in March 1923 in Allahabad one M was a candidate, and was subsequently declared to have been duly elected. For some years he, with other members of his family, had held a contract for the supply of kerosene oil in bulk to the Municipal Board.

Held that on a fair construction of S. 16 (3) (c) the words "place of profit in the gift or disposal of the Municipal Board" do not cover any ordinary commercial contracts. The words "place of profit" in S. 16 (3) (c) denote position and employment in the sense of having a title attached to such employment and a definite standing and partaking of the nature and character of that of a master and servant. [P. 137 C. 2]

K. N. Katju—for Petitioners.

S. N. Sen, Harnandan Prasad and *S. B. Johari*—for Opposite Parties.

Mears, C. J.—At the Municipal election held in March last in Allahabad one Khan Bahadur Muhammad Abdul Baqi Khan was a candidate, and was subsequently declared to have been duly elected. For some years he, with other members of his

family, had held a contract for the supply of kerosene oil in bulk to the Municipal Board. He was a member of the Board, whose term of office came recently to an end, and he had some three years ago disclosed the existence of that contract to the Commissioner and had been duly given permission to hold the same. He sat as a duly elected member throughout the period of the last Municipal Board. When he deemed himself to have been duly elected this year he again sought and obtained the permission of the Commissioner to carry out the contract, notwithstanding his membership of the Board. A petition to unseat him is now in course of hearing by the Commissioner; and amongst other grounds it is alleged that he was disqualified from becoming a candidate for election and that his election is consequently of no effect because he was at the time a person who under S. 16 (3) (c) held a "place of profit in the gift or disposal of the Municipal Board".

The Commissioner has referred this point to us for our determination. The argument put forward by the petitioners is that the words "place of profit" were deliberately chosen as a compendious, all embrasing phrase to cover every recognised ground of disqualification such as are to be found in the Indian Acts in *pari materia*. In support of that argument Dr. Katju has referred us to the Bombay Municipal Act (Act III of 1901) where amongst other provisions, disabilities attach to "a Municipal officer or servant, a licensed surveyer, or plumber, or one who has directly or indirectly by himself or through his partner any share or interest in any contract or employment with or under, or by, or on behalf of, the Municipality". S. 39 of the Calcutta Municipal Act has exactly similar disqualifying provisions. The Madras Municipal Act also affirms the inability of a person seeking election who has interest in any contract made with or work done for the corporation.

Therefore had this question, which we are called upon to decide, arisen in any election to which the Bombay, Calcutta or Madras Acts applied the position would be clear. The respondent would by the very words of either of these Acts have been disqualified for election. Here however we have to consider the words of the Local Municipal Act which are said to include the case of a man having a contract or interest in a contract with the Board. The question which we have to decide is whether it would be a fair construction of S. 16 (3) (c) to say that on a reasonable rendering of the words "place of profit in the gift or disposal of the Municipal Board" cover an ordinary commercial contract. The words "place of profit" have a definite historical association and when coupled with the word "office" are familiar to all students of constitutional history. The Act of settlement 12 and 13 William III Chapter II, S. 3 provides that upon the Accession of the House of Brunswick, no person holding any office or place of profit under the King should be capable of serving as a member of the House of Commons. The phrase recurs in the Act of settlement of 4th Anne and in 6th Anne Chapter 41.

The object of these Acts was to insure that the members of the House of Commons should be as far as possible free from any possibility of influence, or under any likelihood of the exercise of authority by the monarch and should be free to give effect to their political opinions and should not be merely puppets. The office or place of profit to which these enactments apply vary from posts which were merely sinecures in the Royal House-hold to positions damanding arduous duties as great officers of State. An examination of them fails to disclose that they were in any way connected with commercial contracts into which, after all, a King as well as a commoner has to enter for the supply of commodities.

As far as we are aware there is only one case in which the term "office or place of profit" has been the subject of a judicial decision. In *Astley* v. *New Tivoli Ltd.* (1) the plaintiff sought an injunction to restrain the defendant company and the other Directors from preventing him from acting

(1) [1899] 1 Ch. 151—68 L.J., Ch. 90—79 L.T. 541—47 W.R. 326.

as a Director of the Company. The defendants alleged that the plaintiff had ceased to be a Director because he had accepted from the Company the trusteeship of a covering deed relating to debentures on terms of payment by the company to him for his services. They insisted that these circumstances caused his Directorship to be determined inasmuch as one of the articles of Association prescribed that the office of a Director should be vacated if he held "any other office or place of profit under the company". Mr. Justice North decided that the position of trustee for the debenture holders was "a place of profit", the object of the articles of Association being to prevent the Directors from doing anything by which a Director continues to be a Director and yet accepted or held an additional office or place of profit under the company.

It will therefore be seen that the meanings which have been attached to the words "office or place of profit", do not lend any assistance to the petitioners, and they are thrown back upon their original general statement that the draughtsman meant by that phrase to include, and the Local Government by its acceptance meant to enact, that it should cover the special disabilities specifically set out in the Bombay, Calcutta and Madras Acts. We are unable to accept that argument. We find it, for instance, difficult to give any meaning to the words in S. 40 "continued to hold . . . any interest in a contract" or those in S. 82 "continues to have" . . . . . unless the Act contemplated the possibility of a candidate for election having in fact at the time an interest in a contract and being given by S. 40 an opportunity of obtaining permission from the Commissioner on his election to carry out the contract notwithstanding his election. A contractor who receives remuneration for the supply of articles cannot in accordance with the ordinary meaning of the word "place" be said to hold a place of profit. In Murray's Dictionary "place" is defined in this connection as 'office, employment, situation'. We are of opinion that the proper meaning which should be ascribed to the words "place of profit" in S. 16 (3) (c) is one which denotes position and employment in the sense of having a title attached to such employment and a definite standing and partaking of the nature and character of that of master and servant. That is, a position in relation to the Board in which the Board can require a person to obey its command and do certain work or render personal services in return for remuneration. Instances of this kind readily occur to one, *e. g.* a consulting Engineer who for a retaining fee holds himself at readiness to give expert opinions and furnish reports; a whole or part time medical officer with defined duties towards the Municipal Board; and each and every Municipal servant of any grade. This rule is necessary because members of a Board should not be in the false position of being masters and servants at one and the same time. We appreciate that the position of a contractor sitting on a Board may be a delicate one, and may give rise at times to difficult and embarassing situations but the question which we are called on to decide is whether on fair construction of the words "place of profit" a contractor could be included. We think not, and though it may have been the intention of the local legislature to follow along the lines of the disqualifications which had found favour in the enactments of Bombay, Calcutta and Madras, the fact according to our view is that they have failed to do so. That being so, we are of opinion that the holding of the kerosene contract by Khan Bahadur Muhammad Abdul Baqi Khan did not prevent his standing as a candidate and does not invalidate his election; and this is the answer we return to the Commissioner.

Reference answered in the negative.

✱ 1924 ALLAHABAD 137

BANERJEE A.C.J. AND PIGGOTT, J.

Lalla Mal Hardeo Das Cotton Spinning Mill Co. of Hathras—In the matter of.

Mis. Case No. 223 of 1923, Decided on 2nd July, 1923, reference made by the Commissioner of Income-tax United Provinces, D/- 4th May, 1923.

(a) *Income Tax Act (1922), S. 66—Question of fact.*

The question whether there has been an advance of capital by particular partners, or a *bona fide* borrowing of money by the firm, in which the lender happens to be a partner must be treated as one of fact in each case. [P. 138 C. 2]

(b) *Income Tax Act (1922), S. 2 (14)—Registered firm.*

When a firm does not apply for registration as prescribed by statutory rules prior to the last day by which its return of income for the year was due, it can not be held to be a registered firm for the year in question by filing the application prior to the assessment.

The very latest date on which a return was due from the objectors under subsection (2) of S. 22 of the Indian Income-tax Act was the 5th of July, 1922. On this date there was not even in existence "an instrument of partnership specifying the individual shares of the partners." The applicants presented their application to the Income-tax Officer on January, 2nd, 1923, who actually registered their firm by an order which purported to effect registration from January, 30th to March, 31st 1923.

Held: that the mere blunder of an Income-tax Officer could not make the objectors "registered firm" for the purposes of assessment during the financial year 1922–23, if they were not such within the meaning of the definition. [P. 139 C.1 P.140C.1 & P.141 C.2]

L. M. Banerjee—for the Crown.

S. N. Sen—for Applicants.

Piggott, J.—This is a reference by the Commissioner of Incometax under S. 66 (2) of the Indian Income-tax Act, No. XI of 1922. The assessees at whose instance the reference has been made are a firm carrying on business at Hathras, in the Aligarh District, under the style of the "Lalla Mal Hardeo Das Cotton Spinning Company": they may be conveniently referred to hereafter as "the objectors."

In the petition which led to the reference they sought to raise sundry questions of detail in respect of which no reference has been made. The Commissioner's action in this respect has been perfectly correct. The Commissioner is required to refer to the High Court any question of law arising out of any order made by him under S. 32 of the Act. The objectors are seeking to raise questions not referred to in their petition of appeal to the Commissioner; obviously no reference can be made to the High Court on any such question.

There remain two points set forth in the order of reference. One of these is of no great practical consequence and may be disposed of at once. The objectors were being assessed to income-tax for the financial year 1922—23 on the basis of the profits disclosed by their accounts for the calendar year 1921. In those accounts a total sum of Rs. 42,882/- was shown as interest paid on account of money advanced during the year by partners in the firm for the purpose of carrying on the business. The objectors claim that this interest should be treated as an "allowance" admissible under S. 10 (2) (iii) of the Indian Income-tax Act, and should therefore be deducted from the net profits of the year before these are assessed to Income-tax. The Assistant Commissioner, who examined the books of the firm reports that the money in respect of which this interest is charged in the accounts was not really borrowed for the purposes of the business, "but represented" only an advance of capital by the partners." This is so nearly a pure question of fact that it is not easy to formulate any question of law arising thereon in respect of which we can give an opinion. In the order of reference itself the question is stated thus:—

"Is the sum paid as interest to partners for capital put into a firm as allowance admisssble under section 10 (2) (iii)?" To the question as thus stated our answer is:—"No: such interest represents merely an assignment of a part of the net profits for the year in favour of partners who are regarded as entitled to such assignment by reason of special advances of capital made by them in the course of the year."

The question whether there has been an advance of capital by particular partners, or a *bona fide* borrowing of money by the firm, in which the lender happens to be a partner must be treated as one of fact in each case. We are not called upon to enter into questions of fact; but we feel bound to add that the facts laid before us

in the course of arguments on both sides have not left us under the impression that the objectors have suffered injustice in this matter.

The other question raised by this order of reference is one of great importance to the objectors. They have been required to pay no less a sum than Rs. 81,641/9/- as super-tax on account of the year under assessment. They contend that they are not liable to supertax, because they were, during the financial year 1922-23, a "registered firm," within the meaning of that expression as defined in section 2 (14) of the Indian Income-tax Act. The commissioner, affirming the order of the Assistant Commissioner, has held that they were not; and the question has been referred to us in the following form :-

"Whether, when the firm did not apply for registration as prescribed by statutory rules prior to the last day by which its return of income for the year was due, it can be held to be a registered firm for the year in question by filing the application prior to the assessment."

Here again the question of law has been stated to us in a form which only admits of one answer, and that answer is negative. By definition, a "registered firm" is one "constituted under an "instrument of partnership specifying the individual shares of the partners of which the prescribed particulars have been registered with the Income-tax Officer in the prescribed manner." By clause (10) of the same S. 2, the word "prescribed" means "prescribed by rules made under this Act." It is not denied that certain rules have been made by competent authority and duly published so as to "have effect as if enacted in this Act" (vide section 59 (4) of the same) which "prescribe" the manner in which a firm entitled to do so can get itself "registered". Those rules have been laid before us. In Rule 2 it is laid down that the application to the Income-tax Officer must be made "on or before the date on which a return is due under sub-section (2) of S. 22 of the Indian Income-tax Act." In Rule 3 it is laid down that the application must be in a prescribed form and be accompanied by the original instrument of partnership under which the firm is constituted, together with a copy thereof. The Income-tax officer is empowered in special cases to dispense with the production of the original instrument, but a properly authenticated copy must always be produced.

Now, in the present instance, it is not denied that the very latest date on which a return was due from the objectors under sub-section (2) of S. 22 of the Indian Income-tax Act was the 5th of July 1922. On this date there was not even in existence an instrument of partnership specifying the individual shares of the partners" in the Lalla Mal Hardeo Das Cotton Spinning Company : such an instrument only came into existence on July 20th 1922. Not only therefore is it a fact that the objectors did not apply to the Income-tax Officer within the period limited by Rule, 2 but that period actually expired before they had put themselves in a position to make such an application by executing the "instrument of partnership " necessary to entitle them to do so. It follows inevitably that the objectors never brought themselves within the definition of a "registered firm" by getting the "prescribed particulars registered with the Income-tax Officer in the prescribed manner "

These considerations are sufficient to dispose of the reference ; but it is perhaps expedient that we should go into certain points a little further. In the course of an exceedingly able, and indeed exhaustive, statement of the case on behalf of his clients, Dr. Sen, who represented the objectors, raised two points which are not exactly covered by the remarks hitherto made.

First he contended that, even though his clients may not have presented their application to the Income-tax Officer within the prescribed period, that Officer had condoned the irregularity by accepting an application presented to him, in the first instance, on January 2nd, 1923, and once more presented after amendment on January 5th 1923 ;

that the said officer did actually register their firm by an order which purports to effect registration from January 30th to March 31st 1923; that such registration, once effected, necessarily operates from the commencement of the financial year 1922-23; and that, in any event, the effect of this certificate is to entitle the objectors to immunity from the super-tax for two months of the financial year.

Secondly, Dr. Sen represented, in various forms and in connection with different parts of his argument, the contention that his clients were entitled to a generous interpretation in their favour of a fiscal enactment; that they were the victims of chicanery on the part of the officials of the income-tax department and, generally, that the equities of the case were entirely in their favour.

To the first point it would be almost a sufficient answer to say that the mere blunder of an Income-tax Officer could not make the objectors a "registered firm" for the purposes of assessment during the financial year 1922-23, if they were not such within the meaning of the definition. Indeed, the exigencies of Dr. Sen's argument brought him perilously near the position that a formal certificate of registration, dishonestly or corruptly issued by an Income-tax officer in flat defiance of the rules, would bind the Income-tax authorities and carry with it a right of exemption from super-tax. In the present instance, of course, there is no suggestion of intentional misconduct on the part of the Income-tax Officer. Indeed it is obvious that he did not himself regard the certificate granted by him as of any effect prior to the 30th of January 1923. Nor could it have any such effect, supposing it to be otherwise valid; for in Rule 5 of the rules on the subject it is expressly laid down that such a certificate of registration "shall have effect from the date of registration". Obviously this certificate was never intended to affect the liability of the objectors to payment of super-tax which was being levied in respect of the earnings of their firm during the calendar year 1921. That liability could not be split up so as to be enforced for part only of the financial year 1922-23; the objectors had finally lost their right to the privileges of a registered firm" for that year, when the 5th of July 1922 went by without their even having executed an instrument of partnership. The certificate issued by the Income tax Officer on January 30th 1923 may have been intended to save the objectors' trouble by enabling them, during the next financial year, to apply for a renewal of the certificate, instead of having to take out a new one: it could have no other possible effect.

We can make these matters even clearer by dealing briefly with Dr. Sen's next point.

On April 5th, 1922 the objectors were served with a formal notice calling on them to put in a return of their income for the calendar year 1921, and giving them a month in which to do so.

On may 4th. 1922 the objectors obtained a month's extension of time.

On June 3rd. 1922 they put in two applications. One of these asked for another month's time in which to prepare and submit the return of income: it was on this application that they were given time till the 5th of July 1922. The other was an intimation that the firm intended to apply for registration; but it contained an admission that no instrument of partnership had yet been executed, and asked for information on points of procedure, which information was duly furnished.

The 5th of July 1922 passed without any return having been furnished; and on July 17th, 1922 the Assistant Commissioner wrote to the firm and told them plainly that their chance of obtaining registration was over for that year.

On July 20th, 1922 the objectors at last got their instrument of partnership executed; but at the time they seemed inclined to accept the intimation that it was now too late to be of any use for that year.

On October 27th, 1922 the objectors were at last compelled to submit their books for examination; and on December 22nd, 1922 the Income-tax

Officer was able to report the result of his examination. The Assistant Commissioner, whose duty it was to make the assessment, by reason of a general order lawfully issued under S. 5 (4) of the Indian Income-tax Act, completed his work on January 26th, 1923. One would have assumed that the same general order would have transferred to the Assistant Commissioner from the Income-tax Officer the duty of dealing with any application for registration which the firm might make. We do not know whether this was the case or not; the point is one which the Commissioner might do well to note, so that no such complication may again arise as was permitted in this case. It appears that, while the question of their assessment was before the Assistant Commissioner, the objectors went, behind his back, to the Income-tax officer with an application for registration, first presented on January 2nd, 1923, and again on January 5th, 1923, after the instrument of partnership had been returned for certain amendments. It was on this application that the Income-tax Officer's certificate of registration was obtained on January 30th, 1923. The Assistant Commissioner was in, complete ignorance of these proceedings when he made his assessment on January 26th, 1923. On that date the objectors were beyond all question an "unregistered firm" and were very properly assessed as such.

From this statement of the facts it is clear that the objectors were to blame for not making any return of their income, and also for the delay in the production of their books of account. There are no merits whatever in their case. They had lost their right to be dealt with as a "registered firm" for the financial year 1922-23, for the simple reason that they had failed even to provide themselves with an instrument of partnership within the extended period allowed them for the presentation of their return of income. The obvious intention of the rules, as shown by the wording of the prescribed form of certificate, is that such applications should ordinarily be presented in the month of April, the first month of the financial year. Where, as in the present case, the period for making a return of income has been extended, there can be no objection to a certificate being issued bearing the correct date of some other month. It will take effect from the date specified therein. When the assessment comes to be made, the officer charged with that duty will have to determine simply whether the firm with whose return, or with whose accounts, he is dealing, is or is not a "registered firm" within the meaning of the definition. The objectors had been plainly told that they would be dealt with for the year 1922-23 as an "unregistered firm": their attempt to escape from this position by going to the income tax officer at the beginning of January 1923 was wholly futile. It is they who are attempting to evade a just liability by raising technical pleas and pressing for a strained, and indeed impossible, interpretation of one or two details in the rules.

Our answer therefore to the principal question referred to us is, as we have already intimated, in the negative.

Under clause (6) of S. 66 of the Indian Income-tax Act (No. XI of 1922) we order the assessees to bear the costs of this reference, including the fee certified by the Government Advocate, who has appeared to support the assessment.

Reference answered in the negative

1924 ALLAHABAD 141

DANIELS, J.

Dukhi—Applicant.

v.

King Emperor—Opposite Party.

Criminal Ref. No. 230 of 1923, Decided on 26th April 1923 form the S. J., Allahabad, D/-12th April 1923.

Cr. P. Code S. 106—Order under this section should be passed by the same Magistrate who tried the accused for the principal offence and not by another Magistrate.

[P. 142, C. 1]

Daniels, J:—This case has been referred by the learned Sessions Judge at Allahabad on the ground that an order under S. 106 of the Code of Criminal Procedure was passed without jurisdiction. A case under Ss. 352 and 506 of the Indian Penal Code was before a Magistrate of the second class. Being of opinion that the accused should be bound over under S. 106 of the Code of Criminal Procedure he referred the case to the joint Magistrate. The Joint Magistrate passed an order under S. 106 but did not deal with the substantive charge and on his sending the record back the accused were convicted by the second class Magistrate in whose Court the case originally was. Under these circumstances the learned Sessions Judge is right in saying that the Joint Magistrate acted without jurisdiction. The learned Sessions Judge appears to be of opinion that the order was a proper order on the merits but he has not thought it necessary to ask this Court to restore the order in the exercise of its revisional jurisdiction under S. 106 (3) of the Code of Criminal Procedure. I accept the reference and set aside the order passed under S. 106.

Reference answered in the affirmative.

✱ 1924 ALLAHABAD 142

DANIELS, J.

Jhandoo Singh—Applicant.

v.

King Emperor—Opposite Party.

Criminal Rev. No. 292 of 1923, Decided on 5th July, 1923, against the Order of Dt. Mag., Budaum D/-21st March 1923.

Criminal P. C., S. 110—Evidence insufficient.

Evidence showing that the applicant took part in a dacoity, that he was actually arrested in connection with the decoity but the police considered the evidence against him of so little value that he was released under S. 169 of Cr. P. C. without even being placed before the Court, is totally insufficient for binding the accused over on a charge of being a bad character. (P 142, C 2)

Thompson—for Applicant.

The Asstt Government Advocate—for the Crown.

Daniels, J.—This is an application by Jhandu Singh who has been bound over under S. 110 of the Code of Criminal Procedure and sentenced to rigorous imprisonment on the failure to give security. An appeal was filed to the District Magistrate who in a very brief judgment dismissed the appeal. The learned District Magistrate says that the he has read the evidence, that the Magistrate has written a fair and convincingjudgment and that he fails to see how the trying Magistrate could have come to any other conclusion with regard to the guilt of the appellant. I regret to say that the judgment of the trying Magistrate produces an entirely opposite impression on me from that which it has produced on the learned District Magistrate. The applicant was admittedly at enmity with the Mukhia Nawab Singh and was a witness for the prosecution in a case in which the Mukhia was accused of murder. The applicant was tried with eight other persons as forming one gang. The Magistrate expressly finds that the evidence that they did form one gang is unworthy of credit. He has also acquitted several of the accused on the ground that they were implicated through enmity. His chief reason for convicting the applicant is that he believes that certain evidence goes to show that the applicant took part in a dacoity which was committed in December 1922 shortly after the murder case. Now the applicant was actually arrested in connection with the dacoity in question, but the police considered the evidence against him of so little value that he was released under S. 169 of the Criminal Procedure Code without even being placed before the Court. It is contrary to all accepted principles to make use of this evidence as a ground for binding the accused over on a charge of being a bad character. If the evidence was insufficient to implicate the accused in the offence to which it relates it was equally insufficient to be used for influencing the Court against him on a question of his general character. It was equally

not open to the Magistrate to act on information not given in evidence but obtained from a perusal of the special diary. Although the Magistrate says at the conclusion of his judgment that there is some evidence against the accused and the other persons who have been convicted of cutting crops it is clear from the judgment that the main grounds on which he has convicted the accused are the evidence tendered to show that he took part in the dacoity case and a perusal of the special diary. The order of the Court below cannot therefore be upheld. I allow the application and setting aside the order passed against the accused direct his immediate release.

Application allowed.

✱ 1924 ALLAHABAD 143

KANHAIYA LAL, J.

Abdul Rashid Khan—Applicant.

v.

Haji Nisar Muhammad Khan and *another*—Opposite Party.

Criminal Ref. No. 330 of 1923 Decided on 6th June 1923, from the S. J, Moradabad, D/-23rd April 1923.

Workman's Breach of Contract Act (13 of 1859 amended by 12 of 1920), S. 4—New contract in place of old one—No cash advance for the second time—Contract is valid.

Accused obtained an advance of Rs. 300 for doing certain work. He worked for a few months after the execution of the agreement but failed to complete the engagement. He was arrested and on being charged with a breach of contract executed another agreement in lieu of the former advance to work for another period of one year. Thereupon the complaint originally filed against him was withdrawn After the execution of the second agreement he worked again for a little while and then broke off the engagement. The complainant thereupon proceeded against him to enforce his agreement and obtained an order.

Held that the order was right ; Although no advance in cash was made at the time of the second agreement the new contract entered into under the circumstances above mentioned merely superseded the old contract, and its validity is recognised by S. 4 of the Act.

[P 143, C 2]

The Applicant was not Represented.

S. Raza Ali—for Opposite Party.

Kanhaiya, Lal, J.—This is a reference by the Sessions Judge of Moradabad in a case in which the accused Abdul Rashid Khan has been directed to pay Rs. 300/- to the complainant Haji Nisar Muhammad Khan by certain instalments under S. 2 of Act 13 of 1859 as amended by Act 12 of 1920. It appears that in 1920 Abdul Rashid Khan obtained an advance of Rs 300/- for doing a certain wark. He worked for a few months after the execution of the agreement but failed to complete the engagement. He was arrested and on being charged with a breach of the contract executed another agreement in lieu of the former advance to work for another period of one year. Thereupon the complaint originally filed against him was withdrawn. After the execution of the second agreement he worked again for a little while and then broke off the engagement. The complainant thereupon proceeded against him again to enforce his agreement and obtained an order, the correctness of which forms the subject of this reference. The view taken by the learned Sessions Judge is that inasmuch as no advance in cash was made at the time of the second agreement, S. 2 of Act 13 of 1859 as amended by Act 12 of 1920 was inapplicable. But the advance may be an advance made at that time for the performance of the engagement or at some time earlier. The new contract entered into under the circumstances above mentioned merely superseded the old contract, and its validity is recognised by S. 4 of the Act, which provides that the word "contract" as used therein would include all contracts falling within the meaning of the Indian Contract Act of 1872 except where the period specified for performance exceeds one year. The new contract provided for the performance of the engagement for one year only and was valid and enforceable. The order of the trying Magistrate need not therefore be disturbed.

Reference answered in the negative.

1924 ALLAHABAD 144

RYVES AND DANIELS, JJ.

Nasir Khan—Objector—Appellant.

v.

Itwari and others—Decree-holders—Respondents.

Ex. S. A. No. 372 of 1923, Decided on 28th May 1923, from the D. J., Farrukhabad, D/- 13th October 1922.

(A) *Civil P. C., O. 41, R. 17—No dismissal on merits is allowed.*

Under Order 41 Rule 17 Court should not dismiss the appeal on the merits. 45 Mad. 882 Foll. [P. 144, C. 1]

(B) *Appeal—Right to, depends on actual order.*

The right of appeal does not depend on what the Court ought to have done but on what it actually did. 3 All. 519 & 8 All. 20 Dist. [P. 144, C. 2]

A. Sanyal—for Appellant.

P. L. Banerjee—for Respondents.

Judgment.—The appellant before us was the judgment debtor, and on an application being made to execute the decree against him he objected that the application was time-barred. The trial Court dismissed the objection. The objector appealed and on the date fixed for the hearing of the appeal failed to put in an appearance, and he was not represented by Counsel. The learned District Judge recorded the following order :—

"Counsel for the appellant is absent. Appellant is himself absent. His brother or a person alleging himself to be his brother, applies for an adjournment. I see no good reason to grant this. There does not seem to me to be the least force in this appeal; the reasons given by the Subordinate Judge holding that the application of the decree-holder respondent for execution was in time and not time-barred are good and sound. I dismiss this appeal with costs on the merits."

The appellant comes here in second appeal and urges that under Order 41 Rule 17 the learned District Judge should not have dismissed the appeal on the merits but should either have allowed an adjournment or should have dismissed it for default. This point was considered recently in the Madras High Court, in *Mahammad* v. *Manavikrama* (1) and we entirely agree with that decision.

A preliminary objection is taken that no appeal lies on the ground that on the appellant's own showing the Court below had no jurisdiction to pass the order which it did pass. The form which the argument takes is this. The only order which the Court below had jurisdiction to pass was an order dismissing the appeal for default. The order under appeal must therefore be treated as an order dismissing the appeal for default, since this is the only order the Court below could legally pass. From such an order no appeal lies.

The argument is ingenious but unsound. The right of appeal does not depend on what the Court ought to have done but on what it actually did What it actually did was to pass a decree on the merits. Against such a decree the law allows an appeal. When the appeal comes up for decision the appellate Court has then to decide whether the order passed was a proper order and one which the Court below had jurisdiction to pass. If it decides this question in the negative it will set the order aside. The respondents reasoning would deprive the aggrieved party of the right of appeal just in those cases in which it is most needed. The respondent relies in support of his argument on two old cases *Kanahi Lal* v. *Nanhat Rai* (2) and *Krishna Ram* v. *Govind Prasad* (3). These were decisions under the old Act the language of which is different from that of the present Code, but if there is anything in these cases to support the position taken up by the respondent we are unable to follow them. The result is that we allow the appeal. The question involved is one of law and we should have been prepard to dispose of it ourselves, but all the documents which have been relied on by the Court of first instance are not before us. We therefore allow

(1) 1923 Mad. 13—45 Mad. 882—16 M.L.W. 434—43 M.L.J. 317—(1922) M.W.N. 604—69 I.C. 513.
(2) [1881] 3 All. 519—(1881) A.W.N. 17.
(3) [1885] 8 All. 20—(1885) A.W.N. 321.

the appeal and pass the order which we think the Court below should have passed, that is, to dismiss the appeal to the Court below for default. If the appellant wishes to restore the appeal, he must apply to the Court below and satisfy that Court that the appeal should be restored.

We make no order as to costs.

Appeal allowed.

1924 ALLAHABAD 145

RYVES AND DANIELS, J.

Ummed and others—Appellant.

v

King Emperor—Opposite Party.

Criminal App. No. 409 of 1923 Decided on 30th June 1923, from the order of the S. J., Mainpuri, D/- 9th April, 1923.

Penal Code, Ss. 302 & 34—Beating by five persons Death the common result—All are guilty.

One B an elderly Kachhi was mercilessly beaten by the four accused. There had been litigation between B on the one side and two of the accused, on the other, in which B had been entirely successful, B was taken to the hospital where he died two days afterwards. All the accused had joined in beating B when he was on the ground with lathis and they inflicted such serious injury to him that he died two days afterwards.

Held: that they must have known that at the least they were causing injury which was likely to cause death, and if death resulted they are guilty of murder. In such cases it is immaterial by whose lathi the fatal injury is inflicted. 29 All. 283 is no longer good law. 1923 All. 88 Ref. . [P 145 C 2, P 146 C 1]

The Asstt. Govt. Advocate—for the Crown.

Ryves, J.—Niranjan, Banwari, Ranjit and Ummed were committed to the Court of Sessions at Mainpuri on charges under Ss. 148 and 302 I. P, C. The learned Sessions Judge convicted Ummed under Ss. 148 and 304 I. P. C. and convicted the remainder under Ss. 148 and 325. He sentenced Ummed to transportation for life under S. 304 and the other three, to five years rigorous imprisonment under S. 325. Ummed appealed to this Court. On his appeal being admitted by a learned Judge of this Court notice was sent to Niranjan, Banwari and Ranjit to show cause why the conviction should not be altered in their case and the sentence enhanced accordingly Niranjan has since died in jail. The notice has been served on Banwari and Ranjit and no cause is shown on their behalf. We therefore take up the case of Ummed on appeal and the cases of Ranjit and Banwari in revision.

It is proved by the clearest evidence that Bhopal an elderly Kachhi of Narayanpur was mercilessly beaten by the four accused and one Gannu who is absconding. There had been litigation between Bhopal on the one side and Niranjan and Banwari, who are brothers, on the other in which Bhopal had been entirely successful with the result that there was the bitterest enmity against him on the part of Niranjan and Banwari. Only very shortly before this occurrence Bhopal had obtained a decree under S. 9. of the Specific Relief Act against them and was then putting his decree into execution. Bhopal was taken to the Hospital at Mainpuri where he died on the 13th January. The medical evidence shows that he was most mercilessly beaten and his skull was fractured and eleven ribs were broken.

The evidence against the accused is overwhelming. It consits of several eye-witnesses who saw the assualt in broad day-light and who knew all the accused. In the first report which was made on information given by Bhopal himself, all five are named. The learned Sessions Judge has come to the conclusion that on the evidence the apparent intention of the accused was to cripple Bhopal and not to kill him. He gathers this from the statements of the witnesses who say that the accused were saying as they were beating Bhopal that they would not leave him in a condition to fight a case in Mainpuri. We should have drawn a very different inference from these remarks, but it seems to us quite unnecessary to do so. There is no doubt that all the five accused joined in beating Bhopal when he was on the ground with lathis and they inflicted such serious injury to him that he died two days afterwards. They

must have known that at the least they were causing injury which was likely to cause death, and if death resulted they are all guilty of murder. In such cases it is immaterial by whose lathi the fatal injury is inflicted. The learned Judge has drawn a distinction between Ummed and the other three accused before him, a distinction which we are entirely unable to appreciate. It may be that Ummed inflicted the first blow or even the blow on the head but that does not distinguish his case from that of the others. They all joined in the attack and the death was the result of the beating inflicted by them all jointly. The learned Sessions Judge has relied on the case of *Emperor* v. *Bhola Singh* (1). That case has not been followed in several later decisions and can no longer be treated as good law: Vide *Emperor* v. *Ram Nevaz* (2) and *Emperor* v. *Hanumam* (3) *Emperor* v. *Gulab* (4). In this case the decision of a single Judge in *Emperor* v. *Chandan Singh* (5) which followed 29 All. 282, was expressly overruled. A similar decision reported in *Dhian Singh* v. *King Emperor* (6), was dissented from in 35 All. 560. The latest decision on the point is that of *Sipahi Singh* v. *Emperor* (7). In our opinion all the accused ought to have been convicted of murder, and if they had been so convicted and sentenced to death we should not have interfered. As it is we alter the conviction in the case of Ummed from S. 304 to S. 302 and in the case of Banwari and Ranjit from S. 325 to S. 302. We maintain the sentence of Ummed of transportation for life and enhance that of Banwari and Ranjit to transportation for life with effect from the 9th of April 1923. The sentence under S. 148 will remain and run concurrently.

Appeal dismissed.

Sentences enhanced.

(1) [1907] 29 All. 282—4 A.L.J. 207—(1907) A.W.N. 51—5 Cr. L.J. 130.
(2) [1913] 35 All. 506—11 A. L. J. 804—14 Cr. L.J. 615—21 I.C. 663.
(3) [1913] 35 All. 560—11 A.L.J. 926—14 Cr. L.J. 685—21 I.C. 1005.
(4) [1918] 40 All. 686—16 A. L. J. 731—19 Cr. L J. 953—47 I C. 505.
(5) [1918] 40 All. 103—16 A.L.J. 11—19 Cr. L.J. 150—43 I C 438.
(6) [1912] 9 A.L.J. 180—13 Cr. L. J. 265—14 I.C. 649.
(7) 1923 All 88—45 All 130—20 A. L. J. 900—24 Cr. L. J. 106—71 I.C. 234.

1924 ALLAHABAD 146

LINDSAY AND SULAIMAN, JJ.

Ramdas Rai and others—Defendants—Appellants.

v.

Abdul Ghafur and others—Plaintiffs—Respondents.

S. A. No. 586 of 1923, Decided on 20th April 1923, from the D. J., Ghazipur, D/-21st December 1922.

(a) *Pre-emption — Wajib-ul-arz — Custom—Presumption.*

An entry in the Wajib-ul-arz of 1882 raised a presumption of the existence of the custom. To rebut this evidence the defendants proved that in the year 1840 there was a single proprietor in the mahal.

Held, the circumstance of there being a single proprietor in 1840 does not necessarily rebut the presumption of custom raised by the entry in the wajib-ul-arz of 1882 [P 146 C 2]

(b) *Civil P. Code, S. 100—Sufficiency of rebutting evidence is a question of fact.*

Whether the evidence adduced by the plaintiffs had not been sufficiently rebutted is a question of fact and will not be interfered with in second appeal. 17 A.L.J. 345 Dist. [P 147 C 1]

A. P. Pandey—for Appellants.

Judgment—This is a defedants' appeal arising out of a suit for pre-emption. The Court of first instance dismissed the suit. On appeal the learned District Judge has decreed it

The plaintiffs in order to prove the custom alleged relied on an entry in the *wajibularz* of 1882 which *prima facie* raised a presumption of the existence of the custom. To rebut this evidence the defendants proved the fact that in the year 1840 there was a single proprietor in this mahal and further that no suit for pre-emption had ever been brought between the years 1840 and 1882. The learned District Judge has considered all the circumstances in the case and has weighed the evidence. In our opinion the circumstance of there being a single proprietor in 1840 does not necessarily rebut the presumption

of custom raised by the entry in the *wajibularz* of 1882; as the learned Judge has pointed out, it was admitted in the written statement that there had been numerous transfers it was possible that a custom might have grown up during that interval. In second appeal we find it impossible to hold that the learned Judge was wrong in holding that the evidence adduced by the plaintiffs had not been sufficiently rebutted.

The learned vakil for the appellants relied on the case of *Kulsumunnissa Bibi* v. *Khasalat Husain* (1). We may point out that in that case stress was laid on the circumstance that the learned Judge of the Court below was under a misapprehension on a question of law, namely that the fact that the property once was in the hands of a single proprieter did not put an end to the custom. It was in view of that erroneous assumption that the Bench said that in the peculiar circumstances of that case a question of law did arise and they were justified in going behind the findings of fact.

The result is that the appeal fails and is dismissed under Order 41 rule 11.

Appeal dismissed.

(1) [1919] 17 A.L.J. 345=50 I.C 179.

1924 ALLAHABAD 147

KANHAIYA LAL, J.

Ganesh Din and another—Defendants—Appellants.

v.

Lachman Singh and others—Plaintiffs—Respondents.

S. A. No. 896 of 1923, Decided on 20th June, 1923, against the decree of the Small Causes Court, exercising the powers of Sub. J., Allahabad, D/-10th March, 1923.

T. P. Act, S. 91—A person in joint cultivation of occupancy holdnig can redeem.

In the case of an occupancy holding if one parcel is mortgaged and another parcel is free from the mortgage, and a person is joint in cultivation with the mortgagor in the latter, that is enough to give him a right to redeem the former. [P. 147, C. 1

Damodar Das—for Appellants.

Judgment.—This appeal arises out of a suit for the redemption of a mortgage said to have been effected by Diplu Singh, the ancestor of the plaintiffs in favour of Thakur Dayal, the ancestor of the defendants. The defendants denied the existence of the alleged mortgage; but the Court below found that the mortgage in question was proved. The defendants also denied that the plaintiffs were the lawful successors of Diplu Singh; but the Courts below found against them. It appears that Diplu Singh was an occupancy tenant of the plots in dispute and that he mortgaged them with Thakur Dayal and gave him possession. The plaintiffs were his collateral descendants and were according to the Courts below joint in cultivation with him in the holding. The extent of that holding is not mentioned. Whether they were joint with him in the cultivation of the whole holding mortgaged or in the cultivation of the remainder of his holding, makes no difference, because a holding is defined as a parcel or parcels of land held under one tenure or lease or engagement. If one parcel is mortgaged and another parcel is free from the mortgage, and a person is joint in cultivation with the mortgagor in the latter, that is enough to give him a right to redeem the former. If he is joint in cultivation with him in the holding, that is to say in any parcel of land comprised in that holding, the entire holding can devolve on him, for it must devolve as a whole under S. 22 of the U. P. Tenancy Act (No. II of 1901). If the holding comprised only the mortgaged plots, the fact that the plaintiffs were in joint cultivation with the mortgagor before the mortgage would equally give them a right to redeem the mortgage. An occupancy tenant may hold a part of the land comprised in the holding in his cultivation jointly with his kinsmen and may sub-let the rest thereof but the effect of such a sub-lease cannot prevent the devolution of the entire holding on the kinsmen, who are joint in the cultivation with him of the remainder. The fact that he has made a mortgage of a portion would similarly make no difference. In either event the jointness in the

cultivation is determined by the fact of cultivation itself and not by its extent.

It is asserted that the statements of some of the witnesses relied on were misunderstood by the Courts below in arriving at the conclusion recorded by those Courts, but there is nothing to show that that contention is well-founded. The appeal is therefore rejected.

Appeal dismissed.

✱ 1924 ALLAHABAD 148

DANIELS, J.

Mt. Aisha Bibi—Defendant—Appellant.

v.

Chhajju Mal and others—Plaintiffs—Respondents.

S. A. No. 905 of 1923, Decided on 22nd June, 1923, against the decree of the Dt. J., Saharanpur, D/-23rd February, 1923.

Registration Act, S. 32—General power to execute document includes power to present for registration.

Where a person holds a power of attorney to execute a document on behalf of his principal and the document has been executed by him as such he is, so far as the Registration Office is concerned, the actual executant of the document and is entitled under S. 32 (*a*) to present it for registration and to get it registered. He need not possess a separate power authenticated as under S. 33. [P. 148, C. 2.]

Mushtaq Ahmad—for Appellant.

Judgment.—The point raised in this appeal is a point of law under Ss. 32 and 33 of the Registration Act, but as the question appears to me to be quite free from doubt on the language of the Act, I propose to dispose of the appeal at once. The document, the presentation of which is challenged, was executed by Raghunath Das the general agent of Ram Lal and of the widow of Ganpat Rai on their behalf. The power of attorney which he held authorised him to execute documents on their behalf and he executed the document under the terms of this power of attorney. He then presented it for registration at the Registration Office and it was registered. The plea taken by the appellant in this Court and in the Courts below was that in order to enable him to present the document it was necessary that he should hold a power of attorney authenticated before the Sub-Registrar under the provisions of S. 33. A reference to S. 32 shows that a document may be presented for registration either under Cl. (*a*) by a person actually executing it or by some one claiming under it, or it may be presented under Cl. (*c*) by the agent of such person duly authorised by a power of attorney executed and authenticated in accordance with S. 33. The provisions of S. 33 therefore clearly apply where the person presenting a document is the general attorney of the person executing it, and not where it is presented for registration by the actual executant, even though he may have executed it as agent for some one else. The person actually executing a document is entitled to present it for registration under Cl. (*a*) of S. 32 without the necessity of any power of attorney. No doubt an agent requires a power of attorney to empower him to execute a document on behalf of his principal, but when once the document has been executed he is, so far as the Regiatration Office is concerned, the actual executant of the document and is entitled under S. 32 (*a*) to present it for registration and to get it registered. The appellants suggest that the case is altered by the fact that the power of attorney which Raghunath Das held gave him two authorities, first an authority to execute documents on behalf of his principal, and second an authority empowering him to present documents for registration on behalf of his principal. This in my opinion does not affect the case as in this case he acted under the first of the two powers. The learned Judge of the Court below has in my opinion properly appreciated and dealt with the point of law involved, and as his decision is in my opinion clearly right I dismiss the appeal under order 41 rule 11.

Appeal dismissed.

✱ 1924 ALLAHABAD 149

RYVES AND DANIELS, JJ.

Lalta Prasad and others—Defendants—Appellants.

v.

Darshan Singh and others—Plaintiffs—Respondents.

S. A. No. 475 of 1922, Decided on 28th May 1923, from the Dt. J., Cawnpore, D/- 8th February 1922.

(a) *Hindu Law—Alienation by Widow—Legal necessity—Arrears of revenue is necessity.*

The existence of arrears of revenue for which the estate is liable to be sold up is at least presumptive evidence of necessity, even though when the loan is incurred, the Government may not have taken measures to enforce the liability. This presumed necessity may no doubt be repudiated by showing that the widow had sufficient income to enable her to pay the revenue without the necessity of borrowing. [P. 149, C. 2.]

(b) *Evidence Act, S. 71—Execution, proof of.*

S. 71 does not require execution in the presence of the attesting witnesses to be proved. 17 All. 141 Foll. [P 150, C. 1.]

N. P. Ashthana—for Appellants.

K. N. Katju—for Respondents.

Judgment.—The issue in this case is whether the mortgages executed in 1907 and 1908 by a Hindu widow Mussammat Kailasha were executed for legal necessity

The suit out of which the appeal arises was brought by the mortgagees for sale of the mortgaged property. The defendants appellants are the reversioners of Musammat Kailasha's husband Radha Kishan. There are some parts of the judgment of the lower Appellate Court which are not very clear, but there is no doubt as to what its findings are. It finds that the consideration for these mortgages was actually advanced for payment of revenue, and it is not disputed that it was applied in payment of revenue. The appellants contend that there was no legal necessity, first because it was not shown that the estate was actually threatened with sale when the mortgages were executed and secondly because Mt. Kailasha received from the estate an income sufficient to enable her to pay the revenue. As to the latter point the learned Judge finds that she had an income which would ordinarily be sufficient to enable her to pay revenue, but at the time when these mortgages were executed, she had been obliged to incur unusual expenditure by reason of a litigation in which she had been involved for the protection of the estate. The learned Judge therefore finds that there was at the time a pressure on the estate. He also finds, though he has not attached to the circumstance the weight to which we think it is justly entitled, that the reversioners themselves paid off, as if it were a valid debt, another mortgage executed by Mt. Kailasha for payment of revenue, shortly after the mortgages in suit. These mortgages were actually recited in that deed. On these findings the question of legal necessity cannot be seriously disputed. The existence of arrears of revenue for which the estate is liable to be sold up is at least presumptive evidence of necessity, even though, when the loan is incurred, the government may not have taken measures to enforce the liability. This presumed necessity may no doubt be repudiated by showing that the widow had sufficient income to enable her to pay the revenue without the necessity of borrowing. The learned Judge in this case, though he finds that she had a substantial income, has also found that there were special circumstances which made it necessary for her to borrow money at this particular time.

Three other points have been urged by the appellants. The first is that the interest under the deed was excessive. This point is nowhere specifically raised in the grounds of appeal, though the memorandum of appeal is divided into seven paragraphs, and we do not think that the appellants are entitled to urge it. Nor do we think that 15 per cent. interest with yearly rests is an extraordinarily high rate. The second point is that instead of passing a mortgage decree in the usual form the Court below has given a personal decree against the reversioners. This is no doubt due to an oversight on the part of the office in drawing up the decree. The learned Judge merely says in his judgment that he allows

the appeal and decrees the sum claimed. Reference to the plaint shows clearly that the claim was for a decree for the amount claimed by sale of the mortgaged property. This plea is therefore allowed and the decree will be amended and the decree in the form of order 34 rule 4 will be prepared. Accounts will be prepared up to a date six months from now. Interest will run at the contractual rate up to that date, and thereafter simple interest will be allowed at 6 per cent. per annum till payment. We notice that the decree of the Court below was signed by the appellant's learned pleader who is therefore responsible for not pointing out the oversight.

The last point was that the second mortgage was not proved, and this point is taken in para 7 of the grounds of appeal, but it does not appear to have been pressed in the Court below. In any case we are satisfied that there is no substance in it. There were three attesting witnesses to the deed. Two of them were dead and the third denied attestation. A witness has proved execution under S. 71 of the Evidence Act. The appellant's argument was that he should also have proved execution in the presence of the attesting witnesses. S. 71 does not require this and there is authority both of this Court in *Narain Das* v. *Dilwar* (1) and that of the Patna High Court in *Lakshman Sahu* v. *Gokul Maharana* (2) that proof of execution is sufficient.

Except to the extent stated above we dismiss the appeal. As the appellant has substantially failed the respondents will get their costs including in this Court fees on the higher scale.

Appeal dismissed.

---

(1) [1919] 41 All. 250—17 A.L.J. 141—52 I.C. 830.
(2) 1922 Pat. 41—1 Pat. 154—70 I.C. 298.

✱ 1924 ALLAHABAD 150

LINDSAY AND SULAIMAN, JJ.

Kundan Lal—Plaintiff—Appellant.

v.

Makundi Kunwar and others—Defendants—Respondents.

F. A. No. 30 of 1920, Decided on 26th April 1923, from a decree of Addl. Sub. Judge, Saharanpur, D/-27th October 1919.

Practice—Pleadings — Inconsistent findings against co-defendants cannot be given.

Where after both parties have given evidence and the Court has come to the conclusion that the plaintiff had failed to prove the case set up by him, it would not lie in the mouth of the plaintiff to turn round and ask for a decree against one of the defendants who had not expressly denied one of the facts in issue. 25, All, 159, Foll. [P. 152, C. 1]

Surendra Nath Sen, *Lalit Mohan Banerji* and *Surendra Nath Gupta*—for Appellant.

B. E. O'Conor, *Nihal Chand*, *J. M. Banerji*, *Girdhari Lal Agarwala*, *P. L. Banerji*, *K. N. Katju* and *M. J. Prosad*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for recovery of possession of considerable property, together with mesne profits, against several sets of defendants. The plaintiff's case was that one Maheshwar Dayal, son of Sri Kishen Das, was the last male owner of the property and died in the year 1895. On his death he was succeeded by his mother Musammat Gomti Kunwar, who died in 1903; and on her death his grandmother Musammat Darab Kunwar remained in possession till 1906 when she also died. On the death of this second limited owner the plaintiff claimed to succeed as Maheshwar Dayal's nearest collateral, alleging that he was connected with him through Jwala Datt, who was Harsukh Rai's daughter's son and was alleged to be his adopted son also.

The suit was instituted just within 12 years of the death of Musammat Darab Kunwar. In the plaint there was no express mention as to when the alleged adoption of Jwala Datt took place, nor was it stated whether

he had been adopted by Harsukh Rai himself or by his widows after his death, and in the latter case, whether the widow had any authority to adopt. The plaintiff contented himself by simply stating that he was the heir of Maheshwar Dayal according to the genealogical table given in the plaint. By subsequent oral pleadings the plaintiff asserted that Jwala Datt had been adopted after the death of Harsukh Rai by his widows with his authority, and that there was a custom among Vaish Agarwals to adopt a daughter's son.

Separate written statements were filed on behalf of various defendants. Musammat Makundi Kunwar and Musammat Lachchi Kunwar, defendants Nos. 1 and 2, pleaded that Nihal Chand and Sri Kishen Das had been joint, and that Jwala Datt had never been adopted by Harsukh Rai's widows nor had the widows any authority to adopt him, nor could an adoption of a daughter's son be valid. They further set up the adoption of Jai Bhagwan Sarup, defendant No. 3, thereby denying that the plaintiff was the nearest collateral. Jai Bhagwan Sarup, defendant No. 3, asserted that Musammat Lachchi Kunwar, the widow of Bisheshwar Dayal, had adopted him and thus he became the nearest heir of Sri Kishen Das or Maheshwar Dayal and would in any case exclude the plaintiff. He also pleaded that the plaintiff was estopped from denying his adoption and urged that the claim was barred by time. Lala Fateh Chand, defendant No. 4, filed a separate written statement in which he admitted generally the pedigree given in the plaint, with the exception of the existence of Maheshwar Dayal. He pleaded, *inter alia*, that no son qualified to inherit was ever born to Sri Kishen Das, and set up a will of Sri Kishen Das in favour of Musammat Gomti Kunwar and a subsequent will of Musammat Gomti Kunwar in his own favour. By a subsequent oral pleading he denied the validity of the adoption and the existence of the alleged custom. Defendants Nos. 5 to 7 in addition set up their claim as *bona fide* purchasers for value from ostensible owners.

Twenty-eight issues were framed in the Court below out of which all the issues except issues Nos. 3, 4, 8, 26 and 27, have been found in favour of the plaintiff. The grounds on which the plaintiff's claim has been dismissed are that the factum of the adoption of Jwala Datt has not been established, nor has it been proved that Harsukh Rai's widows had the authority to adopt The plaintiff's contention that an award of the year 1873 either operated as *res judicata* or concluded the matter as a family arrangement has been overruled.

The learned advocate for the plaintiff has challenged the findings of the learned Subordinate Judge on the issues decided against his client.

[The judgment then dealt with evidence and continued as follows.]

Having considered the entire evidence, both oral and documentary, we are of opinion that the balance of evidence is distinctly in favour of the defendants and we think that the learned Subordinate Judge has come to the right conclusion in holding that the plaintiff has failed to establish that Jwala Datt had been adopted by the widows of Harsukh Rai.

In view of this finding it becomes unnecessary for us to go into the question of the authority to adopt or any other of the questions raised in the Court below.

There, however, remains for us to consider the argument of the learned advocate for the plaintiff that in view of the admissions contained in Lala Fateh Chand's pleadings the plaintiff is entitled to a decree against him in respect of the properties in his possession. We have already pointed out that the plaint itself was very defective inasmuch as it did not make any express allegation that Jwala Datt had been adopted by the widows of Harsukh Rai or that his widows had any authority to adopt. The fact of adoption was mentioned only in the genealogical tree given in the plaint. The defendant Lala Fateh Chand generally admitted the correctness of the pedigree, with one exception. When the time for the oral pleadings came, the plaintiff's vakil stated that Jwala Datt had been

adopted by the widows of Harsukh Rai after his death and that there was a custom among Vaish Agarwals under which the adoption of a daughter's son was valid. Lala Fateh Chand's vakil although admitting the factum of adoption, denied the validity of it basing its invalidity, on the Hindu law. The other defendants to the suit had expressly denied the adoption of Jwala Datt The plaintiff took upon himself the burden of proving the alleged adoption and led evidence to that effect without any reservation. After both parties had given evidence and the Court had come to the conclusion that the plaintiff had failed to prove the case set up by him, it would not lie in the mouth of the plaintiff to turn round and ask for a decree against one of the defendants who had not expressly denied one of the facts in issue, though he had denied the validity of the adoption and the maintainability of the claim of the plaintiff altogether. If such a request were allowed, the result would be that in the same suit the Court would have to record one finding in favour of the plaintiff based on the admission of one of the defendants to the suit, and another finding on the same issue against him based on the evidence. In an analogous case, namely that of *Janki Das* v. *Ahmad Husain Khan* (1) this Court remarked that it would be illogical to hold in one and the same decree that the full amount of consideration in a mortgage was paid as far as the mortgagor was concerned and that another sum was paid as far as the subsequent transferee was concerned, and that the proper thing to do would be to allow all the defendants to take advantage of the plaintiff's failure to establish the the case set up by him. In addition to this we would like to point out that Order 8, rule 5 of the Code of Civil Procedure, which regards allegations of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted, as taken to be admitted, gives a discretion to the Court to require any facts so admitted to be proved otherwise than by such admission. We think that in the present case, in view of the ambiguous assertion made in the plaint and the unsatisfactory way in which the pedigree was admitted and the validity of adoption denied by one of the defendants, the court below was justified in calling upon the plaintiff to prove his case. The plaintiff having undertaken to prove it and having failed to do so cannot now fall back upon the partial admission of one of the defendants and ask for a separate decree against him. We are of opinion that when the plaintiff has failed to prove the alleged adoption of Jwala Datt, without proving which he cannot possibly succeed, his whole suit must fail against all the defendants. The plaintiff has in no way been prejudiced and no question of estoppel can arise under the circumstances.

In our opinion the appeal is without force and is hereby dismissed with costs.

We direct that the respondents will be entitled to one set of costs for counsel's fee as against the plaintiff appellant, in addition to the printing and other charges legally taxable. Counsel's fee is allowed to be divided equally between respondents Nos. 1 and 2 (first set), respondent No. 3 Jai Bhagavan (second set) and respondent No. 4, Lala Fateh Chand (third set).

Lala Fateh Chand has filed a set of cross-objections challenging some of the findings of the learned Subordinate Judge as well as urging that the amount of costs awarded to him should be increased by a sum of Rs. 216-10-8. As the decree was in his favour it was unnecessary for Lala Fateh Chand to file any separate objection. As to the question of costs we are of opinion that in view of the unsatisfactory defence set up by him we should make no modification. The result is that the cross-objections are dismissed with costs.

Appeal dismissed.

---

(1) [1902] 25 All. 159—(1902) A.W.N. 218.

1924 ALLAHABAD 153

LINDSAY AND KANHAIYA LAL, JJ.

Ghasi Ram and others—Defendants-Appellants.

v.

Bhola Nath and another—Plaintiffs-Respondents.

F. A. No. 386 of 1920, Decided on 5th November 1923, from the decree of the Second Addl. Sub. J., Aligarh D/-10th September 1920.

(a) *Evidence—Local inspection by judge can be relied upon by him to decide the truth or falsity of witnesses.*

Where plaintiff's evidence is not convincing but the defendant has produced practically no evidence, the Court can rely on the local inspection made by itself to determine whether the plaintiff's story is correct. [P. 154, C. 1]

(b) *Mortgage- Construction — Payment of arrears of revenue by mortgagor does not include time-barred rent-decrees obtained by mortgagee.*

Under the terms of the mortgage the mortgagor was to be liable at the time of redemption to pay to the mortgagee all sums due in respect of arrears from the tenants.

Held that the intention of the parties was that the mortgagor should pay up the arrears to the mortgagee when the latter vacated the possession and that he in turn was to acquire the right of realizing the arrears from the tenants after he himself had been put into possession after redemption, but this claim does not include payment in lieu of time barred decrees obtained by the mortgagee against tenants. [P. 154, C. 2]

(c) *T. P. Act, S. 63—Mortgagee granting occupancy rights on reciept of Nazarana—Mortgagor is entitled to Nazarana.*

Mortgagees during their period of possession by their failure to eject non-occupancy tenants, allowed them to acquire occupancy rights and in some cases occupancy rights were actually granted to non-occupancy tenants in return for *Nazrana* (a premium),

Held that the land after occupancy rights have accrued in it cannot be sovaluable to the landlord as it was before those rights came into existence. And if it is the duty of a mortgagee to take such care f the property as a prudent man would, he certainly is not entitled to hand the property back to the mortgagor in a worse condition than he received it. Therefore the plaintiffs mortgagors were entitled to the sum of *Nazarana*. [P. 155, C. 1]

P. L. Banerji and *K.N. Laghate*—for Appellants.

B. K. Mukerji, *U. S. Bajpai* and *S. N. Mukerji*—for Respondents.

Lindsay, J.—This is an appeal from a suit brought for redemption by the plaintiffs-respondents.

The appellants here are the defendants mortgagees.

In addition to the appeal we have also before us cross-objections put forward against the decree of the Court below by the plaintiffs-respondents.

It is not necessary to set out the facts of the case in any great detail. The dispute between the parties here is with regard to certain items of the mortgage account. The defendants-mortgagees complain that certain items ought to have been allowed to them by the Court below. In turn the plaintiffs-mortgagors complain that the lower Court has not given them credit for certain items to which they were entitled.

We deal first with the appeal of the defendants appellants, the mortgagees.

One claim which was made in the suit for redemption was that these mortgagees had during the continuance of the mortgage cut a large number of trees the value of which was assessed at Rs. 3,000/—.

The plaintiffs therefore asked the Court to allow this sum of Rs. 3000/- by deduction from the mortgage money payable in order to get redemption.

The learned Judge of the Court below came to the conclusion that the plaintiffs were entitled to a deduction of Rs. 2,950/—.He found with respect to one tree that there was no evidence regarding its value, the value having been assessed by the plaintiffs at Rs. 50/—.He therefore disallowed this item.

The defence set up was that the mortgagees never cut down the trees as alleged by the plaintiffs. There was a direct conflict of evidence and the learned Judge, as we have already said, has found in favour of the plaintiffs.

Four witnesses were examined on behalf of the plaintiffs in order to prove that these trees had been cut and that a sum of close on Rs 3000/- had been obtained by selling them. Much criticism has been bestowed on the testimony of these witnesses and it may at once be acknowledged that their evidence is not perhaps of the highest class. On the other hand, as

opposed to it, we have nothing but the bare denial of one of the mortgagees who appeared as a witness and whose testimony was supported by the evidence of a partisan witness whose satatement may be disregarded altogether.

During the course of the trial the Subordinate Judge made an inspection of the spot and recorded a note of, what he had observed at the time of his visit. Relying principally upon the result of his observation the learned Subordinate Judge came to the conclusion that the story for the plaintiffs was probably true and that the trees had been cut as alleged.

We have felt the force of the observations which have been addressed to us on behalf of the defendants appellants regarding the plaintiffs' evidence in this respect. On the other hand is the consideration that the learned Judge of the Court below had the witnesses before him and he seems to have been satisfied on the whole that they were telling the truth. He has given reasons for awarding credit to the story told by the plaintiffs and he certainly had some solid ground to go on the fact that he himself had been to the spot and had observed certain indications that trees had been cut. It is perfectly true that the Subordinate Judge could not as the result of his examination of the locality determine how many trees had been cut or by whom. At the same time he is perfectly justified in holding that what he saw at the time of his visit entitles him to award preference to the story which has been told on behalf of the plaintiffs and to reject the story which was put forward on behalf of the mortgagees, namely, that no trees had been cut at all.

On this part of the case therefore, we must decline to interfere with the finding of the Court below. We certainly are not in a position to say that the finding of the learned Subordinate Judge on this part of the case is wrong.

The next point which had been raised on behalf of the mortgagee appellants is that the Court below wrongly refused to allow them certain sums which were claimed to be owing as arrears of rent.

Under the terms of the mortgage the mortgagor was to be liable at the time of redemption to pay to the mortgagee all sums which were due in respect of arrears from the tenants

As we understand this term of the mortgage, the intention of the parties was, that the mortgagor should pay up the arrears to the mortgagee when the latter vacated possession and that he in turn was to acquire the right of realizing the arrears from the tenants after he himself had been put into possession after redemption.

The present claim that has been made by the mortgagee appellants for the arrears is based upon a series of decrees all of which are now time-barred. It is quite obvious therefore, that if this sum now claimed by the mortgagees were allowed and if the decrees were transferred to the mortgagor after redemption, the decrees would be of no use whatever to the mortgagor. They cannot now be executed by reason of lapse of time. It seems to us therefore that on a proper construction of the mortgage deed and the true intention of the parties this claim for arrears should not be allowed. As for any claim for further arrears over and above those mentioned in the decrees to which we have referred, all we need say is that there is no proof of it. Further, we find no provision in the mortgage deed for the payment of interest on the arrears of rent and the claim for interest therefore which is also put forward must be rejected.

This disposes of the case of the defendants appellants.

The cross-objections raise really two points. In the first place, it is said that the lower Court ought to have awarded damages to the plaintiffs by reason of losses which they have incurred in the following way:— It is said that these mortgagees during their period of possession, by their failure to eject non-occupancy tenants, allowed these tenants to acquire occupancy rights. In some cases it is alleged that occupancy rights were actually granted to non-occupancy tenants in return for *nazrana* (a premium).

The finding of the Subordinate Judge is that it is proved that a sum of Rs. 580/ was realised by the mortgagees in return for the grant of occupancy rights.

The Subordinate Judge however refused to allow this sum to the plaintiffs. He gives a variety of reasons for his decision none of which appeals to us. He says, for example, that it can make no difference to the mortgagor whether the land which he has to get back after redemption is burdened with occupancy rights. That is obviously an erroneous conclusion.

It seems to us to be quite clear that the land, after occupancy rights have accrued, cannot be so valuable to the landlord as it was before those rights came into existence. And if it is the duty of a mortgagee to take such care of the property as a prudent man would, he certainly is not entitled to hand the property back to the mortgagor in a worse condition than he received it.

We find therefore that occupancy rights have accrued on this land, and those rights, we take it, cannot now be extinguished. We can see no reason therefore for denying the plaintiffs this sum of Rs. 580/- and we cannot see that the mortgagee has any right whatever to retain this money. Allowance therefore must be made for this sum in calculating the amount which is to be paid for redemption. The fact is, that by conferring occupancy rights in return for payment of a premium the mortgagee has been conveying away certain rights of the owner of the property and he is not entitled to retain the money which he has got for granting those rights and at the same time to return the land burdened with those rights to the owner, the mortgagor.

We hold therefore that the sum of Rs. 580/- ought to be allowed to the mortgagors by reduction of the sum found payable by the Court below.

The other claim which has been put forward on behalf of the mortgagors is, we may say at once, quite untenable.

When the mortgage was made by Musammat Shiam Kunwar in the year 1905 it was arranged between her and the mortgagee that she was to remain in possession of an area o cultivated land measuring 67 bighas. A portion of this was to be held on payment of rent amounting to Rs. 90 a year and the remainder was to be held rent-free, and it was expressly stipulated between the parties that while the mortgage continued, the lady was to be allowed to retain possession of all this land, the only right of the mortgagee being that of receiving annually the sum of Rs. 90/- from Musammat Shiam Kunwar.

The plaintiffs ask us to hold that when Shiam Kunwar sold the equity of redemption to them in the year 1914 they acquired the right to take over possession of this land, that is to say, the tenancy right which Musammat Shiam Kunwar had obtained by agreement with the mortgagee when the mortgage was made in the year 1905.

One obstacle to the entertainment of this argument is the fact that the deed of transfer by which the equity of redemption was sold to the plaintiffs does not in terms confer upon them any right to occupy the land which remained in Shiam Kunwar's possession under the terms of the mortgage. It would therefore be a sufficient answer to the case of the plaintiffs to say that they have shown no right to set up any claim in respect of compensation or damages relating to the occupation by Musammat Shiam Kunwar of these 67 bighas.

It was argued further that being entitled to possession of this land the plaintiffs were justified in calling upon the mortgagees to eject Musammat Shiam Kunwar and they therefore asked for damages because the mortgagees refused to eject the lady.

But it is quite clear from the terms of the mortgage that the mortgagees could have had no right whatever to eject Musammat Shiam Kunwar as long as the mortgage subsisted. There is, as we have said, an express provision relating to this matter in the mortgage and it is futile to contend that in any case the plaintiffs, after their purchase of the right to redeem, had a right to call upon the mortgagees to eject Musammat Shiam Kunwar. This part of the case put

forward on behalf of the plaintiffs respondents must therefore fail.

The result of all this is that we find no force in the appeal of the defendants appellants and direct that it be dismissed with costs including in this Court fees on the higher scale.

As regards the cross-objections we think the plaintiffs respondents are entitled to succeed to the extent of the sum of Rs. 580/- which will be deducted from the amount declared to be payable by them for the purpose of obtaining redemption. In the cross-objections therefore we allow the parties costs in proportion to success and failure including in this Court, fees on the higher scale.

Appeal dismissed.

Cross-objections allowed in part.

1924 ALLAHABAD 156

MEARS, C. J. AND PIGGOTT, J.

Mahomed Said—Defendant—Appellant.

v.

Bishambhar Nath—Plaintiff — Respondent.

F. A. No. 53 of 1921, Decided on 22nd May 1923, from the decree of the Sm. C. J., Allahabad.

Contract Act S. 11—Minor vendor representing himself major — No compensation to purchaser can be awarded on the sale being set aside, if he has made no proper enquiry.

Purchasers or money lendors who deal with persons who are hovering upon majority and whose ascertainment of exact age is impossible must not complain if their cupidity leads them at times into litigation and loss. [P. 157, C. 1]

B. E. O'conor and *Iqbal Ahmad*—for Appellant.

K. N. Katju and *K. B. Lal*—for Respondent.

Judgment.—We are concerned in this appeal with a sale-deed dated the 20th September 1916, whereby the plaintiff Bishambhar Nath purported to convey to the defendant Muhammad Said a four annas share in certain zamindari property in the village of Kurian near Cawnpore. There are two issues for determination :—

(1) Was Bishambhar Nath a minor on the 20th of September 1916?

(2) If the first issue be found in the affirmative, should the decree in favour of the plaintiff be made subject to repayment of any consideration actually received by him from the defendant on account of the sale-deed in question?

[The evidence bearing on the first issue was then examined and it was held that Bishambhar Nath was a minor on the 20th of September 1916.]

We now turn to the second question. Should the decree in favour of the plaintiff be made subject to any and what conditions of repayment?

Notwithstanding that the effect of our first finding is to declare the contract between the parties destitute of legal effect we are of opinion that we have an equitable power wholly distinct from the existence of a contractual or non-contractual relation of the parties, which entitles us in a case of this kind to make a decree conditional upon repayment. In each case the test must be the conduct of the parties. On the one hand, the father of the plaintiff contends that the defendant and his father have brought about the moral and financial ruin of his two sons. He maintains that Abdul Aziz secured influence over Sheo Narain, influenced him adversely to his own interests and those of his father, acquired the whole of his share of the family property, and by putting him in funds enabled him to commence a course of dissipation. Similarly when Bishambhar Nath, in July 1916 was minded to raise money he was brought by Sheo Narain to the defendant and the latter adopted the same course with him and most carefully and cautiously kept all knowledge of his transactions with Bishambhar Nath from the father. He accepted from Sheo Narain a document of doubtful authenticity, the horoscope; he relied upon a paragraph in a written statement of the father, he contended himself with a medical certificate whereas, it is contended he ought to have gone to the father and told him of the son's intentions and asked him for proof of his age. It is said that he did not do so as he was well aware that the father would have

disapproved strongly of the suggested transactions and would have asserted his son's minority, and as against the defendant the case has been put as one of studied abstention on his part from all communication with the father and as one on which he was prepared to take risk actuated by a desire to add to the property originally owned by Sheo Narain that of his brother Bishambhar Nath.

In one view of the case it is possible that Sheo Narain and Bishambar Nath did perpetrate a fraud upon the defendant. They may have 'planted' a forged horoscope upon him and Sheo Narain may have made verbal representations as to the age of Bishambhar Nath. This is however largely matter of surmise and proof of these matters was on the defendant. He failed to give the requisite proof. Whilst due protection must be given to persons in the position of the defendant, when victims of a clear fraud, they must nevertheless make out a plain case for equitable relief and the very request for such relief puts upon the Court the obligation of looking carefully into the conduct of the petitioner in each case. We think that the father of the minor plaintiff is right in charging the defendant with having been to some extent unscrupulous in his dealings with his two sons and as regards Bishambar Nath we think in the defendant's anxiety to acquire the property he was content to run some degree of risk. Purchasers or money-lenders who deal with persons who are hovering upon majority and whose ascertainment of exact age is impossible must not complain if their cupidity leads them at times into litigation and loss. We are of opinion that we ought not to exercise our powers of equitable relief in this case and that the appeal must be dismissed. We however direct that in this and the trial Court each party shall pay his own costs.

Appeal dismissed.

1924 ALLAHABAD 157

DANIELS, J.

Babu Lal—Plaintiff—Appellant.

v.

The Municipal Board, Furukabad and another—Defendants—Respondents.

S. A. Nos. 1636 of 1921, and 237 of 1922, Decided on 26th April 1923, from the decree of the S. J., Farukabad D/-2nd August 1921.

U. P. Municipalities Act, S. 267—Board can ask for demolition of a structure previously permitted to be built by them.

The plaintiff's latrine of the kind known as *sandas* originally opened on the east side of the house and was cleaned from that side. In January 1919 he applied for permission to reconstruct it so that it should open on the south side of the house and permission was granted by the Public Works Committee on 15th February 1919. The proposed alterations were thereupon carried out. About eight months afterwards a complaint was made to the Municipal Board that the latrine as altered gave forth a very unsavoury smell and constituted a public nuisance and a danger to the health of the persons living in the neighbourhood. The Board were satisfied after inspection by the Health Officer that this was the case and they thereupon issued notice to the plaintiff under S. 267 of the Act to close the latrine. The plaintiff then sued for a declaration that the resolution of the Municipal Board ordering his latrine to be closed was not authorised by law and for an injunction restraining the Municipal Board from taking any step in respect of it.

Held: that it is impossible to point to any provision in U. P. Municipalities Act which debars a Municipal Board from taking action under S. 267 in the interests of the public health solely because it has previously given sanction to the construction of the building in question under S. 180 of the Act. On the contrary there is an express provision in S. 184 that no sanction shall operate as an estoppel or confer or extinguish any right or disability. 45 Bom. 797 Dist. [P 158, C 2]

K. N. Katju—for Appellant.

S. N. Sen and *B. Prasad*—for Respondents.

Daniels J.—These two connected appeals raise a question whether a Municipal Board has power under S. 267 of the U. P. Municipalities Act to order the removal of a latrine for the construction of which it had previously given permision. The plaintiff's latrine is of the kind known as *sandas*. It originally opened on the east side of the house and was cleaned from that side. In January 1919 he applied for permission to re-construct it so that it should open

on the south side of the house. This application was made under S. 178 of the U. P. Municipalities Act and permission was granted by the Public Works Committee on 15th February 1919. The proposed alterations were thereupon carried out. About eight months afterwards a compl int was made to the Municipal Board that the latrine as altered gave forth a very unsavoury smell and constituted a public nuisance and a danger to the health of the persons living in the neighbourhood. The Board were satisfied after inspection by the Health Officer that this was the case and they thereupon issued notice to the plaintiff under S 267 of the Act to close the latrine. This suit was then instituted by the plaintiff praying for a declaration that the resolution of the Municipal Board ordering his latrine to be closed was not authorised by law, and for an injunction restraining the Municipal Board from taking any steps in respect of it.

The suit has been dismissed by the Court below. The plaintiff appeals and pleads that the action of the Municipal Board was *u'tra vires*. The appellant relies on a decision of the Bombay High Court in *Municipality of Sholapur* v. *Abdul Wahab* (1), and argues on general grounds that very great injustice may result if it is held to be within the competence of a Municipal Board to order the demolition of a building or part of a building the erection of which it has previously sanctioned. The Bombay case is not quite on all fours with the present case as the Municipality formally revoked a sanction to build which it had previously granted. The case was moreover decided on a construction of S. 96 of the Bombay Municipal Act the provisions of which, though generally similar to those of the U. P. Municipalities Act, are not identical.

As regards the second plea there is no doubt that great hardship might be caused if the Municipal Board abused its powers under the Act. This must necessarily be the case whenever a public body is entrusted with wide statutory powers. At the same time very grave public inconvenience might equally arise if a Municipal Board is held to be debarred from taking action against what is undoubtedly a nuisance because on some previous occasion it had sanctioned the erection of the building from which the nuisance proceeds. The case must be decided, not on general considerations, but on a construction of the Municipalities Act in force in these Provinces. It is impossible to point to any provision in this Act which debars a Municipal Board from taking action under S. 267 in the interests of the public health solely because it has previously given sanction to the construction of the building in question under S. 180 of the Act. On the contrary there is an express provision in S. 184 that no sanction shall operate as an estoppel or confer or extinguish any right or disability. It is argued on behalf of the appellant that the reference to estoppel refers only to an estoppel against a plea of title to property, but the words used are very wide and taken in their ordinary meaning certainly do provide that no estoppel shall be raised against a Municipal Board on the ground of its having granted any sanction under the preceding sections. It may be added that the lower appellate Court finds as a fact that the latrine as it now exists does amount to a nuisance, and therefore the order complained of was in fact a proper order, though the Municipal Board acted without sufficient care in originally granting sanction for the alteration of the latrine. I agree with the Court below that the notice issued by the Municipal Board was within its statutory powers and I accordingly dismiss the appeals with costs.

There is deficiency of Rs. 5 on account of Court fees due from the respondent Municipal Board in appeal No. 1636. The decree of this Court will therefore not issue until this has been made good.

The cross-objection regarding costs was not pressed. It is accordingly dismissed but without costs.

Appeals & cross-objection dismissed.

(1) [1921] 45 Bom. 797—23 Bom. L.R. 244—61 I.C. 428.

1924 ALLAHABAD 159

DANIELS, J.

Karan Singh and another—Plaintiffs—Appellants.

v

Dal Chand and others—Defendants—Respondents.

S. A. No. 1652 of 1921, Decided on 27th June 1923, against the decree of the Addl. D. J, of Moradabad D/-8th June 1921.

Easements Act, S. 18—Customary easement of any nature can exist against landlord.

The first illustration to S. 18 expressly recognises that a tenant may have a customary right of easement against his landlord. A customary easement is not limited to easements of a kind which could not be recognised at all apart from special customs such as the right of pasturage and the right of privacy referred to in the illustrations. Any kind of easement recognised by custom of the provinces would surely fall within the meaning of the term. [P 159, C 2]

M. L. Agarwala—for Appellants.

S. N. Mukerji—for Respondents.

Judgment. —The plaintiffs appellants are zamindars of mauza Budpur and the defendants are occupancy tenants in the same village. The present suit was brought by the plaintiffs for a perpetual injunction restraining the defendants from making use of a way through fields Nos. 131,505 and 505. The suit was filed on the 9th August 1920 and the allegation in the plaint was that the defendants only began to make use of the way through this land from December 1919. The Court below differing from the Munsif finds that the way in reality is an old way which had been in use since the time of the settlement nearly 30 years ago and has dismissed the suit. In appeal to this Court it was objected that the Subordinate Judge did not state the precise ground on which he based his judgment, and it was argued that even if the way was an old one the zamindar was entitled to close it. Under the Full Bench ruling as *Udit Singh* v. *Kashi Ram* (1) a tenant could not acquire by prescription an easement against his landlord and it was found by the trial Court and not disputed in appeal that the right claimed was not an easement of necessity in the technical sense. The defendants when challenged asserted that they claimed the right as a customary right or as a customary easement under S. 18 of the Easements Act. It was pointed out that the first illustration to S. 18 expressly recognises that a tenant may have a customary right of easement against his landlord. I thereupon remitted an issue to the Court below on this plea. The Court below finds that a customary right of easement is established in favour of the defendants.

The appellant has challenged this finding on the ground that the Court below has mistaken the nature of customary easement. It is urged that a customary easement is limited to easements of a kind which could not be recognised at all apart from special customs such as the right of pasturage and the right of privacy referred to in the illustrations. Although this is the view taken in Peacock's Easement, I know of no warrant for limiting the term in this manner. Any kind of easement recognised by the custom of the province would surely fall within the meaning of the term. Now it is in my opinion beyond doubt that according to the customs prevailing in these provinces a zamindar has no right arbitrarily to close a way which has been used by occupancy tenants of the village for 30 years without question or opposition for access to their fields and for removing their produce. The plaintiff himself never claimed any such right. He came into Court (as in all cases of this kind which have ever come up before me) on the allegation that the way was newly made. It is only in the stage of appeal through the mouth of his counsel that he asserts his unrestricted right to close a way however old. If the right cannot be claimed as an easement I should be prepared to assume a grant of the right as appurtenant to the tenancy from the fact of long user and long acquiescence by the plaintiff. The zamindar having acquiesced in the use of the disputed way by the defendants for a period of 30 years

(1) [1892] 14 All. 185—(1892) A.W.N. 38. (F. B.)

it is too late for him to turn round and deny their right to use it. On his findings of fact the learned Subordinate Judge was in my opinion right in dismissing the suit and I accordingly dismiss the appeal with costs.

Appeal dismissed.

1924 ALLAHABAD 160

KANHAIYA LAL, J.

Niamat Ullah—Defendant—Appellant.

v.

Mt. Shafut-un-nissa Bibi—Plaintiff—Respondent.

S. A. No. 1697 of 1921, Decided on 20th June 1923, against the decree of the Addl. D. J, Gorakhpur D/-24th September 1921.

U. P. Land Revenue Act., Ss. 118 & 119—Do not apply where plaintiff sues defendant to have the latter's trees on the former's plot to be removed.

Plaintiff is entitled to an order directing the defendant to remove the trees standing on his plot, where the parties were the co-sharers of the village; but by a partition the said plot was awarded to the plaintiff and the trees standing thereon were awarded to the defendant. S. 118 of the U. P. Land Revenue Act has no application to such a case by analogy or otherwise. S 119 might apply if it has been alleged that the trees in question had been planted and possessed by the defendant, or his predecessor-in-interest prior to the partition. 39. A. 707 (F. B.) Dist. [P. 160 C. 2]

S. P. Sinha—for Appellant.

H. Sahai—for Respondent.

Judgment.—The question for consideration in this case is whether the plaintiff is entitled to an order directing the defend nt to remove the trees standing on old plot No. 97-13 corresponding with No. 123 new khasra of mauza Simra Tappa. The parties were co-sharers of the village; but by a partition effected in 1909 the said plot was awarded to the plaintiff and the trees standing thereon were awarded to the defendant. The entire plot No 97 was apparently a waste land covered by trees. The partition record summoned shows that one of the co-sharers Musammat Amna claimed the entire plot as her separate *maqbuza* land; but the Assistant Collector held that the plot in question was not her *maqbuza* land and could not be allotted to her share with the trees standing thereon. That order was upheld on appeal by the Collector. The result thereof was that the land was divided separately from the trees; and some of the trees fell to the share of the defendant; while others fell to the shares of the other co-sharers. S. 118 of the U. P. Land Revenue Act has no application by analogy or otherwise. S. 119 might have been applicable, had it been alleged that the trees in question had been planted and possessed by the defendant or his predecessor-in-interest prior to the partition; but there is no allegation in the written statement that that was so. On the other hand it is admitted that the other co sharers have caused the trees owned by them cut down since the partition, showing thereby that the land in question was jungle land, and that the trees partitioned belonged to the co-sharers of the village. They were separately partitioned according to their value and divided between the co-sharers in proportion to their shares. Paragraph 9 of the *tarz taqsim* prepared at the time of the partition directed that the trees scattered about the village were to be divided in that manner between the co-sharers according to their value and share. The decision in *Sarup* v. *Lala* (1) does not apply because that was a case of house occupied by one co-sharer at the time of partion, the site whereof was allotted to another co-sharer and S. 118 of the U. P. Land Revenue Act applied Where the trees are scattered trees standing on waste land, that consideration does not arise; and if a co-sharer files a suit within 12 years from the date of the partition for the removal of the trees allotted to one co-sharer and standing on the land allotted to another co-sharer he is entitled to have the same removed. and the land vacated. The defendant has no right to stay on the land against the will of the plaintiff. The appeal is therefore dismissed with costs.

Appeal dismissed.

---

(1) [1917] 39 All. 707—15 A. L. J 757—42 I. C. 589 (F. B.)

* 1924 ALLAHABAD 161

PIGGOTT AND STUART, JJ.

Ganga Prasad and another—Defendants—Appellants.

v

Ganeshi Lal and others—Plaintiffs—Respondents.

F. A. No. 79 of 1920, Decided on 6th November 1923, from the decree of the S. J. Agra., D/- 8th January 1920.

Civil P. C., S. 13 (c)—Foreign Court following another Limitation Law and passing judgment on that basis—British Indian Court cannot question its judgment—Appearance of defendants implies waiver of plea of want of jurisdiction.

A foreign judgment must be enforced by the Courts in British India in every case in which the judgment-debtor had valuntarily appeared before the foriegn Court which passed the judgment.

A suit was brought in British India and was founded on a judgment passed by Dholpur Court (foreign Court). It was pleaded that if the suit upon which the foreign judgment was passed had been brought in British India it would have been held to be time-barred under the law of limitation in operation in British India, but the Law of Limitation in Dholpur not being the same as the Law in British India the remedy in Dholpur was not time barred.

Held that there had been no refusal to recognise the Law of British India, in this case; A Court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action or the propriety of the decision. [P. 162 C. 1]

U. S. Bajpai and *N. Asthana*—for Appellants.

G. Lal and *B. Prasad*—for Respondents.

Stuart, J.—This appeal was filed by Ganga Prasad and Ram Rattan, defendants in the original suit. There were other defendants in the original suit but the decree was passed against Ganga Prasad and Ram Rattan alone. While the appeal was pending Ganga Prasad died. His representatives are on the record. Later on Ram Rattan died. His representatives have not been brought on the record, and under the law they cannot be brought on now. The appeal must therefore be taken to have abated as far as Ram Rattan is concerned. It has been argued on behalf of the representatives of Ganga Prasad.

The facts may be stated very briefly. A decree was obtained by the plaintiffs respondents against Ganga Prasad, Ram Rattan and others in the Court of the additional Judge of Dholpur on the 30th of April, 1913. The decree was for a sum of money. A portion of this amount was realised by execution of the decree, and the plaintiffs instituted the suit out of which this appeal has arisen to recover the balance upon the foreign judgment of the Dholpur Court. In the course of the trial Ganga Prasad and Ram Rattan set up that the Dholpur Court had no jurisdiction, and they further set up that the judgment of the Dholpur Court could not be operative in the Court in British India inasmuch as it proceeded on a refusal to recognise the law of British India in a case in which such law was applicable.

The learned Subordinate Judge repelled these and the other pleas, and decreed the suit as against Ganga Prasad and Ram Rattan, the remaining defendants being held not liable by consent of the plaintiffs.

The present appeal is preferred and the only points argued before us were that the Dholpur Court had no jurisdiction and that judgment was founded on a refusal to recognise the law of British India.

In respect of the first point we consider it sufficient to say that inasmuch as the appellants Ganga Prasad and Ram Rattan themselves appeared and contested the claim in the Dholpur Court, the plea of jurisdiction cannot be raised. We need specify no further authority for this conclusion than the decision in *Emanuel* v. *Symon* (1). At page 309 it is laid down that a foreign judgment must be enforced by the Courts in England in every case in which the judgment-debtor had voluntarily appeared before the foreign Court which passed the judgment. The law is the same in British India. It is laid down in the decisions of the High Court in Madras which have been quoted by the Subordinate Judge.

The second plea is as follows. If the suit upon which the foreign judgment was passed had been brought

(1) [1908] 1 K.B. 302—77 L.J. K.B. 180—98 L.T. 304—24 T.L.R. 85.

in British India, it would have been held to be time barred under the law of limitation in operation in British India; but the law of limitation in Dholpur is not the same as the law in British India and the remedy in Dholpur was not time barred. This is a case in which it cannot be suggested that there has been a refusal to recognise the law of British India where such law was applicable. The general rule is that a Court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action, or the propriety of the decision, and that rule applies here.

For the above reasons we dismiss the appeal of Ganga Prasad with costs and fees on the higher scale. The appeal of Ram Rattan has abated.

Appeal dismissed.

✱ 1924 ALLAHABAD 162

KANHAIYA LAL, J.

Kedar Nath—Plaintiff—Appellant.

v.

Nanak and others—Defendants—Respondents.

S. A. No. 38 of 1922, Decided on 29th May 1923, against the decree of the Dt. Judge, Moradabad D/- 5—8—1921.

Limitation Act., S. 12—Time for copies of judgment and decree was excluded.

The order appealed against was passed on the 7th January 1921. On the same day the plaintiff applied for a copy of judgment and that copy became ready for delivery and was delivered to him on the 14th January 1921. He filed an appeal on the 4th February 1921, accompanied by a copy of the judgment, but without any copy of the decree, for no decree was then in existence. On the 10th February 1921 he applied for a copy of the decree. On 15th February 1921 the formal order was drawn up and a copy of that formal order became ready on the 17th February 1921 and was delivered to him two days later. On the 23rd February 1921 he filed the copy of the formal order in the appeal.

Held: that adding the time spent in obtaining the copy of the formal order the appeal was clearly within time. [P. 163 C. 1.]

S. A. Haider—for Appellant.

Durga Prasad—for Respondents.

Judgment.—The question for consideration in this appeal is whether the appeal filed in the Court below was filed within time. The order appealed against was passed on the 7th January 1921, but by a mistake of the office, no formal order was prepared. On the same day the plaintiff applied for a copy of the judgment and that copy became ready for delivery and was delivered to him on the 14th January 1921. He filed an appeal on the 4th February 1921, accompanied by a copy of the judgment, but without any copy of the decree, for no decree was then in existence. The appellate Court brought to his notice that a copy of the decree should also have been filed. On the 10th February 1921 he applied for a copy of the decree. On 15th February 1921 the formal order was drawn up and a copy of that formal order became ready on the 17th February 1921 and was delivered to him two days later. The reason for the delay in delivery is not ascertainable. On the 23rd February 1921 he filed the copy of the formal order in the appeal, but the Court below held that it was filed too late and the appeal was barred by time. Under S. 12 of the Indian Limitation Act (Act 9 of 1908) the appellant is entitled to have excluded the time spent in obtaining a copy of the decree and also that of the judgment. Deducting the time spent in obtaining the copy of the judgment, the limitation for filing the appeal did not expire till the 14th February 1921.

Before that date he had applied for a copy of the formal order. He could not have applied earlier with any benefit because the formal order was prepared while the application for a copy of it was pending, and adding the time spent in obtaining the copy of the formal order the appeal was clearly within time. As pointed out in *Kamala Dasi* v. *Tarapada Mukherji* (1) in cases in which an order is not drawn up, it is sufficient for the appellant to attach to his memorandum of appeal a copy of the judgment alone and time can run from

(1) [1912] 15 C.L.J. 498—14 I.C. 1006.

the date of the judgment, but where a separate order is drawn up, copies of both the judgment and the formal order ought to be attached to the memorandum of appeal and the appellant is entitled to a deduction of the time spent in obtaining copies thereof. In *Chinnappan Chetty* v. *The Secretary of State for India* (2) it was held that where no formal order has been prepared, the appellate Court should adjourn the appeal until the copy of the decree is forthcoming. The decision in *Mulraj* v. *Madar Mal* (3) does not apply because there the period of limitation for filing the appeal had run out and there is nothing to show whether a copy of the decree was or was not obtainable. The appeal must therefore be allowed and the case is remanded to the lower appellate Court with a direction to re-instate it to its original number and to dispose of it according to law. The costs of this appeal will abide the result.

Appeal allowed.

(2) [1919] 42 Mad. 239—36 M.L.J. 124 — 25 M.L.T. 121 — (1919) M W.N. 120—9 L.W. 289—49 I.C. 673. (F.B.)

(3) [1920] 42 All. 260—18 A.L.J. 208—55 I.C. 315.

1924 ALLAHABAD 163

LINDSAY AND SULAIMAN, JJ.

Tota—Plaintiff—Appellant.

v.

Jaggu—Defendant—Respondent.

S. A. No. 40 of 1922, Decided on 5th April 1923, from a decree of the Addl. Dt. Judge, Meerut.

Civil P. C., S. 11—Decision that A is tenant does not preclude the plea that B sowed the land.

The decision of the Rent Court to the effect that a certain person was the tenant of the land and was liable for the rent does not decide the question of the title to the sale-proceeds of the crop in that field so as to bar a claim that another person grew the crop. [P. 161 C. 1]

Kailas Nath Katju—for Appellant.

Peary Lal Banerji—for Respondent.

Lindsay, J.—In our opinion this appeal ought to be allowed. We think that the decision of the Court below that the present claim was barred by *res-judicata* is erroneous.

The appellant was the plaintiff in the suit and he brought this suit for a declaration of his title to a certain sum of money which was held in deposit under an order made by a Magistrate of the first class.

It appears that in the later part of the year 1919, a dispute arose between the present plaintiff and the defendant regarding some land, on which sugar-cane had been sown. Proceedings were taken under S. 145 of the Code of Criminal Procedure. The crop was attached and sold by the order of the Magistrate, and the money was thereafter ordered to be kept in deposit.

The plaintiff says that he is the man who sowed this crop, and is, therefore, entitled to the sale-proceeds. The case for the defendant, on the other hand, was that he was the tenant of the land; that he sowed the crops, and that he had a title to the money.

The Court of first instance has found that the crop in question was sowed and raised by the plaintiff, but it was of opinion that because there had been a decision by the Rent Court regarding the question of tenancy, it was not possible to give the plaintiff relief inasmuch as it had been held in the proceedings referred to that the tenant of the land was the defendant Jaggu and not the plaintiff Tota.

In order to explain this matter it is necessary to refer to the litigation in the Rent Court. A suit for arrears of rent was brought by the zemindar for the years 1325, 1326 and 1327 Fasli. This suit was brought against both Tota and Jaggu, the allegation of the landlord being that he was not sure which of these defendants was his tenant. Both defendants claimed to be tenants of the holding. In that suit it was decided that Tota had been the tenant of the holding up to the end of the year 1326 Fasli, corresponding with the 1st of July, 1919, while Jaggu was held to have become the tenant of

the holding from the beginning of 1327 Fasli. The result of this was that the zemindar got a decree against Tota for the arrears of rent for 1325 Fasli, and for the arrears of rent for 1327 Fasli against Jaggu. That decision of the Rent Court was upheld in appeal by the Additional District Judge.

It is on the strength of this decision that both the Courts below have not held that the plaintiff cannot succeed in this claim. The Courts have taken the view that because it was held in the proceedings in the Rent Court that Jaggu was the tenant of this land for the year 1327, it is impossible now for Tota to put forward the claim that he is entitled to the sale proceeds of this crop, which grew during the year 1327 Fasli. In the first place, we are not disposed to hold that the question as to who sowed this sugar-cane crop and raised it was a matter, which was substantially in issue in the suit which was filed in the Revenue Court, and, in any case, it is clear to us that the decision of the Rent Court to the effect that Jaggu was the tenant of this land and was liable for the rent of the year 1327 Fasli, would not decide the question of the title to the sale-proceeds of the sugar-cane crop. This is apparent, if it is remembered, that sugar-cane is a crop which is sown in the month of March or April, and is not finally gathered until late in November or the beginning of December.

Obviously, therefore, this sugar-cane crop, which was standing on this land in November, 1919, and was sold at or about that time, must have been sown early in the year, that is to say, about the month of March or April, 1919, and the judgment of the Rent Court on this point is clear, namely, that at the time when the crop was sown Tota was still the tenant of the holding We have already mentioned that it was held in the rent suit that Tota was the tenant of the land up till, at any rate, the 1st of July, 1919. There can, we think be no doubt that Tota sowed this crop and he must have tended it until it was well advanced, and, in the circumstances, we hold that he is entitled to recover this money.

We are clearly of opinion that the decision in the suit for arrears of rent does not constitute *res-judicata* for the purpose of barring the present claim.

We, therefore, allow this appeal, set aside the decree of the Court below and direct that the plaintiff's claim be decreed with Costs in all three Courts.

Appeal allowed.

✱ 1924 ALLAHABAD 164

RYVES, J.

Jamaluddin and others—Appellants.

v.

King Emperor—Opposite Party.

Criminal Appeal No. 337 of 1923, Decided on 14th June 1923, against the order of the S. J. Shahjahanpur, D/- 23rd March 1923.

Criminal trial—Evidence—Conviction based on first information report alone, illegal—Evidence Act S. 155—Criminal P. C., S. 161.

First information report is not substantive evidence of the facts recorded in them and a conviction cannot be based on such reports They can be used to corroborate the witnesses who made them and are of value showing that they told the same story at the first possible occasion. If they tell a different story in Court, the report can be used to contradict them or discredit their testimony. But it is not legitimate for a Court, when witnesses tell a different story in the witness box and contradict the report made by them, to discard the evidence given on oath and to rely on the report. (P. 165 C. 1

Nehal Chand—for Appellants.

The Government Pleader—for the Crown.

Ryves, J.—That a riot took place about sunset in the village of Rawatpur on the 22nd of January last in which one Abid Ali unfortunately was fatally injured is established beyond doubt. Ten men were sent up for trial under Ss 147 and 304 of the Indian Penal Code to the Court of Sessions at Shahjahanpur. The learned Judge convicted three of them and these have appealed. The learned Judge has come to the definite conclusion that the evidence on both sides is wholly unreliable' He says, "as the

witnesses on both sides are unreliable there remains only the reports on which to base any definite conclusion". This is not a legitimate use of a first information report. Such reports are not substantive evidence of the facts recorded in them and a conviction cannot be based on a report. They can be used to corroborate the witnesses who made them and are of value as showing that they told the same story at the first possible occasion. If they told a different story in Court, the first report can be used to contradict them or discredit their testimony. But it is not legitimate for a Court when witnesses tell a different story in the witness box and contradict the report made by them, to discard the evidence given on oath and to rely on the report. The result probably is that there has been a miscarriage of justice in this case, but that is not the fault of the Court but of the complainants themselves and their witnesses. If they choose to suppress the real facts and give false evidence in order to implicate their enemies the only result is that persons who are probably guilty have to be acquitted. I allow the appeal, set aside the conviction and sentence and direct the appellants to be released.

Appeal allowed.

1924 ALLAHABAD 165

DANIELS, J.

Muneshur Tewari—Plaintiff—Appellant.

v.

Mt. Mahesha Kueri and others—Defendants—Respondents.

S. A. No. 78 of 1922, Decided on 29th April 1923, against the decree of the D. J., Gazipur, D/- 29th September 1921.

Agra Tenancy Act, S. 63—Co-sharer who can collect rent can also sue in ejectment.

The co-sharer who is entitled to collect the entire rent of a particular tenant is also entitled to eject him. He is the landholder for the purposes of the Act. Select Decision No. 2 of 1910 Foll. [P. 165 C. 2.]

H. Sahai—for Appellant.

M. L. Agarwala—for Respondents.

Judgment—This is an appeal by the plaintiff in a suit for ejectment under S. 63 of the Tenancy Act. The plaintiff is alone entitled to collect the entire rent from the tenants. This has been clearly found by the learned District Judge. The learned District Judge however, was of opinion that though the plaintiff was entitled to the entire rent he was not entitled to eject the defendant without the concurrence of the entire body of co-sharers. It is hardly necessary to point out that this view if correct would be productive of great inconveniences, especially in the eastern districts where co-sharers are often very numerous. The learned District Judge gives two reasons in support of his decision. The first is that S. 194 only makes an exception in the case of money suits, and the other that the word 'landholder' does not occur in S. 58 of the Tenancy Act. The reference to S. 194 is doubtless to sub-section (3). This sub-section however only applies where one of two or more co-sharers is not entitled to sue alone which is the whole point in dispute in this case. It is quite true, as the learned District Judge says, that S. 58 does not contain the word 'landholder.' There is no reason why it should as it only specifies the grounds of ejectment. The operative section under which the tenant is ejected is S. 63, and the very opening words of this section are "when a landholder desires to eject a tenant." 'Landholder' is defined in S. 4 (5) as the person to whom rent is payable, and it is in my opinion clear law that the co-sharer who is entitled to collect the entire rent of a particular tenant is also entitled to eject him. He is the landholder for the purposes of the act. This view was also taken by the Board of Revenue in Select Decision No. 2 of 1910, a decision which has been followed in many subsequent cases. I am told by Mr. Agarwala that this decision has recently been dissented from by the present junior member in a ruling which has not yet been reported. However that may be, it is in my opinion good law. It was finally urged by Mr. Agarwala for the respondents that the District Judge's decision does not cover all

the pleas which were urged before him. I have accordingly been through the grounds of appeal with the counsel and it is found that the only plea that can be said to be not covered by the judgment is that contained in paragraph 6 of the memorandum of appeal. In that the defendant urged that he had acquired occupancy rights. This point is not covered either directly or by implication in the judgment of the Court below and the learned Judge does not say that it was not urged before him. I accordingly remit an issue under order 41 rule 25 to the lower appellate Court:—

Has Mt. Murta Kuer the defendant acquired occupancy rights in the land in suit?

On receipt of the finding, which should be submitted by 30th June, ten days will be allowed for objections. The finding will be decided on the evidence already on the record.

Case remanded.

1924 ALLAHABAD 166

BANERJI, AG. . C J. & RYVES, J.

Mt. Sartaji—Defendant—Appellan t.

v.

Ramjas and another— Plaintiffs—Respondents.

L. P. A. No. 78 of 1922, Decided on 19th July 1923, from the Judgment of Gokul Prasad J., D/–27th April 1922.

Hindu Law—Alienation by Widow—Gift as a dowry in marriage of her daughter to the daughter amounts to acceleration.

One G. died leaving his widow Mt. R. and his daughter Mt. J. R. inherited her husband's property as next heir. On the occassion of marriage of J. in 1881 she executed a document by which she transferred her rights in the husband's property which consisted of a share of Zamindari and a house, to her daughter Mt, J. J. was in possession for some years when she died, R. survived her. J. left a daughter S. who obtained possession upon the death of J. and remained in possession for more than 12 years. Plaintiff A was the son of B. who was the nephew of G. and was the next reversioner to the estate of G. Mt. R. died in 1918 and upon her death the present suit was brought by B. for recovery of the property from S.

Held that the plaintiff's right to succeed accrued upon the death of J. and that event having taken place more than 12 years prior to the institution of the suit, and S. having been in possession for more than 12 years without having any right, her possession thus amounted to adverse possession and the plaintiff's claim was beyond time and was rightly dismissed by the lower appellate Court It makes no difference that the transfer was made as a marriage gift. 42 M. 533 and 47 C. 466 Foll. [P 167 C 1]

S. P. Sinha—for Appellant.

N. P. Upadhiya—for Respondents.

Banerji, Ag. C J.—The property to which this litigation relates originally belonged to one Guptar, who died leaving his widow Mt. Raj Rani and his daughter Mt. Jaipali Raj Rani inherited the property as next heir to her husband. On the occasion of the marriage of Jaipali she executed a document by which she transferred her rights in the husband's property, which consisted of a share of zemindari and a house, to her daughter Mt. Jaipali. This she did in the year 1881. Jaipali was in possession for some years when she died, Raj Rani survived her. Jaipali left a daughter Sartaji, who is the defendant in this case. Sartaji has been found to have obtained possession upon the death of Jaipali and to have remained in possession for more than 12 years.

The plaintiff Ramjas is the son of Balraj, who was the nephew of Guptar, and is the next reversioner to the estate of Guptar. Mt. Raj Rani died in 1918 and upon her death the present suit was brought by Balraj for recovery of the property from Sartaji;

The Court of first instance decreed the claim but the lower appellate Court dismissed it. That Court was of opinion that there was a surrender by Raj Rani of her rights as a Hindu widow, and this amounted to an acceleration of the reversionary rights of Jaipali. Upon Jaipali's death the only person who could claim the property was Balraj and Balraj not having brought any claim in respect of this property and Sartaji having been allowed to remain in possession for more than twelve years she had acquired an absolute right to the property, and the plaintiff could not recover it.

This decision of the lower appellate court has been reversed by a learned Judge of this Court solely on the ground that the transfer to Jaipali was made at the time of her marriage and as a marriage gift. No doubt in the document which Raj Rani executed in 1881 in favour of Jaipali she says that she was making this transfer to her daughter as dowry on the occasion of her marriage. We think however that the fact that the transfer was made to her on the occasion of her marriage makes no difference so far as the rights acquired by Jaipali were concerned. Jaipali was the next reversioner to the estate after her mother. Her mother divested herself of the whole estate and transferred it to her daughter. This amounted to an acceleration of the right of her daughter to succeed to the estate of her father. It was held in the cases of *Rangasami Gounden* v. *Naciappa Gounden* (1) and *Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (2) by their Lordships of the Privy Council that where the widow divests herself entirely of her estate and makes a transfer, the effect of which is an entire effacement of herself, it amounts to a vesting of the estate in the reversioner immediately upon the making of the transfer, whether this is called a surrender or an acceleration. It is not the form in which the transfer is made that is to be looked at but the effect which it would have on the estate itself. It cannot be held that what was transferred by Mt. Raj Rani to Jaipali was the life-estate of Raj Rani by way of gift as such life-estate. She completely effaced her own life estate, and thereupon the right, which Jaipali would have succeeded to on her death, became vested in her at once. In this view it was a case of surrender of the estate, and the fact of the surrender having been made on the occasion of the marriage of Mt. Jaipali in the shape of a gift, makes no difference. Upon the death of Jaipali the right to the property vested in the next reversioner to her father and not in her mother. Therefore the fact of her mother being alive for a number of years after the death of Jaipali does not affect the question of the plaintiff's right of succession. The plaintiff's right to succeed accrued upon the death of Jaipali and that event having taken place more than twelve years prior to the institution of the suit, and Sartaji having been in possession for more than twelve years without having any right, her possession thus amounted to adverse possession and the plaintiff's claim was beyond time and was rightly dismissed by the lower appellate Court. We allow the appeal set, aside the decree of the learned Judge of this Court and restore the decree of the lower appellate Court with costs of both hearing in this Court, including fees in this Court on the higher scale.

Appeal allowed.

(1) [1919] 42 Mad. 523—46 I.A. 72—36 M.L.J. 493—17 A.L.J. 536—29 C.L J. 539—21 Bom. L.R. 640—23 C.W.N. 777—(1919) M.W.N. 262—26 M.L.T. 5—10 L.W. 105—50 I.C. 498 (P.C.)

(2) [1919] 47 Cal. 466—46 I.A. 259—37 M.L.J. 513—17 A.L.J. 1036—(1919) M.W.N. 860—1 P.L.T. 1—22 Bom. L.R. 477—24 C.W.N. 274—53 I.C. 347 (P.C.)

✱ 1924 ALLAHABAD 167

BANERJI AND GOKUL PRASAD, JJ.

Panna Lal—Plaintiff—Appellant.

v

Husain Beg—Defendant—Respondent.

S. A. No. 306 of 1922, Decided on 11th April 1923, from a decree of the Dt. Judge, Agra.

Specific performance—Vendor having no title to sell—Specific performance can not be granted.

Defendant contracted to sell a house to plaintiff and also received earnest money but later on he refused to sell it, saying that the house really belonged to his wife and she refused to sell it.

Held, that the contract could not be specifically enforced but that the plaintiff was entitled to recover damages for breach of contract entered into with him by the defendant and that the measure of such damages was difference between the market value of the property and the contractual price. [P 168 C 2, P 169 C 1]

Kailas Nath Katju—for Appellant.

Narain Pd. Asthana — for Respondent.

Banerji, J.—This is a plaintiff's appeal arising out of a suit for specific performance of a contract for sale of a house and in the alternative for damages. It appears that the defendant wanted to sell a house, and for this purpose Abdul Aziz, a common friend of the parties to the suit, was negotiating with prospective purchasers. Abdul Aziz wrote to the defendant saying that a certain person was offering Rs. 3,600 for the house and was enquiring if the defendant would agree to sell the house. On the 13th of December, 1918, the defendant wrote back to Abdul Aziz saying that if the purchaser was willing to pay Rs. 4,000 for the house and the costs of transfer, he would sell the house. Abdul Aziz thereupon on the 21st of December, 1918, wrote to the defendant saying that one Panna Lal had accepted the terms proposed by the defendant and was sending a money order for Rs. 200 as earnest-money and the defendant was to send a formal receipt. It appears that the defendant received a money order for Rs. 200 on Saturday and wrote back saying that as the next day was a Sunday, he would send the receipt on the Monday following by registered post or under a bearing cover as desired by Abdul Aziz. Matters stopped here for some days. On the 5th of January, 1919, the defendant wrote to Abdul Aziz saying that he had received a telegram asking him for the return of Rs. 200 sent as earnest-money and he wanted to know if Panna Lal was going back out of the agreement. Later on he also said that the house really belonged to his wife and she refused to sell it. Ultimately the defendant refused to execute a sale-deed and then the plaintiff brought the present suit for specific performance of the contract to sell, and, in the alternative, for damages.

Several pleas were taken in defence and the main plea was that Abdul Aziz had by misrepresentation induced the defendant to agree to the sale of the house in December, 1918, and that it was owing to this misrepresentation that the defendant acted as he did, but that the defendant did not contract with the plaintiff to sell the property. The trial Court, the learned Subordinate Judge of Agra, came to the conclusion that the defendant had contracted to sell the house but he could not give a decree for specific performance of the contract, because the defendant was not competent to sell the house which belonged to his wife. He, however, gave a decree for damages and the refund of Rs. 200, the earnest-money already advanced. The defendant went up in appeal and the learned District Judge has confirmed the finding of the trial Court as to the amount of damages, but has allowed the appeal and dismissed the suit on the ground that there was no completed contract for sale. It is not very easy to understand how the learned District Judge came to this conclusion. Having regard to the correspondence to which we have referred above, there can be no question that there was a proposal by Abdul Aziz that the defendant made an offer to sell the house for Rs. 4,000 and the said offer was accepted by Panna Lal who sent Rs. 200 by money order as earnest-money. The learned Judge seems to be under the misapprehension that a receipt registered under the Registration Act was required for the Rs. 200 sent by Panna Lal as a condition precedent to the completion of the contract. This was clearly the result of a mis-reading of the correspondence between Abdul Aziz and the defendant. In the letter which Abdul Aziz wrote to the defendant, he asked the defendant to send a receipt by post under registered cover or bearing, and the defendant wrote back in reply saying that he would send it on Monday following by registered post or bearing. The learned Judge seems to think that this last letter meant that the receipt was to be registered under the Registration Act and then sent to Abdul Aziz. This was no body's case and the learned Judge seems to have misunderstood the defence and erred in deciding the

case on a point not raised by the parties. In our opinion the judgment of the trial Court was correct and should not have been disturbed. We are of opinion that the plaintiff is entitled to recover damages for a breach of the contract entered into with him by the defendant and that the measure of such damages is the difference between the market value of the property and the contractual price. The learned Judge accepts the amount assessed by the Court below as correct. We, therefore, allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in this Court and in the Court below.

Appeal allowed.

1924 ALLAHABAD 169

KANHAIYA LAL, J.

Jadubir—Defendant—Appellant

v

Gajadhar and others—Plaintiffs—Respondents.

S. A. No. 567 of 1922, Decided on 6th July 1923, against the decree of the D. J. Benares, D/-13th Jan. 1923.

Hindu Law—Alienation by father—Auction purchaser under a decree against father cannot be dispossessed unless the sons prove the debt to be immoral or illegal.

Where joint ancestral property has passed out of a joint family under a sale in execution of a decree for the father's debt, the sons cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted. 1 I.A. 321 and 39 A. 437 P.C. Foll. [P. 170 C. 1]

Kumuda Prasad—for Appellant.

H. K. Mukerji—for Respondents.

Judgment.—The dispute in this case relates to a portion of plot No. 44 *khasra* situated in the village Pipri. That portion belonged to a joint family consisting of Salik Pande and his sons Ram Jag and Gajadhar. Salik Pande was the manager of the joint family. On the 2nd of July 1890 he and his son Ram Jag made a simple mortgage of the said property in favour of Jagannath. Subsequently on the 31st of January 1900 he and his co-sharers mortgaged their entire plot No. 44 *khasra* with Mangru and gave him possession. In 1903 Jagannath filed a suit for the recovery of the money due on his mortgage and obtained a decree in execution of which he purchased the mortgaged property. The other son and grandsons of Salik Pande were not made parties to that suit. Jagannath sold the share purchased by him to Jadubir Pande, who got mutation of names effected in his favour in the revenue papers in respect of the same.

The present suit was filed by one of the sons and some of the grandsons of Salik Pande for a declaration that the mortgage and auction sale aforesaid were not binding on them and for the maintenance of their possession over the same. Their allegation was that the mortgage in question was made without any legal necessity and that they had since acquired the rights of Mangru by paying the money due to him on the subsequent mortgage of the 31st of January 1900. The defendant Jadubir Pande opposed the claim on the ground that he had purchased the property in question in satisfaction of a prior mortgage, which was made for a valid family necessity. He denied that the plaintiff was in proprietary possession of the disputed property and pleaded that the claim was barred by limitation under S 42 of the Specific Relief Act. The Courts below repelled those contentions and decreed the claim. They found that the plaintiffs were in possession of the disputed property by virtue of their redemption of the subsequent mortgage and that the contesting defendant appellant had failed to establish that the mortgage of the 2nd of July 1890 was made for a legal necessity.

They, however overlooked the fact that the mortgaged property had already been sold in satisfaction of that mortgage, and rights of a third party had come into existence, which could not be displaced unless the sons and grandsons of Salik Pande, the mortgagor, were prepared to establish that the mortgage in question was made for illegal or immoral purposes

As observed by their Lordships of the Privy Council in *Girdhari Lal* v. *Kantu Lal* (1) where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, the sons cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted. In *Sahu Ram Chandra* v. *Bhup Singh* (2). Their Lordships re-affirmed that view. The sale was a public sale, which could have been presented by the plaintiffs, had they taken steps in time, by an assertion of their rights. They took no such steps; and they cannot now be permitted to defeat the rights acquired by a third party by simply questioning the transaction entered into by the head of the family, of which they were members. The Courts below erred in throwing the onus on the defendants, as if no sale had taken place, and the rights of the third party had not come into existence. It is no use sending the case back for disposal because in the plaint there was no allegation that the debt in question was incurred for illegal or immoral purposes. All that was said was that the mortgage was not taken for family necessity; but that ground is not enough to defeat the auction purchaser or his assignee of the rights acquired by virtue of the auction sale. The subsequent redemption made by the plaintiffs of the puisne mortgage cannot give them any higher title. The appeal must therefore be allowed and the claim of the plaintiffs dismissed with costs here and heitherto.

Appeal allowed.

(1) [1874] 1 I.A. 321—14 B.L.R 187—22 W.R. 56—3 Sar. 380 (P.C.)

(2) [1917] 39 All. 437—44 I.A. 126—21 C.W.N. 698—1 P.L.W. 557—15 A.L.J. 437—19 Bom.L.R. 498—26 C.L.J 1—33 M.L.J. 14—(1917) M.W.N. 439-22 M.L.T. 22-6 L.W. 213—39 I.C. 280 (P.C.)

*** * 1924 ALLAHABAD 170**

DANIELS, J.

Chandrika Singh—Defendant—Appellant.

v.

Bhagwat Singh and others—Plaintiff & Defendants—Respondents.

S. A. No. 666 of 1922, Decided on 30th July 1923, against the decree of of the D. J. Azamgarh, D/-11th February 1922.

Hindu Law—Alienation by father—Burden of proof of necessity on purchaser—Necessity proved for a portion—Sale set aside.

Where property has passed out of the hands of the family either in lieu of an antecedent debt or under an execution sale in respect of a debt of the father the sons can only recover the property by showing that the debt was either illegal or immoral, but this rule does not apply to a sale for cash. when a transaction such as this is impeached by the son it is for the creditor or transferee in the first instance to prove either legal necessity or at least such inquiry as would have satisfied a prudent man that the necessity existed, and the same rule applies where the defendant is not the original transferee but a pre-emptor.

Where necessity for a portion is proved, the Court should look to the amount of the consideration to which no legal necessity has been established. If this amount was so trifling that it could be left out of account the sale should be upheld, otherwise it should be set aside. In this case legal necessity was proved for Rs. 1780 out of Rs. 2500 but the sale was set aside. 41 A. 338 Dist 1922 A. 321 foll. [P. 171 C. 1, 2 P. 172 C. 1]

Iqbal Ahamad—for Appellant.

Ambika Prasad—for Respondents.

Judgment.—This is an appeal in a suit in which the plaintiff Bhagwat Singh suing as a minor through his next friend Ram Autar sought to recover possession of property sold by his father Gajadhar Singh on the ground that the property was the joint family property of the plaintiff and his father and that the sale was made without legal necessity. The sale was effected on 9th December 1914 for a sum of Rs. 2499-11-3. The Court below has held that Rs. 1780- of the sale price was for legal necessity or antecedent debt and has given the plaintiffs a decree subject to repayment of this amount. There were a number of defendants to the suit, Gajadhar Singh himself, the original vendees, and subsequent transferees, but the only one with whom we are

now concerned is the appellant Chandrika Singh. Chandrika Singh filed a pre-emption suit on the basis of the sale deed executed by the plaintiff's father and obtained the property under a pre-emption decree dated the 7th August 1916.

The two points urged in this appeal have been.

1. That the burden of proving legal necessity was wrongly placed by the Court below on the defendant;

2. That even on the findings of the Court below the sale should have been maintained. The question of the burden of proof was the main issue argued in both the Courts below. The trial Court placed the burden on the plaintiff under the impression that the ruling in *Sahu Ram Chandra's* case. (1) required it to be so placed. The learned Additional Judge held that the trial Judge had misunderstood the passages of the ruling on which he relied and that the real effect of the ruling was in such a case as the present clearly to place the burden of proof on the defendant. In my opinion the learned Additional Judge was right. Where property has passed out of the hands of the family either in lieu of antecedent debt or under an execution sale in respect of a debt of the father the sons can only recover the property by showing that the debt was either illegal or immoral, but it is now so well established as to need no citation of authority that this rule does not apply to a sale for cash. As regards the portion of the sale price which is now in dispute the sale was a sale for cash. The sum in regard to which the Court below finds that legal necessity was not established amounts to roughly Rs. 700- out of an item of Rs. 500-taken in cash at the time of registration of the deed. The ostensible object of the loan was to pay the marriage expenses of certain members of the family. The finding of the lower appellate Court is that there was legal necessity only for a sum of Rs. 200 and that the balance of Rs.700 was taken without any necessity. There is now a long chain of authority for the view that when a transaction such as this is impeached by the sons it is for the creditor in the first instance to prove either legal necessity or at least such inquiry as would have satisfied a prudent man that the necessity existed. The appellant does not dispute this proposition where the defendant is the transferee. He urges that a different rule should be followed where the defendant is not the original transferee but a pre-emptor. The pre-emptor stands in the shoes of the original vendee. It is true that he is not himself a party to the transaction impeached, but I know of no authority, and none has been cited to me, for holding that this circumstance alone is sufficient to transfer the burden of proof from him to the sons. I hold therefore that the burden of proof has been rightly laid by the Court below.

The second issue is whether on its findings the Court below was right in setting aside the sale. The argument strenuously urged on behalf of the appellant is based on certain facts which appear in the judgment of the Court below though they are not referred to in connection with this particular issue. It appears that the whole family property consisting of an eight anna share had been usufructuarily mortgaged for 59 years at the time of the transaction. If this mortgage was not paid off within a year the right of redemption would have been finally lost. The appellant's case is that in this state of affairs the father was justified in selling a portion of the property-he actually sold a five anna share out of eight annas-in order to pay off this mortgage and recover possession of the entire property, and that even though the sale realised Rs. 700 more than were actually necessary it should be upheld. Tho criteria have been laid down in different cases for determining whether in a particular case the sale should be upheld or not.

(1) [1917] 39 All. 437—44 I A. 126—21 C.W.N. 698—1 P.L. W. 557—15 A. L.J. 437—19 Bom. L. R. 498—26 C. L. J. 1—33 M. L. J. 14—(1917) M. W. N. 439—22 M. L. T. 22 —6 L. W. 213—39 I. C. 280 (P. C.)

In *Jainarain Pande* v. *Bhagwan Pande* (2) relying on the Privy Council ruling in *Girdhari Lal* v. *Kantu Lal* (3), it was said that what the Court should look, at is the amount of the consideration in regard to which no legal necessity has been established. If this amount was so trifling that it could be left out of account the sale should be upheld; otherwise it should be set aside. In one case of this Court, *Balkrishna Das* v. *Hira Lal* (4), a some what different criterion was applied. This was a case in which a sale of a house for Rs. 19,500 was upheld although the antecedent debt existing at the time amounted to Rs. 7775 only. The test here was "could the sum for which legal necessity was established have been raised without effecting the sale which was impugned". In the case in question it was held that it could not have been otherwise raised- The house sold could not have been divided up and sold piece meal, and as there was no other source from which the money could be raised the sale of the entire house was upheld by this Court If this test is applied to the present case it fails to support the appellant's contention in its entirety. The zamindari share, unlike the house in the case just cited, might have been sold piecemeal. and it is clear that if a sale of five anna share realised Rs. 2500 the amount of Rs. 1780 which had to be raised for legal necessity or antecedent debt might have been obtained by the sale of less than four annas. If there were any precedent for so doing I might be disposed to uphold the sale to such an extent as would have been necessary to raise the amount of Rs. 1780 but in the whole of the voluminous case law on this subject I can find no precedent for such a course and I am reluctant to add yet another to the complications of the existing law.

(2) 1922 All. 322—44 All. 683—20 A. L. J 621.
(3) [1837] 1 I. A. 321—14 B. L. R. 187—22 W. R. 56—3 Sar. 380 (P. C.)
(4) [1919] 41 All. 338—17 A. L J. 239—50 I. C. 74.

The appellant has sought to support his plea on the ground of benefit to the estate but this really carries him no further. The sale could only be beneficial to the estate to the extent to which it was necessary to raise the sum justified by legal necessity.

These were the only two pleas urged in the argument in chief but in replying on the case the appellant's learned counsel made some reference to a plea taken in the 4th paragraph of his memorandum of appeal to the effect that it was only necessary for the transferee to show that he made reasonable enquiries. I asked the learned counsel if he could point me to any evidence not referred to by the court below to show that such enquiries were in fact made, but he was unable to do so. Indeed neither in the trial Court where the decision was in favour of the appellant nor in the Court below where it was against him, does any point seem to have been made of the question of enquiry.

It is no doubt true, as both the Courts below have remarked, that the pre-emptor in a suit of this kind is in a difficult position. It is very doubtful if he could escape paying the full price for the property on the ground that any part of that price was not justified by legal necessity. On the other hand when he comes to defend a suit by the son he is in a much less favourable position than the original transferee by reason of the fact that he was no party to the transaction impugned and only came into the case after it was completed. It may be that he has a remedy against the original vendee for the portion of the price which he has lost on the ground that it has not been for legal necessity. As to this I can express no opinion in the present case. As the law stands the decree by the Court below was in my opinion a correct decree and I therefore dismiss the appeal. Under all the circumstances of the case it appears to me equitable to direct that the parties bear their own costs of this appeal and I direct accordingly.

Appeal dismissed.

1924 ALLAHABAD 173

SULAIMAN, J

Abdullah Beg and another—Plaintiffs—Appellants.

v.

Ramzan Khan and others—Defendants—Respondents.

S. A. No. 746 of 1922, decided on 6th November 1923, from the decree of the S. J., Jaunpur, D/-11th January, 1922.

Civil P. C., O. 9 R. 3—Court passing an exparte decree as against some defendants can entertain application to set it aside during pendency of appeal by contesting defendants though non-contesting defendants applying under R. 13 were pro forma respondents to the appeal.

A suit was decreed against defendants No. 1-5. Defendants Nos. 1,2 and 3 only appealed to the lower appellate Court. The proceedings had been exparte against the defendants Nos. 4 and 5 and they preferred no appeal, While the appeal preferred was ponding an application was presented in the original Court on behalf of defendants 4 and 5 for setting aside the exparte decree. The Court of the first instance apparently on the ground that the defence raised by the defendants was a common one set aside the decree not only against the two defendants who had applied but against all the defendants and revived the suit, When this suit was retried by the first Court it was dismissed on the merits. An appeal was preferred by the plaintiffs to the lower appellate Court. But the plaintiffs for the first time in second appeal raised the objection that the order setting aside the exparte decree was *ultra vires* in as much as an appeal had been preferred from the decree that was then ponding.

Held that in as much as the appeal was still ponding the decree of the original Court was till in force and in operation; it had not been superseded by any decree on appeal or merged herein. Under these circumstances it was difficult to appreciate how on principle the view could be maintained that the jurisdiction of the original Court to entertain the application to set aside the exparte decree so far as it was exparte had been taken away.

Held further that in view of the clear wording of O 9 R. 13 the contention urged on behalf of the plaintiffs was without any force. 44 M. 731, 38 Cal. 394 and 39 A. 13 Foll. 7 A. L. J. 598 and 37 A. 258 Dist. [P. 175, C. 1]

A. Sanyal—for Appellants.

Mushtaq Ahmad with *M. A. Aziz*—for Respondents.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for possession and arrears of rent. The suit was originally decreed on the 3rd September, 1920 against defendants Nos. 1-5. On the 25th October 1920 defendants Nos. 1,2 and 3 only appealed to the lower appellate Court. The proceedings had been exparte against defendants Nos. 4 and 5 and they preferred no appeal; they were however made *pro forma* respondents in the appeal. While the appeal preferred on behalf of defendants 1-3 to which defendants Nos. 4 and 5 were parties, was pending, an application was presented in the original Court on behalf of defendants 4 and 5 on the 30th October 1920 for setting aside the exparte decree. Certain objections were filed by the plaintiffs on the 15th November 1920 but in these objections no plea was taken that the trial Court had no jurisdiction to set aside the decree on the ground that an appeal was already pending. On the 7th May 1921 the Court of first instance, apparently on the ground that the defence raised by the defendants was a common one, set aside the decree not only against the two defendants who had applied but against all the defendants and revived the suit. The suit having been revived the defendants who had appealed to the District Judge got a statement made through their vakil before the District Judge that there was no longer any necessity for deciding the case and that the appeal should be struck off. The order passed by the appellate Court was "appeal is dismissed according to the above statement".

When this suit was retried by the first Court it was dismissed on the merits. An appeal was preferred by the plaintiffs to the lower appellate Court; bu in the grounds of appeal again no point was taken that the order setting aside the decree was *ultra vires*, nor does it appear to have been argued before the lower appellate Cort as there is no reference to the point anywhere in the judgment. The appeal was dismissed on the merits, the lower appellate Court coming to the conclusion that the plaintiffs had no right to the land and had never been in possession of it.

A second appeal has been preferred on behalf of the plaintiffs and two main points have been urged on

their behalf. One is that the order setting aside the exparte decree was *ultra vires* inasmuch as an appeal had been preferred from that decree and was then pending and the second is that the Court below has erred in interpreting the document filed by the parties.

As regards the second point there is obviously no force in it. No question of an interpretation of any document arises in this case. The lower appellate Court after considering all the documentary and oral evidence has come to the conclusion that the plaintiffs have no right to the land and have never been in possession of it. The finding is one of fact and cannot be challenged.

The main contention of the plaintiffs however is that the Court of first instance had no jurisdiction to interfere with the decree which was then under appeal.

Order 9 rule 13 of the Code of Civil Procedure expressly states that in case in which a decree is passed exparte against a defendant the latter may apply to the Court by which the decree was passed for an order to set it aside, etc. If there were no rulings to the contrary, I would have no hesitation in holding that an application under Order 9 rule 13 had to be made to the Court which passed the decree. The opinion prevailing in the various High Courts however has by no means been uniform. The view taken in the Madras High Court some time ago was certainly to the effect that the mere presentation of an appeal to an appellate Court ousts the jurisdiction of the Court of first instance. Aid appears to have been sought from S. 107 of the Code which gives to the appellate Court the same powers as are ordinarily performed by the Court of original jurisdiction. This view however was dissented from in case after case by the Calcutta High Court, where the opinion was expressed that such an application can be made only to the original Court. In one case the Calcutta High Court went even to the length to which a Bench of this Court in *Gajrajmati Tiwarin* v. *Swami Nath Rai* (1) was not prepared to go. None of the reported cases of this Court which have been brought to my notice are exactly on all fours with the present case. In the present case there are two circumstances to be noted.

1. That the appeal had not been disposed of when the first Court's decree was set saide.

2. That the applicants for setting aside the decree were parties to the appeal.

In two earlier cases namely those of *Palakdhari Rai* v. *Mankaram Rai*, (2) and *Mathura Prasad* v. *Ram Charan Lal*, (3) it was held that after the decree of the first Court had been affirmed in appeal the first Court had no jurisdiction to set it aside. These cases are distinguishable on the ground that the appeal had been disposed of and the decree of the first Court had been affirmed. On the other hand the case reported as *Gajrajmati Tiwarin* v. *Swami Nath Rai* (1) lays down that where the applicants for setting aside the decree are not made parties to the appeal, the jurisdiction of the first Court to set aside the exparte decree is not ousted. In the latter case there is an exhaustive review of the previous authorities and it is noteworthy that at pp 25 and 31 the learned Judges were inclined to the view that the opinion prevailing in the Madras High Court was not supported by any provision of the Code of Civil Procedure and was erroneous. The Madras High Court has however since wavered very much. The first case namely that of *Ramanadhan Chetty* v. *Narayana Chetty* (4) has since been overruled by a Full Bench of that High Court vide *Sankara Bhatta* v. *Subraya Bhatta* (5) and in a later case reported as *Palaniappa Chetty* v. *Subramania Chetty* (6)

(1)]1917] 39 All. 13—14 A. L. J. 853—36 I. C. 307.
(2) [1910] 7 A.L.J. 598—6 I. C. 205.
(3) [1915] 37 All. 208—13 A. L. J. 283—28 I. C. 261
(4) [1904] 27 Mad. 612.
(5) [1907] 30 Mad. 535—17 M. L. J. 436.
(6) [1921] 44 Mad. 731—41 M. L. J. 90—(1921) M.W.N. 309—13 L.W. 519—62 I. C. 755.

it has now been conceded that the mere presentation of an appeal does not necessarily take away the jurisdiction of the original Court. On the facts, that was a case clearly in point. There a decree was passed exparte against one of the defendants and an appeal against the decree was preferred by another defendant and was pending in the appellate Court when an application by the former defendant to set aside the exparte decree passed against him was made to the original Court and not to the appellate Court. It was held that such an application was not barred. I have already noted that the view prevailing in the Calcutta High Court has consistently been against the appellant. The case of *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury* (7) is a case which on the facts is very similar to the present one. That also was a case where the appeal was still pending and had not been disposed of. At page 401 the learned Judges remarked that inasmuch as the appeal was still pending the decree of the original Court was still in force and in operation; it had not been superseded by any decree on appeal or merged therein. Under those circumstances it was difficult to appreciate how on principle the view could be maintained that the jurisdiction of the original Court to entertain the application to set aside the decree in so far as it was exparte had been taken away. The view that the immediate effect of the presentation of an appeal to a superior Court is to destroy the jurisdiction of the subordinate Court to deal with the judgment was not accepted as a proposition well-founded on principle.

There is thus the authority of the Madras High Court in *Palaniappa Chetty* v. *Subramania Chetty* (6) and of the Calcutta High Court in *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury* (7) and there are observations in *Gajrajmati Tiwarin* v. *Swami Nath Rai* (1) supporting the Calcutta view. The earlier cases in *Palakdhari Rai* v. *Mankaram Rai* (2) and *Mathura Prasad* v. *Ram Charan Lal* (3) are clearly distinguishable on the ground that in those cases the appeal had been disposed of and the decree of the first Court confirmed.

In view of this state of the authorities as well as in view of the clear wording of Order 9 rule 13 of the Code of Civil Procedure I am of opinion that the contention urged on behalf of the plaintiffs appellants is without any force. The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

(7) [1911] 38 Cal. 394—13 C. L. J. 221—15 C.W.N. 399—9 I. C. 189.

✱ 1924 ALLAHABAD 175

PIGGOTT, J.

Ishdat Tiwari and another—Plaintiffs—Appellants.

v

Tameswar Tiwari and others—Defendants—Respondents.

Stamp Reference in S. A, No. 1553 of 1922, Decided on 20th March 1923.

Court fees Act, S. 7 (V) Sch. 1. Art. 1—Court fee for condition of payment being removed is advelorem on the amount.

Relief claiming that condition of payment before taking possession be removed requires advalorem Court fee on the amount ordered to be paid. [P. 175, C. 1)

Piggott, J.—I have considered the office report and the arguments of counsel. The cross-objections are admittedly liable to an *ad valorem* fee on the subject matter in dispute. This can only be ascertained by an examination of the decrees passed by the Courts below. The first Court dismissed the plaintiffs' suit: the lower appellate Court gave the plaintiff Ishdat a decree "*ba qadr jaedad maliyat mubligh* Rs. 100-10-0." The defendants in their petition of cross-objections ask for the restoration of the first Court's decree. I hold that the value of the subject matter in dispute on their petition of cross-objections in Rs. 100-10-0 ; they must pay an *ad valorem* fee on this amount. I allow them one month within which to make good the deficienoy.

1924 ALLAHABAD 176

DANIELS, J.

Mt. Mahtab Kuer—Defendant—Appellant.

v

Mt. Birhmo and others—Plaintiffs—Respondents.

Application in S. A. No. nil of 1923, Decided on 9th July 1923, from the decree of the D. J., Meerut, D/- 28th March 1923.

Limitation Act, S. 5—Negligence of client's agent is not sufficient cause.

The appeal was decided in the Court below on the 28th March. About 6 weeks later the appellant's agent went to a pleader's clerk and deposited Rs. 6 with him to obtain copies. No instructions were given to the pleader himself. A week later the subordinate Courts closed for thirty days for the vacation. The copies were not applied for till 27th June, a week after the Courts reopened, and were obtained on July 3. Even then the Copy of the judgment of the trial Court was not applied for and this was obtained between July 3 and July 5.

Held, that no sufficient cause was proved so as to admit the appeal beyond time. [P.176, C. 2]

N. C. Vaish—for Appellant.

Daniels, J.—This is an application for admission under S. 5 of the Limitation Act of an appeal which was filed on the 6th July, three days beyond time. As the reasons given by the defendant appeared to me on the face of them insufficient I have heard appellant's counsel in support of the application. He has failed to satisfy me that the application should be allowed.

The appeal was decided in the Court below on the 28th March. About six weeks later, according to the facts stated in the affidavit, the appellant's agent went to a pleader's clerk and deposited Rs. 6/- with him to obtain copies. He does not say that he gave any instructions to the pleader himself. A week later the Subordinate Courts closed for thirty days for the vacation. Copies were not applied for till 27th June, a week after the Courts reopened, and were obtained on July 3. Even then the copy of the judgment of the trial Court was not applied for and this was obtained between July 3 and July 5.

This is not a case of an appeal being filed too late or in the wrong Court owing to a *bona fide* mistake of law or to wrong advice given by a pleader. It is a case of gross negligence on the part of the defendant's agent and of the pleader's clerk whom the latter employed to get the copies for him. A pleader's clerk in this country is not a person to whom obtaining of copies could be safely left without any supervision. The defendant through her agent appears to have taken no steps to find out whether the copies had been obtained until almost the very day that limitation would in the ordinary course expire. Even if the negligence was that of the pleader himself it would make no difference. As Mr. Rustomji says on page 43 of his Limitation Act of 1922 (3rd edition) "Negligence of counsel or solicitor stands on the same footing as that of any other person and a negligence by him is not sufficient cause." A somewhat similar case to to the present is that of *Budhu* v. *Diwan* (1) decided in Letters Patent Appeal. There a fee and some papers were left with a legal practitioner in order to file an appeal. He failed to file it and returned the papers to the client after the period of limitation had expired. It was held that this was not a sufficient ground for admitting the appeal beyond time under S. 5. Even the case on which the appellant chiefly relies, *Nicholas* v. *Asphar* (2) is really against him. The words on which he relies are that the expression "sufficient cause" should receive a liberal construction when no negligence or inaction or want of *bona fides* is imputable to the appellant.

In my opinion the ground alleged for admitting the appeal beyond time in this case is inadequate and I therefore reject the appeal as time barred.

Appeal dismissed.

---

(1) [1915] 37 All. 267—13 A.L.J. 286—28 I.C. 265.
(2) [1897] 24 Cal. 216.

* 1924 Allahabad 177.

SULAIMAN, J.

East Indian Railway Co.—Applicant.

v.

Messrs. Sri Ram Mahadeo—Opposite party.

Civ. Rev. Case decided on 13th November, 1923, from the order of the Small Cause Court Judge, Cawnpore, dated the 27th August, 1923.

Railways Act, S. 72—Risk Note B—Proof of wilful neglect was held sufficient from circumstances.

The plaintiff was the consignee of 126 bags which were loaded at Kidderpur station and were despatched to Cawnpore. The wagon admittedly arrived at Cawnpore and the seals on the wagon were found intact. As the Railway Company had many other wagons to unload, this wagon was put on a siding and remained there for two days when it was reported that the seals on one side of the wagon were broken. When the contents were checked it was discovered that six bags were missing. After a lengthy correspondence which came to nothing the plaintiff instituted the present suit to recover damages for the loss of the bags. It was found on evidence that the yard where the wagon was kept was a very large one and that its wall on the jungle side was broken at several places at the time when the goods were stolen.

Held that though ordinarily the neglect or theft has to be proved by the plaintiff, in this case it has sufficiently been proved and therefore the Railway is liable. (39 All. 418, *Expl.*) [P. 177, Cs. 1 & 2; P. 178, C. 1.]

L. P. Zutshi—for the Applicant.

Sulaiman, J.:—This is an application in revision arising out of a Small Cause Court matter. The plaintiff was the consignee of 126 bags, which were loaded at Kidderpur station and were despatched to Cawnpore. The wagon admittedly arrived at Cawnpore on the 27th of December, 1921, and the seals on the wagon were found intact. As the railway company had many other wagons to unload this wagon was put on a siding and remained there for two days. On the 29th of December it was reported that the seals on one side of the wagon were broken. When the contents were checked it was discovered that six bags were missing. After a lengthy correspondence which came to nothing, the plaintiff instituted the present suit to recover damages for the loss of the bags.

The railway company took several pleas in defence, but three main issues were framed by the trial court. The first was whether the risk note absolved the defendant company of all liability or not. The second was whether the goods were stolen at Cawnpore yard and whether the risk note (Form B) applied and whether the defendant company was guilty of wilful negligence or not. And the third was to what money the plaintiff was entitled.

The learned Judge of the Small Cause Court found these issues in favour of the plaintiff and granted him a decree. The defendant company has come up in revision, and on its behalf it is urged that the findings of the lower court are quite insufficient, and further that the burden lay on the plaintiff to prove that there was either a wilful neglect of the company or theft by or on account of the wilful neglect of its servants.

I am bound to concede that under the contract which took the shape of the risk-note (Form B) a *prima facie* burden lay on the plaintiff to prove neglect or theft of the kind mentioned therein. I agree that a mere proof of the loss of the goods would not be sufficient to entitle the plaintiff to a decree. This was the view expressed by a Beach of this Court in the case of *E. I. Ry. Co.* v. *Nathmal Behari Lal* (1) and the same view has prevailed in other High Courts also. I do not however take that rule to mean that in no case can the burden of proof be shifted to the defendant. It is obvious that the evidence, if any, of wilful neglect or negligence is within the special means of knowledge of the railway company, and it is ordinarily very difficult for a plaintiff to establish that the loss was due to the wilful neglect of the company. Nevertheless, I concede that under the terms of the contract the burden is *prima facie* on the consignee. But I am of opinion that where certain circumstances have been established, either by direct evidence produced by the plaintiff or by the cross-examination of the witnesses for the defendant, from which circumstances wilful neglect or negligence can be inferred, the burden must then be shifted to the defendant company. Such circumstances coupled with the patent fact that the packages have been lost, may justify a court to hold that the burden has been discharged.

As to the case of *E. I. Ry. Co.* v. *Nathmal Behari Lal* (1) referred to above, it is to be noted that the only circumstance

(1) (1917) 39 All. 418=15 A.L.J. 321=39 I.C. 180.

which the plaintiff had there proved was the fact that the goods had been despatched and on arrival of the train in Cawnpore the seals of the doors of five wagons were found to have been broken and six bags of sugar found missing. The learned Judges were doubtful whether it was not a case of theft from a running train.

In the recent case decided by the House of Lords, namely, *H. O. Smith, Ld.* v. *Great Western Railway Company* (2) it was laid down that the burden of proving *in the first instance* that the loss sustained arose from the wilful misconduct of the company's servants was thrown upon the trader. In that case also all that the plaintiff was able to show, as will appear from the remarks on that page, was that he had proved the delivery of the goods to the railway company's servants, and he put in evidence subsequent correspondence between himself and the railway company which suggested that the company was very reluctant to supply information to the plaintiff. On behalf of the plaintiff it was urged by his Counsel that the wilful misconduct on the part of the company's servants must be inferred from the subsequent correspondence. Their Lordships did not accept that contention, and found that the burden of proving wilful neglect had not been discharged.

In the present case I find that the learned Judge of the Small Cause Court had before him a clear issue as to the wilful negligence of the company. In the course of his judgment he has pointed out that the yard where the wagon was kept was a very large one and that its wall on the jungle side was broken at several places at the time when the goods were stolen. He has also commented on the fact that the railway company took two days to unload the goods after their arrival at the station. Having considered these circumstances he remarks: "If the goods are lost on account of the railway company's not making proper arrangements the railway company is liable". Further on he remarks that it was clearly not a case of theft from a running train. In view of these findings I am unable to hold that the judgment of the learned Judge of the Small Cause Court is wrong. There were certain circumstances before him from which it was open to him to infer that proper arrangements had not been made by the railway company, and that therefore there was a wilful neglect. He was entitled therefore to hold that the burden had been discharged. In view of this I am unable to interfere. The application is rejected.

Revision rejected.

(2) [1922] 1 A.C. 178.

---

* 1924 Allahabad 178.

WALSH AND RYVES, JJ.

Ram Chand and others—Plaintiffs.

v.

Maula Baksh and others—Defendants.

F. A. F. O. No. 45 of 1923, decided on 20th October, 1923, from the order of the Subordinate Judge, Muttra, dated 7th December, 1922.

Civ. Pro. Code, S. 11, Expl. 6—Though persons suing in public right in the prior suit are different from persons, suing in public right in the latter suit but the suits relate to the same subject the parties are same and not different.

There is in the Muhalla Taksalyan in Muttra a well. There is a mosque adjoining thereto. The word "well" in this connection includes of course *the Chabutra* and also certain strips of land adjoining the Chabutra and appurtenant to the well. Some time back the trustees of the mosque came into collision with the Municipal Board about this well. They applied to the Municipal Board for a certain sanction under the Municipalities Act and were refused. They then brought a suit asserting that the well was the property of the mosque in which they joined the Municipal Board as defendant and in which certain other persons, Banias of the Mohalla, applied for and were granted permission to join as defendants in defence of the alleged public property in the well. That suit was tried out and it was held that the trustees of the mosque had failed to prove their title to the well, that the well was a public one and that the trustees of the mosque had no right to enclose it.

Fifteen years later the trustees erected what they politely call a room but what is really a structure in which no body is ever likely to sit or was ever intended to sit but which represents in the shape of a wall an obstruction to the public use of the well, in defiance of the previous decision and as a challenge to the public. Possibly the complexion of the Municipal Board had changed in the interval and they did not sue for the removal of that construction and therefore plaintiffs being residents in the Mohalla interested in the well if it is a public one, properly obtained the sanction of the Legal Remembrancer to bring a suit under S. 91 for the removal of the interference with their public right.

Held that applying explanation 6 to this case it is quite clear that the present plaintiffs are claiming under the persons who *bona fide* litigated in

respect of a public right in the first suit, and therefore no issue can be raised in this suit as to whether or not this well and its appurtenances are public property. [P. 180, C. 1.]

N. Asthana—for the Appellants.

Gulzari Lal—for the Respondents.

Walsh, J.:—We find ourselves unable to agree with the view which the District Judge has taken in this particular matter. The point in dispute is a small one and we think the law is really quite clear. It is probable that the true legal considerations were not pointed out to the learned Judge in the argument. There is in the Muhalla Taksalyan in Muttra a well which has become the subject of much litigation. There is a mosque adjoining thereto and the trustees of the mosque, who are of course Muhammadans, have been from time to time asserting a right of private ownership over this well. When the word 'well' is used in this connection it includes of course the *chabutra* and also certain strips of land adjoining the *chabutra* and appurtenant to the well in the same way that when a man speaks of his house he includes the compound and the gate although they are no part of the house. Sometime back the trustees of the mosque came into collision with the Municipal Board about this well. They applied to the Municipal Board for a certain sanction under the Municipalities Act and were refused. They then brought a suit asserting that the well was the property of the mosque in which they joined the Municipal Board as defendants and in which certain other persons, Banias of the Mohalla, applied for and were granted permission to join as defendants in defence of the alleged public property in the well. That suit was tried out and it was held that the trustees of the mosque had failed to prove their title to the well, that the well was a public one and that the trustees of the mosque had no right to enclose it. Fifteen years have passed since that decision and the trustees of the mosque, having regard to their present assertions are entitled to some credit for having sat down patiently under that decision for so long; but whether times have changed, or whether the trustees regard 15 years as a period longer than is reasonable to expect judicial consistency, they have recently erected what they politely call a room but what is really a structure in which nobody is ever likely to sit or was ever intended to sit, but which represents in the shape of a wall an obstruction to the public use of the well. This was no doubt done in defiance of the previous decision and as a challenge to the public. Possibly the complexion of the Municipal Board has changed in the interval. It would have been possible for the Municipal Board representing the public to have brought a suit for the removal of that construction. By section 55 of the Act of 1900, and by the corresponding section of the Act of 1916 all public wells in Muttra are vested in the Municipal Board, but they did not, and the present plaintiffs being residents in the Mohalla interested in the well if it is a public one, properly obtained the sanction of the Legal Remembrancer to bring a suit under section 91 for the removal of this interference with their public right. The Municipal Board of course represents the public in such matters as wells and other things which are vested in them, but the refusal of the Municipal Board, or the negligence of the Municipal Board to assert a public right, does not affect the existence of the public right, and the plaintiffs had a perfect right to sue in assertion of their public right if they could get the necessary authority required by the legislature for bringing such a suit. So stated it would seem perfectly obvious and a mere matter of common sense apart from any legal considerations that the only question was whether the construction put up by the trustees of the mosque was an interference with the public well or with the public enjoyment thereof. Nobody could reasonally suppose that it was open to the trustees in any suit brought by persons representing the public to question the point which has already been decided against them. Probably on this ground no evidence was taken in the court below and the Munsif came to the conclusion that the previous decision bound the defendants, that the construction which the defendants erected amounted to an encroachment and made an order accordingly for its removal. The defendants appealed upon the ground that the matter was not *res judicata*, and the District Judge probably overlooking the provisions of section 11, explanation 6, to which we will refer in a moment, has come to the conclusion that the suit is not between the same parties. The view he probably took was that by section 41 of the

Evidence Act the previous judgment was not a judgment *in rem* within the meaning of section 41, but that it was merely a matter which was to be taken into consideration within the meaning of section 42 of the Indian Evidence Act. He actually says that the issues and the principal parties are different. In one sense they are, but where we differ from him is that in our opinion in the legal sense they are the same. Mr. Gulzari Lal for the trustees of the mosque suggested that the question is this suit related to certain triangular insignificant piece of land which was outside the well and outside the previous dispute. That point was certainly not clearly stated by the defendants in their written statement but it is a question of fact as to whether or not it appertains to the well. The suit was brought in relation to the obstruction which had been erected on this triangular piece of land on the allegation that the piece appertained to the well. It has not been seriously disputed that it does and of course if it does the triangular piece was substantially decided even though the word used in the former judgment was 'well'. With regards to the parties that is not a question of fact but a question of law. The persons are undoubtedly not the same nor is the form under which they appear on the record but the Municipal Board in the previous suit represented the public. The Banias who asked to be joined could not have done so except upon a *bona fide* assertion of an interest in the public right and as they were defendants in the suit brought by the trustees there can be no doubt that they were *bona fide* litigating in respect of a public right which they were defending. Section 11 forbids any court to try an issue which has been substantially in issue in a former suit between the parties under whom they claim. As a matter of fact the section is entirely ungrammatical in this respect but it must mean the parties to the subsequent suit claiming under parties to the prior suit and applying explanation 6 to this case, it is quite clear that the present plaintiffs are claiming under the persons who *bona fide* litigated in respect of a public right in the first suit. The result is that section 11 applies and that no issue can be raised in this suit as to whether or not this well and its appurtenances are public property. There being nothing else left in the suit the appeal must be allowed and the judgment and decree of the Munsif restored with costs here and below.

We suggest that if the parties are desirous of arriving at a final agreement which will bind them and their successors for all time as to the actual dimensions of this public well the best plan would be for them, if they are agreeable thereto, to apply to the Munsif under this decree to make a further addition thereto. Of course he cannot do so without their consent but with their consent there will be no difficulty whatever, and on such application the Munsif either by going there himself or by sending his amin, could demarcate the land itself, have a photo taken or by measurement have a plan prepared and affixed to this decree finally showing in a clear picture the dimensions of the land appertaining to the well. If any attempt to do this is made or any difficulty occurs reference may be made to this Bench, but we do not wish the Munsif to understand that he is compelled to do anything if he is not disposed to do so.

Appeal allowed.

1924 Allahabad 180.

SULAIMAN, J.

Bombay Baroda and Central India Railway Company—Defendant-Applicant.

v.

Firm Budh Sen-Pusp Chand—Plaintiff-Opposite party.

Civ. Rev. No. 88 of 1923, decided on 18th July, 1923, from the order of the Small Cause Court Judge, Agra, dated the 24th November, 1923.

(a) *Railways Act, S. 47—Rules under r. 59—Rule does not authorise Railway to alter contract already made.*

A rule reserving the Railway Company's right of re-measurement, re-weighment, re-calculation and re-classification of rates, terminal and other charges at the place of destination did not give the railway company power to alter the contract between the parties and charge maund rate in lieu of wagon rate. (29 All. 228, F.B., *Foll.*; 14 A.L.J. 494, *Ref.*) [P. 182, C. 1.]

(b) *Civ. Pro. Code. O. 8, r. 5—Matter said to be not "admitted" is denied by implication.*

Where a matter in a pleading is merely stated to be "not admitted" in the written statement it cannot be deemed to be admitted, for it is at least denied by implication. The punctuations in r. 5 however do appear to mean the contrary. [P. 182, C. 2.]

S. S. Sastry—for the Applicant.

K. N. Katju—for the Opposite party.

Sulaiman, J.:—This is a revision from an order of the Court of Small Causes.

The plaintiff firm despatched 57 bundles of cotton weighing 63 maunds and 2 seers from Balrampur station which is on the B. N. W. Railway to the Agra Fort on the B.B. and C.I. Railway. According to the allegations in the plaint the staff of the defendant company when asked, gave out the rate of freight on cotton to be Rs. 1-8 per maund and it was on this understanding that the plaintiff despatched the goods from Balrampur to Agra Fort under the Railway receipt No. 9937, dated the 19th of September, 1921. The plaintiff goes on to allege that, though the actual weight of the goods despatched was 63 maunds, the staff of the Railway Company illegally and unjustifiably charged Rs. 223-2 for 108 maunds, and that the extra amount was paid by the plaintiff under protest which he is entitled to recover from the defendant. The written statement which was filed by the defendant company was very vague and somewhat evasive. Referring to the allegation of the plaintiff that the staff of the defendant company when asked had given out that the rate of freight on cotton would be Rs. 1-8 per maund and that it was on this understanding that the plaintiff despatched the goods, the written statement merely stated "not admitted". The defendant company however went on to plead that out of the consignment of 57 bundles some were loaded in one wagon, which left no room for the remaining commodity to be loaded in, that under paragraph 6 of the instructions printed as notice to the consignors on the back of the railway receipt and forwarding note form, the company reserved the right of re-weighment, re-measurement and re-calculation of freight, and that the charges were correctly recovered. The learned Judge of the court below in his judgment appears to have accepted the plaintiff's case that the railway authorities realised the extra amount at the destination. The learned Judge accepted the statement of the loading clerk to the effect that after loading 52 bundles of cotton no place was left for loading any more goods. It was the defendant's case as disclosed by the loading clerk's evidence that as these articles were bulky they could not be loaded in one four-wheeled wagon and that these bundles were despatched in a bogie carriage, *i. e.*, an eight-wheeler. The learned Judge however overruled the defence on the ground that it had not been shown on behalf of the defendant that the 52 bundles in question could not be loaded in a four-wheeled wagon. This is not quite consistent with the remark previously made as to the statement of the loading clerk. The facts as alleged by the defendant company seem to be that the bundles of cotton were so bulky that they could not all be loaded in one small wagon.

There can be no doubt that under rule 59 of the General Rules when goods tendered for conveyance are of such description that owing to their bulk, measurement, or other cause, it is found impossible to load each broad-gauge wagon to the extent of 120 maunds, and metre or narrow-gauge wagon 81 maunds, such goods will be subject to a minimum charge of 120 and 81 maunds respectively, per wagon, unless any special exception is noted. The above charges are based on four-wheeled wagons. Should the conditions of the consignment involve the use of larger vehicles, the charges will be increased in the proportion of one bogie carriage for two vehicles.

57 bundles of cotton weighed about 52 maunds. If it is a fact that all the 57 bundles could not be loaded in one four-wheeled wagon it is patent that owing to their bulk it is impossible to load 81 maunds of goods in a narrow-gauge wagon. Under rule 58 therefore it is clear that the defendant company was entitled to charge at the minimum rate of 81 maunds per wagon. If the goods were carried in two small four-wheelers or in one bogie carriage then the company was entitled to charge for 162 maunds.

The learned Judge seems to have drawn a distinction between 'bulky goods' and 'goods in bulk'. The expression 'goods in bulk' does not find place in rule 59 at all and its true meaning is altogether irrelevant. There can be no doubt that the bundles of cotton were bulky and it was in consequence of their bulk that 81 maunds of the goods could not be loaded in one small wagon. The railway company was certainly entitled to charge at the minimum rate of 81 maunds per wagon. In this view of the matter the decree of the learned Judge of the Court of Small Causes would not be quite correct.

The learned Vakil for the plaintiff-respondent however supports the decree of the Court below on a different ground. His

case is that according to the allegations in the plaint which were not expressly denied by the defendant and which have been assumed to be correct by the learned Judge of the court below, there was an express agreement between the plaintiff and the railway company to carry the goods at the maund rate, and therefore it is not now open to the company to alter the terms of the contract and demand a charge on the basis of wagon rate. The railway company in their written statement themselves referred to paragraph No. 6 printed on the back of the railway receipt which was to the effect that they had reserved a right of re-weighment, re-measurement and re-calculation of freight, etc. This clearly implies that there was a re-calculation and the extra charge was found recoverable on the re-calculation. As I have already noted there was no express denial of the plaintiff's allegation that an assurance had originally been given by the railway authorities that the goods would be carried at the maund rate.

If there was an original contract to carry the goods according to the maund rate then it is clear that the defendant company would not be entitled to alter that agreement. The rule on which the defendant relied is quite similar to the rule which was under consideration in the Full Bench case of *Chunni Lal* v. *The Nizam's Guaranteed State Railway Company, Ld.* (1). A similar point arose in the case of *Alla-uddin* v. *The G.I.P. Railway Company* (2). At page 232 of the Full Bench case cited above, it was pointed out that a rule of this kind reserving the railway company's right of re-measurement, re-weighment, re-calculation and re-classification of rates, terminal and other charges at the place of destination did not give the railway company power to alter the contract between the parties and charge maund rate in lieu of wagon rate. The second case mentioned by me was a case where the railway company wanted to alter the maund rate into wagon rate and their right to do so under the General Rules was negatived. In view of these pronouncements it is clear that if the original contract between the parties was that the goods should be carried according to the maund rate it would not be open to the defendant company to alter that contract and charge according to the wagon rate.

The learned Vakil for the applicants in rejoinder has urged that the defendant company did not admit that there was any such original contract, nor did they admit that the extra amount charged at the destination was based on an alteration of the rates.

The plaintiff did not go into the witness-box nor did he produce any evidence. The railway company which presumably is in possession of the railway receipt and the forwarding note has also withheld them. The evidence on the point therefore is very meagre.

It is contended on behalf of the respondent that under Order 8, rule 5 if a matter is not denied specifically or denied by necessary implication or if it is merely stated to be 'not admitted' in the written statement it should be taken to have been admitted. Reference is made to certain old English cases where pleadings were strictly construed, as the rules of pleadings in England are very stringent. One would have thought that where a matter is expressly stated to be "not admitted", it cannot be deemed to be admitted, for it is at least denied by implication. The punctuations in rule 5 however do appear to support the contention of the learned Vakil for the respondent, but I do not propose to go into this matter in any further detail, because there is a proviso to that rule which says that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission. Under this proviso therefore even if there be an implied admission by the defendant the court can require evidence to prove it.

Having read the pleadings I am of opinion that the question of there having been an express contract to carry the goods according to the maund rate has not been properly tried by the court below. If there really was such a contract then on the rulings referred to by me the defendant cannot charge wagon rate in lieu of maund rate. On the other hand if there was no such contract at all and the railway company had originally charged at the wagon rate but there was a miscalculation in the amount charged, then certainly it would be open to the railway company to recover the balance.

(1) (1907) 29 All. 228=2 M.L.T. 42=(1907) A.W. N. 21=4 A.L.J. 80.
(2) (1916) 14 A.L.J. 494=34 I.C. 104.

I therefore allow the application and setting aside the decree of the court below remand the case to that court for disposal according to law. The parties will be at liberty to produce fresh relevant evidence if they think necessary. As the whole trouble has been caused by the vagueness in the defendant's pleading I direct that the parties should bear their own costs in this Court. The costs in the trial court should abide the event.

Case remanded.

---

* 1924 Allahabad 183 (1).

DANIELS, J.

Aziz Ahmad—Applicant.

v.

Buddhu Kahan and others—Opposite party.

Criminal Revision No. 125 of 1923, decided on 12th April, 1923, from an order of Sessions Judge, Kumaun.

Crim. Pro. Code, S. 522—Court of appeal or revision cannot make an order under.

A Court of appeal or revision cannot compel the trial Court to pass an order under S. 522 where the latter in the exercise of its discretion, has declined to do so. (39 Cal. 1050 and 14 P.R. (Cr.) 1919, *Ref.*)

Sheo Dihal Sinha—for the Applicant.

Peary Lal Banerji—for the Opposite party.

Daniels, J. :—This is an application in revision asking this Court to make, under section 522 of the Code of Criminal Procedure, an order for the restoration of property, which the trial court has refused to make. The discretion to pass or not to pass such an order is very clearly vested in the trial court by the section, which says that the court may pass such an order *if it thinks fit*. I know of no case in which a court of appeal or revision has compelled a court to pass such an order in a case in which, in the exercise of its discretion, it has declined to do so. Indeed there is the authority of two High Courts, those of Calcutta and the Punjab, for the view that a court of appeal or revision has no power to do so. This was held by the Calcutta High Court in the case of *Bhagabat Shaha* v. *Sadique Ostagar* (1), and by the Punjab High Court in *Muhammad Din* v. *The Crown* (2). Even if this Court in revision has power to pass the order applied for, there are no such exceptional circumstances in this case as would justify such action. I dismiss the application.

Application dismissed.

(1) (1912) 39 Cal. 1050=16 C.W.N. 811=13 Cr. L.J. 608=16 I.C. 176.

(2) (1919) 14 P.R. 1919 Cr.=33 P.L.R. 1919=20 Cr. L.J. 30=1 P.W.R. 1919 Cr.=48 I.C. 510.

1924 Allahabad 183 (2).

KANHAIYA LAL, J.

Bhagwan Das—Decree-holder-Appellant.

Mt. Mahmud Bano—Objector-Respondent.

E. S. A. No. 168 of 1923, decided on 11th June, 1923, from the decree of the District Judge, Bulandshahr, dated 30th October, 1922.

(a) *Civ. Pro. Code, S. 47 and O. 21, r. 58—Objection by legal representative that he holds property as Mutwalli to be tried under r. 58 and not under S. 47.*

In pursuance of an execution proceeding instituted by the decree-holder against Mt. Mahmud Bano the widow and legal representative of the deceased judgment-debtor for the realisation of the decretal amount by the attachment and sale of certain property, three houses were attached as the property of the deceased judgment-debtor. Mt. Mahmud Bano filed an objection that she held the house in question as a Mutwalli under a deed of endowment executed by her and her husband ;

Held that the question is to be determined under O. 21, r. 58 and not under S. 47, C.P.C. [P. 184, C. 1.]

(b) *Appeal—Second appeal lies from lower appellate Court's decree, entertaining first appeal without jurisdiction.*

Where a Court of first appeal entertained an appeal in a case in which no appeal lay to that Court a second appeal would lay to the High Court from the order or decree passed in such an appeal, although no such objection was raised in the lower appellate Court. (13 All. 575 ; 12 A.L.J. 1113 ; 45 Cal. 926, *Foll*.) [P. 185, C. 1.]

S. N. Gupta—for the Appellant.

N. C. Viash—for the Respondent.

Judgment :—This appeal arises out of an execution proceeding instituted by the decree-holder-appellant against Musammat Mahmud Bano, the widow and legal representative of the deceased judgment-debtor, for the realisation of the decretal money by the attachment and sale of certain property. In pursuance of his application three houses were attached as the property of the

deceased judgment-debtor. Musammat Mahmud Bano filed an objection that she held the houses in question as a *mutwalli* under a deed of endowment executed by her and her husband on the 7th of May 1911. The court of first instance treated the objection as one under section 47 of the Civil Procedure Code and after examining the evidence adduced in the case came to the conclusion that the deed of *wakf* in question had not been carried into effect and was not a genuine transaction. It further held that Musammat Mahmud Bano was not in possession of the houses in dispute as a *mutwalli* but she was in possession as the heir of her husband. From that decision there was an appeal to the District Judge which was allowed without any question being raised or considered as to whether such an appeal was maintainable under section 47 of the Code of Civil Procedure.

It is urged here on behalf of the decree-holder-appellant that no appeal lay to the District Judge because the capacity in which Musammat Mahmud Bano was claiming the release of the property in dispute from attachment was different from the capacity in which she had been impleaded as a party to the execution proceeding. Order 21, rule 58 of the Code deals with objections which involve the determination of the question whether the property attached is liable to such attachment or not. A person who has been impleaded as a party to a decree or to an execution proceeding as the heir of a deceased debtor is a party to such decree or proceeding. If such a person claims to be in possession of the property attached not in his or her own right or in his or her right as a legal representative of the deceased judgment-debtor but claims to be so in possession in his or her capacity as a *mutwalli* of an endowment, the objection can be considered under Order 21, rule 60 of the Code; but subject to the result of a suit under Order 21, rule 63, the order passed thereon is conclusive. Section 47 contemplates questions relating to the execution, discharge or satisfaction of a decree between the parties to a suit or their representatives. A person who claims certain property as a *mutwalli* of a trust is not a representative of judgment-debtor, though the author of the trust may have been the judgment-debtor himself, except where such trust is created after the suit or the decree passed therein.

In *Nathmul Das* v. *Tajammul Husain* (1) where a judgment-debtor upon the attachment of certain land in execution of a decree passed against him personally by the Revenue Court instituted a suit for a declaration and establishment of his right to such land, not as his own property but as *wakf*, of which he claimed to be *mutwalli* or trustee, it was held that inasmuch as plaintiff was not suing in his own right but in his capacity as custodian, trustee or manager of the *wakf* property, he must be deemed to fill a character separate from that in which the decree in question was passed against him and section 244 of the old Code of Civil Procedure was inapplicable.

In *Ramnathan Chettiar* v. *Levvai Marakayar* (2) it was similarly held that a person claiming certain property alleged to have been set apart for charitable purposes as a trustee puts forward a claim which cannot be determined in a subsequent proceeding because the court has in such cases to look to the substance of the objection and not to the claim that is put forward by one person rather than another. A person claiming a property under a trust made by a third person is not a representative of a party to the suit any more than a person claiming the property as a personal property when the decree passed against him charges him with liability as a trustee or in a representative character. And it would make no difference if the trust was created by the judgment-debtor himself prior to the execution of the suit which result in such a decree.

In *Kartick Chandra Ghose* v. *Ashutosh Dhara* (3) an objection by a judgment-debtor or his representative to the attachment or sale of certain property on the ground that he held the same in trust for some third person or a charitable institution was similarly held to be excluded from the operation of section 244 of the old Code of Civil Procedure.

It is urged on behalf of the judgment-debtor-respondent that the real question for determination in the present case is whether certain property forms a part of the assets of the deceased judgment-debtor. That is an aspect which presents itself in

(1) (1884) 7 All. 36=(1884) A.W.N. 218.
(2) (1900) 23 Mad. 195=10 M.L.J. 64 (F.B.).
(3) (1912) 39 Cal. 298=16 C.W.N. 26=14 C.L.J. 425=12 I.C. 163 (F.B.).

every case in which an objection to the attachment of any property, whether it is made by a third person or by the legal representative of the deceased debtor. The capacity in which the claimant seeks to have the attachment removed, however, determines the remedy, which is further open to him, if the objection is decided against him, or if the objector claims the said property as a trustee for a third person or a charitable institution, the claimant is not really a judgment-debtor or his legal representative but he represents such third person or charitable institution.

It is also urged that if no appeal lay to the Court below, no appeal would similarly lie here from the decree passed by that Court, but if the Court below assumed jurisdiction and passed a decree such a decree is as much open to a second appeal as a decree passed in a suit by a Court which has no jurisdiction to entertain that suit.

In *Jwala Prasad* v. *Salig Ram* (4) which was followed in *Wilayat Husain* v. *Ram Lal* (5) it was held that where a Court of first appeal entertained an appeal in a case in which no appeal lay to that Court, a second appeal would lie to this Court from the order or decree passed in such an appeal.

In *Bandiram Mookerjee* v. *Poorna Chandra Roy* (6) a similar view was taken. It is true that the decree-holder-appellant raised no such objection in the lower appellate Court, but where a question of jurisdiction is involved, he is not estopped from raising that objection here.

The appeal is therefore allowed and the order of the lower appellate Court is set aside and that of the Court of first instance restored with costs here and in the lower appellate Court.

Appeal allowed.

(4) (1891) 13 All. 575 = (1891) A.W.N. 168.
(5) (1914) 12 A.L.J. 1113 = 25 I.C. 648.
(6) (1918) 45 Cal. 926 = 27 C.L.J. 115 = 43 I.C. 758.

1924 Allahabad 185.

RYVES, J.

Emperor—Petitioner.

v.

Ram Jatan—Opposite Party.

Criminal Reference No. 184 of 1923, decided on 29th March, 1923, made by 1st Addl. Sessions Judge, Gorakhpur.

Crim. Pro. Code, S. 556—Magistrate being a witness to the identification proceedings is no ground for commitment.

Where the Magistrate, who committed the accused, was himself a Magistrate of the first class, but passed an order of commitment on the ground that he was a witness of the identification proceedings in the case:

Held, that the proper course for him, was to have moved the District Magistrate (17 A.L.J. 456, *Foll.*) [P. 185, C. 1.]

REFERRING ORDER:—I am afraid the order of commitment in this case is bad in law. The accused Ramjatan Ahir, an old man of 50, has been sent up on a charge under section 394 of the Indian Penal Code. The case against him is that he robbed Musammat Sitabjan, a prostitute by profession, on the evening of 7th December, 1922, after dark as after getting down from the Railway Station she was going to a village accompanied by one Gharbharan, and after beating both of them carried away from her person a *hansuli*, a *bali* and an *alwan*. The charge is one that was triable by a Magistrate of 1st class, Presidency Magistrate or Court of Sessions. The learned Magistrate, Mr. B. V. Bhadkamkar, I.C.S., who committed the accused, is himself a Magistrate of the first class. In his order of commitment he says, "Though the case is of a petty nature, I am committing accused to the Sessions as I am myself a witness of the identification proceedings." This is the only reason he gives for adopting that course. He does not say that the offence committed was one which, in his opinion, he could not adequately punish. On the other hand, he regarded the crime "of a petty nature" and as such within his competence to pass an adequate sentence. As the case was triable by the learned Magistrate, I think he should have proceeded under section 254, Criminal Procedure Code, which provides that in a case which he is competent to try, if a Magistrate thinks he could adequately punish, he shall frame a charge and proceed with the trial, and he should have committed to Sessions only in case he considered that he could not pass an adequate sentence which in this case he evidently did not think. In any case, he does not express his opinion to that effect. If he felt that by reason of his being a witness in the case he should not himself try it the proper course for him, I think, was to have moved the District Magistrate

to transfer it to some other Magistrate, competent to try it and subordinate to him. The ruling in *Emperor* v. *Bindeshri Goshain* (1) seems to me in point and governs this case. I, therefore, refer the matter to the Hon'ble High Court with a recommendation that the commitment may be quashed."

Ryves, J.:—I agree with the reasons given by the learned Sessions Judge and quash the commitment to sessions. I send the case back to the District Magistrate of Gorakhpur, who will depute a Magistrate competent to try it other than Mr. Bhadkamkar. Let the papers be returned.

Commitment quashed.

(1) (1919) 41 All. 454=17 A.L.J. 456=20 Cr. L.J. 273=50 I.C. 161.

1924 Allahabad 186 (1).

DANIELS, J.

Sita Ram and others—Applicants.

v.

King-Emperor—Opposite Party.

Crim. Rev. No. 224 of 1923, dated 21st May 1923, from the order of Sessions Judge, Saharanpur, dated 29th November, 1922.

Public Gambling Act, S. 6—Direct evidence of taking commission not necessary.

It is not necessary for the police to give direct evidence that the gambling was being carried on for the profit of the keeper of the house. (20 A.L.J. 213, *Dist.*)

A. P. Dube—for the Applicants.

The Assistant Government Advocate—for the Crown.

Judgment:—This is an application in revision against the conviction of the applicants under section 4 of the Gambling Act. The police made a raid on the house of one Surja, as gaming was going on. The accused were found present and instruments of gaming were found. The warrant had been duly obtained, the presumption contained in section 6 of the Gambling Act therefore applied. It has been suggested on the authority of the case of *Lachchi Ram* v. *Emperor* (1) that it was necessary for the police to give direct evidence that the gambling was being carried on for the profit of the keeper of the house. I have examined that judgment and find that it contains no reference to section 6. Here the presumption contained in that section was clearly applicable and dispensed with the necessity of direct evidence that a commission was being taken by the keeper of the house. The revision accordingly fails and I dismiss it.

Petition dismissed.

(1) 1922 All. 61=20 A.L.J. 218=23 Cr. L.J. 196=65 I.C. 852.

1924 Allahabad 186 (2).

DANIELS, J.

Chandu Lal—Applicant.

v.

The Crown—Opposite Party.

Crim. Rev. No. 255 of 1923, decided on 24th July, 1923, from the order of the Sessions Judge, Saharanpur, dated 10th March, 1923.

Evidence Act, S. 105—Penal Code, S. 84—Plea of insanity to be proved by the accused.

Where the evidence as to the insanity of accused is conflicting, the accused should be convicted as on him lies the burden of proving insanity which in the case of conflicting evidence cannot be said to be sufficiently discharged.

S. A. Hyder—for the Applicant.

The Assistant Government Advocate—for the Crown.

Daniels, J.:—This a somewhat curious case. The applicant committed an assault on the wife of a Civil Surgeon and was sentenced to nine months' rigorous imprisonment. The defence of insanity was raised at the trial. The medical evidence regarding the accused was conflicting. One doctor thought him insane, but on the other hand the Superintendent of the Bareilly Lunatic Asylum, under whose supervision he was placed, reported and gave evidence that he was not insane. Under these circumstances the learned Sessions Judge says that if the burden of proving affirmatively the man's unsoundness of mind had been on the prosecution he would say that it had not been discharged, but insanity being of a nature of a general exception which must be proved by the accused, he was of opinion that the defence had failed to prove insanity. This is a correct statement of the law and in view of the evidence of the Superintendent of the Lunatic Asylum I do not think that it can be challenged on the evidence. I may add that the case

was again reported to Government by the Sessions Judge for such action as Government might take and Government has since returned the record stating that it is advised that the man is not insane. Under the circumstances I do not see my way to interfere with the order passed by the Court below.

I accordingly dismiss the application.

Revision rejected.

1924 Allahabad 187.

DANIELS, J.

Bakshi—Applicant.

v.

The Crown—Opposite Party.

Crim. Rev. No. 316 of 1923, decided on 13th July, 1923 against the order of the District Magistrate, Farrukhabad, dated the 21st May, 1923.

Crim. Pro. Code, S. 195—Penal Code, S. 182—Sanction not necessary where false report is made to the police though subsequently same complaint is also made to the Court.

Where a false charge is made to the police and not to a Court no sanction is required. The accused's having subsequently made a complaint in Court is no bar to the Court's proceeding with the trial of the offence under S. 182, I.P.C., without sanction. (17 A.L.J. 32, *Foll.*) [P. 187, C. 2.]

A. Dube—for the Applicant.

The Asst. Govt. Advocate—for the Crown.

Daniels, J.:—This is an application for revision of an order of the District Magistrate directing the trial court to proceed with the trial of the accused under section 182, I.P.C. It appears that the applicant made a report to the police which was alleged to be false and sanction for his prosecution under section 182, I.P.C., was duly granted. The applicant was put on his trial before a Magistrate of the second class. This Magistrate being of opinion that the evidence disclosed an offence under section 211, I.P.C., which he was incompetent to try submitted the proceedings to the Sub-Divisional Officer under section 349, Cr.P.C. This officer framed a charge under section 211, I.P.C., but after the hearing of the case was complete came to the conclusion that he could not try the accused on this charge for want of previous sanction by the court. He therefore sent a report to the Magistrate suggesting that the case should be referred to the High Court under section 435, Cr. P. C., with a view that the whole proceedings be quashed. The District Magistrate declined to make a reference holding that whether sanction to the charge under section 211, I.P.C., was required or not the accused could certainly be tried for an offence under section 182, I.P.C., for which he was originally placed on trial and directed the trying Magistrate to proceed with the case. Against this order the applicant has come in revision to this Court.

Where a false charge is made to the Police and not to a Court a perusal of section 195, Cr. P. C., makes it clear that no sanction is required. The Calcutta High Court has however held in a series of cases of which it is sufficient to mention the case of *Tayebulla* v. *Emperor* (1) and *Brown* v. *Ananda Lal Mullick* (2) that where an accused person has gone on to prefer a complaint in court his accusation to the Police must be held to have been made in relation to the proceedings in court subsequently instituted and that sanction is therefore necessary. A Bench of this Court in *Emperor* v. *Hardwar Pal* (3) was inclined to the same view. Now in this case the accused did subsequently make a complaint in court which was dismissed, though the present prosecution has not been based on that complaint but, as a perusal of the charge-sheet shows, on the original report made at the Police station on 1st September last. The present case is however almost exactly covered by the decision in *Mula* v. *Emperor* (4). There also the accused was charged in the first instance under section 182, I.P.C., before a Magistrate of the second class. That Magistrate returned the record to the District Magistrate on the ground that the accused had committed an offence under section 211, I.P.C., which he was not authorised to try. The District Magistrate, as in this case, directed the trial to proceed. This Court in revision upheld the order on the ground that the accused's having subsequently made a complaint in court was no bar to the court's proceeding with the trial of the

(1) (1916) 43 Cal 1152=24 C.L.J. 134=20 C.W.N. 1265=18 Cr.L.J. 13=36 I.C. 845.

(2) (1917) 44 Cal. 650=20 C.W.N. 1347=18 Cr.L.J. 25=25 C.L J. 59=36 I.C. 857.

(3) (1912) 34 All 522=10 A.L.J. 61=13 Cr.L.J. 702=16 I.C. 510.

(4) (1919) 17 A.L.J. 32=20 Cr.L.J. 114=49 I.C. 98.

offence under section 182, I.P.C. It is interesting to note that the Judge who decided this case was one of the Judges who had previously decided the case of *Emperor* v. *Hardwar Pal* (3). In this case the facts alleged by the prosecution, whether they amount to an offence under section 211, I.P.C., or not, undoubtedly constitute an offence under section 182, I.P.C. It was in respect of this offence that the present trial was commenced. In my opinion no useful purpose would beserved by quashing the present proceedings and requiring the accused to be put on his trial afresh after all the evidence has been recorded.

There is one further objection which it is necessary to notice. The complaint which the accused filed in Court was rejected on a Police report without his being given an opportunity to produce his witnesses. This is contrary to the rulings of this Court, but any objection on this score should have been taken at an earlier stage and not when the trial of the accused is practically concluded.

For the above reasons I dismiss the present application.

Revision rejected.

1924 Allahabad 188.

DANIELS, J.

Angnoo—Applicant.

v.

The Crown—Opposite party.

Crim. Rev. No. 327 of 1923, decided on 13th July, 1923, against the order of the Sessions Judge, Budaun, dated the 12th May, 1923.

U. P. Municipalities Act, S. 85 (1)—Striking work after notice is an offence.

On 10th April ten sweepers sent a notice to the Municipal Board demanding an increase of pay. Having received no reply to this they on 20th April sent a further notice threatening to strike on 1st May unless their demands were granted. On 1st May they abandoned their work in accordance with the notice. The Magistrate examined the Health Officer in the case of one of these and the latter stated that there was the danger of Cholera epidemic.

Held, that they were rightly convicted under S. 85 (1). [P. 188, C. 2.]

H. Cecil—for the Applicant.

The Asst. Govt. Advocate—for the Crown.

Daniels, J.:—These are ten applications in revision by ten sweepers who have been convicted under section 85 (1) of the U.P. Municipalities Act and sentenced to two months' rigorous imprisonment. That section renders a Municipal sweeper who resigns or abandons his employment without the permission of the Board liable to two months' imprisonment. The section is a very drastic one and requires to be very carefully worked. It was obviously enacted to meet the grave public danger which may arise from a sudden strike of sweepers in a town. In this case there is no question whatsoever that the action of the sweepers amounted to an offence under the section. It appears that on 10th April they had sent a notice to the Board demanding an increase of pay. Having received no reply to this they on 20th April sent a further notice threatening to strike on 1st May unless their demands were granted. This notice appears to have been sent by almost the entire staff of the sweepers of the Municipality. On 1st May they abandoned their work in accordance with the notice. It appears that the matter was under the consideration of the Municipal Board and no reply had been given to their notice. The Magistrate thereupon sent for ten of the ring-leaders and on their admitting the facts sentenced them by a summary trial as stated above. The procedure adopted was drastic and could only be justified by the extreme danger to the health of the town which would result if it was left unscavenged. The Magistrate has stated in his explanation that he examined the Health Officer in one case and the latter stated that there was danger of a cholera epidemic. It is said that the trial was illegal but having regard to the provisions of sections 242 and 243 of the Criminal Procedure Code I am not prepared to hold that this was the case. The judgment has also been attacked but it complies strictly with the provisions of section 263, Criminal Procedure Code.

A plea has been taken on the ground of sentence. The accused are now on bail having already served more than a month and a half of their sentence. The danger which led to the proceedings has passed and in my opinion it is not necessary to send them back to jail to undergo the remainder of their sentence. I accordingly reduce the sentence to the amount already undergone but in other respects dismiss the applications.

Sentence reduced. Revisions rejected.

1924 Allahabad 189.

WALSH, J.

Naini Mal—Petitioner.

v.

The Crown—Opposite party.

Crim. Rev. No. 344 of 1923, decided on 15th June, 1923, against the order of the Sessions Judge, Mainpuri, dated 7th April, 1923.

Crim. Pro. Code, S. 115—Order of restoration without notice to custodian and without enquiry as to his title is bad.

Four men were charged a long time ago with stealing 59 bags of mustard seed from the grain market. The thieves dealt with the seed by selling 113 maunds of it to the petitioner. This transaction by the present petitioner took place at a considerable distance, i.e. 30 or 40 miles from the scene of the crime. No charge was made against them for receiving stolen property. After one trial of three of the thieves had taken place in the year 1921 and after a second trial of the fourth thief had taken place in the midsummer 1922, on the 17th of February, 1923, a first Class Magistrate issued an order attaching other property of the applicants as security or by way of satisfaction, for an assumed liability of the value of the grain which they had purchased two years before in the ordinary course of their business.

Held, that the proceeding was absolutely unintelligible and had no reasonable basis. [P. 189, Cs. 1 and 2].

J. M. Banerjee—for the Petitioner.

Judgment:—This appears to be an outrageous proceeding lacking either in legal justification or common sense, so far as I can understand. From the somewhat scanty materials before me, it appears that four men were charged a long time ago with stealing 59 bags of mustard seed from the grain market. The thieves appear to have dealt with the seed by selling 113 maunds of it to the firm of the present petitioner. This transaction by the present petitioner's firm took place at a considerable distance, *i.e.*, 30 or 40 miles from the scene of the crime. No charge has been made against them for receiving, nor could any such charge be reasonably made. They allege that they gave every facility to the prosecution to trace the accused, showing the dealings which the thieves had had in the commodity, and produced their books to show that they themselves as purchasers had dealt with the grain in the ordinary course of business. Under such circumstances as these a Criminal Court ought to hesitate a long time before making an order for restitution even if the goods were still in *esse*. Where a question of *bona fides* and of title by purchase, or otherwise, clearly arises, the duty of the Criminal Court is to leave the complainant to his remedy in the Civil Court if he thinks he has one. But so far as I can gather from section 515 the jurisdiction of the Criminal Court is confined to an order at the conclusion of the trial for the disposal of the property which has been stolen and which is before it in the criminal proceeding. It need not be in the possession of the court, but it must be still capable of being earmarked, and such an order can only be made at the conclusion of the trial and in the presence of the purchaser of the commodity who has a right to be heard. According to the allegation made before me, which derives corroboration from what the Sessions Judge has said in his judgment dealing with an application which was subsequently made to him, it appears that what has happened is this. After one trial of three of the thieves had taken place in the year 1921, and after a second trial of the 4th thief had taken place in midsummer 1922, on the 17th of February, 1923, a first class Magistrate issued an order attaching other property of the applicants as security, or by way of satisfaction, for an assumed liability of the value of the grain which they had purchased two years before in the ordinary course of their business, and it is alleged before me that moveable property of the applicants is now under attachment. But shortly the action of the Magistrate may be summarised in this way that, it is equivalent, not merely to hearing and adjudicating, but also to issuing execution upon a judgment in a suit for damages in favour of somebody or another, who is not before him, against somebody else who had no notice of the proceeding. Such a proceeding has no relation as far as I can see to anything known to the law either in the Criminal or Civil Code. If it is possible to give it a legal terminology it would appear that the order of attachment is equivalent to an order of an execution court executing a decree for Rs. 855-8-3 as damages for a cause of action which I am unable to specify against a person who has never been sued and who was not even before the court. If it be the fact that the order was made six months after the last trial that is sufficient to condemn it, but apart from that the proceeding seems to be absolutely unintelligible and to have no reasonable basis. I

am quite unable to understand what the Magistrate thought he was doing. The Sessions Judge himself was obviously in a difficulty in applying any legal phraseology to the proceeding, and he resorted to the convenient colloqualism in saying that the original owners of the mustard seed "wanted their mustard back." I have no doubt they did, but most people whose property is stolen want it back, or its price. That does not give a cause of action, and certainly does not give, jurisdiction under this section. I have taken the unusual course of dealing with the matter summarily because the petition, which ought to have been supported by an affidavit, appears to state facts which are uncontradicted, and which are corroborated by the Sessions Judge's judgment. I am not surprised that the Sessions Judge felt himself incompetent to deal with the proceeding and got out of the difficulty by denying himself jurisdiction to interfere with an order, which had no jurisdiction in its inception. I am willing to listen to any representation which the District Magistrate chooses to make to me, or the Magistrate who made this order, if they find it worthwhile to pursue this matter any further. No harm can be done by quashing the whole proceeding forthwith, because if this application is based upon any misrepresentation of fact, I can set aside this order and revive the attachment, and if the Magistrate is right in thinking that he can make this order at any time after the trial, there is no reason why on giving notice to the applicants he should not try and make another, though I do not suggest that he should do so. A copy of this order must be sent to the District Magistrate of Agra with a direction that no further proceedings of any kind in relation to this attachment be permitted, and I direct that such property as has been attached be released from attachment. A further copy must be sent to the District Magistrate of Mainpuri and I suggest to him that he should call upon the first class Magistrate who made this order to explain himself. If either of these gentlemen wish to submit any explanation to this Court, it may be sent to me and I will deal with it in due course, but I do not require this to be done because I think the whole proceeding was illegal and the less I hear of it the better.

Revision accepted.

1924 Allahabad 190.

SULAIMAN, J.

Sarju Prasad—Applicant.

v.

The Crown—Opposite party.

Crim. Rev. No. 352 of 1923, decided on 8th August, 1923, from the order of the District Magistrate, Cawnpore, dated 7th April, 1923.

Crim. Pro. Code, S. 4 (h)—Report by a Subordinate Magistrate to his superior, stating facts and his opinion thereon, is a complaint.

While a criminal case was pending before Mr. Christie, a Magistrate, an agreement was signed by Sarju Prasad undertaking to pay Rs. 4,000 to the complainant in case the criminal case was withdrawn. This agreement was filed by the complainant. Later on it was discovered that one word *amanat* in the document had been cut out and it purports to have been initialled. In a separate enquiry Mr. Christie recorded some evidence and then in a long report submitted the facts to the District Magistrate. He referred to the verbal report which he had made to that officer previously and after setting forth all the facts in detail expressed his opinion that he was certain that the alteration was made after the document was filed in Court and that Sarju Prasad had not only committed perjury but had committed an offence under S. 477, Penal Code. He, however, made no order under S. 476. On receipt of this report the District Magistrate passed the order under which he directed the prosecution of Sarju Prasad on two alternative charges under S. 193 and directed that the case should go to a Subordinate Magistrate for disposal.

Held that the report of Mr. Christie cannot in any sense be treated as an order under S. 476, Cr. P. C., but the report falls within the definition of complaint as given in S. 4 (*h*) and his order therefore cannot be said to have been passed without any jurisdiction. (26 All. 514, *Ref.*) [P. 191, C. 1 and 2].

G. W. Dillon—for the Applicant.

The Asst. Govt. Advocate—for the Crown.

Sulaiman, J.:—This is an application for revision from an order of the District Magistrate of Cawnpore, dated the 7th of April, 1923. The point urged against it is that this order was passed without jurisdiction and is liable to be set aside.

It is not necessary to go into the previous history of the litigation, and it is sufficient to say that while a criminal case was pending before Mr. Christie, having been brought by Gauri Charan Misir against Shanker Prasad, an agreement was signed by Sarju Prasad (the present applicant) undertaking to pay Rs. 4,000 to the complainant in case the criminal case was withdrawn. This agreement was filed by Gauri Charan Misir.

Later on it was discovered that one word "*amanat*" in the document had been cut out and it purports to have been initialled. The offence being a non-compoundable one there was of course no compromise but ultimately the accused was acquitted.

In a separate enquiry Mr. Christie recorded some evidence, and then in a long report, dated the 18th of March, 1923, submitted the facts of the case to the District Magistrate. He begins his report by referring to the verbal report which he had made to that officer previously, and after setting forth all the facts in detail, expressed his opinion that he was certain that the alteration was made after the document was filed in court, and that Sarju Prasad had not only committed perjury but had committed an offence punishable under section 477 of the Indian Penal Code. He however made no order under section 476 directing the prosecution of Sarju Prasad.

On receipt of this report the District Magistrate passed the order which is questioned in this revision. Under this order he directed the prosecution of Sarju Prasad on two alternative charges under section 193 and directed that the case should go to Khan Bahadur Maulvi Muhammad Abdul Hamid Khan for disposal.

On behalf of the applicant it is contended that the report of Mr. Christie does not amount to an order under section 476 of the Code of Criminal Procedure, and that the District Magistrate had no jurisdiction whatsoever to pass any such order. On this hypothesis it is urged that the applicant cannot be prosecuted.

There can be no doubt that the report of Mr. Christie cannot in any sense be treated as an order under section 476 of the Code of Criminal Procedure; but at the same time inasmuch as it gives all the facts of the case and mentions that in the opinion of Mr. Christie, Sarju Prasad had been guilty of offences under sections 193 and 477, and inasmuch as these facts were submitted to the District Magistrate, who had jurisdiction to take cognizance of such offences, it is clear that the report falls within the definition of "complaint" as given in section 4 (*h*). In this view of the matter the District Magistrate had before him a complaint made by Mr. Christie. Under section 190 (*a*) of the Code of Criminal Procedure, he had power to take cognizance of these offences, and under section 192 (1) he could transfer the case for trial to another Magistrate subordinate to him. Whatever the intention of the District Magistrate might have been in substance, his order amounts to taking cognizance of the two offences and the sending of the case to a Magistrate appointed by him to try it. This order therefore cannot be said to have been passed without any jurisdiction. So long as there is either the previous sanction or complaint of the court in, or in relation to, any proceedings in which court the offence under section 193 of the Indian Penal Code has been committed, the provisions of section 195 (1) (*h*) of the Code of Criminal Procedure are fully complied with.

The first alleged offence is that Sarju Prasad in his statement, dated the 23rd of October, 1922, before Mr. Christie, had stated that the word "*amanat*" had been erased by him before the document was put in Court. If this statement is proved to be false, there can be no doubt that the applicant would be guilty of an offence under section 193 of the Indian Penal Code. The second alleged false statement is that he has made a false entry in the said document with a view to its appearing in a judicial proceeding and caused an erroneous opinion to be formed by the Magistrate in his judicial proceeding, that is, has fabricated false evidence. It will be for the trying Magistrate to see whether, even if the first charge is proved, it is sufficiently established that the applicant did make the false entry in the document with a view to its appearing in a judicial proceeding. It is to be noted that he was no party to the proceedings in which this document was filed and it may be that some other person interested was responsible for the alteration.

In conclusion I may say that the case is very much similar to the case reported in 26 All. 514.

In the view which I have expressed this application must be dismissed. It is accordingly rejected.

Revision rejected.

1924 Allahabad 192.

SULAIMAN, J.

Bharos Ahir—Applicant.

v.

The Crown—Opposite party.

Crim. Rev. No. 367 of 1923, decided on 16th August, 1923, from the order of the Addl. Sessions Judge, Jaunpore, dated 19th May, 1923.

Penal Code. S. 411—Mere discovery of stolen article in a roofless room of accused's house does not render him guilty.

A burglary was committed in the house of one Maharaji and she made a report the next morning giving a list of articles including wearing apparel. Among the articles she mentioned was a *dhoti* said to have had a tear in the border. A few days after the police searched the accused's house and in the presence of two search witnesses a *dhoti* was found hanging on a peg in a roofless room. This room contained some other articles of household besides the *dhoti*. In front of this room there was another room covered by a roof and then there was a thatched portion of the house in which the accused, his wife and children lived. Mt. Maharaji and her son both recognised the *dhoti* as belonging to them.

Held that an accused person cannot be convicted under S. 411 merely on showing that he was in possession of certain property and failed to account for its possession. The prosecution must prove both that the property was stolen and that the accused received it or retained it dishonestly. But under certain circumstances a Court is entitled to draw presumption under S. 114 of the Evidence Act from the fact of possession. In the present case however there is no necessary inference that the accused had knowledge that the *dhoti* was concealed in the room attached to this house. (6 All. 224, *Ref.*) [P. 193, C. 1.]

M. Ahmad—for the Applicant.

The Govt. Advocate—for the Crown.

Sulaiman J.:—This is a criminal revision from a conviction under section 411 of the Indian Penal Code. On the 23rd of April, 1923, a burglary was committed in the house of one Musammat Maharaji, and she made a report the next morning, giving a list of articles including wearing apparel. It is important to note that among the articles she mentioned was a *dhoti* said to have had a tear in the border. A few days after that the police searched the accused's house and, it is said, in the presence of two search witnesses, only one of whom has been examined in this case, a *dhoti* was found hanging on a peg in a room which has no roof over it. This room contained some other articles of household besides the *dhoti*. In front of this room there is another room, which is covered by a roof, and then there is a thatched portion of the house in which the accused, his wife and children live.

Musammat Maharaji and her son both recognised the *dhoti* as belonging to them, and the accused has been convicted under section 411 of receiving or retaining stolen property.

The defence put forward on behalf of the accused was that some 5 or 6 years before the alleged occurrence, he had filed a complaint for bribery against a local police officer and that therefore the police had a grudge against him. It was further suggested on his behalf that inasmuch as this room had no roof over it, it was very easy for any one to plant the *dhoti* in it.

Both the courts below accepted the evidence of Musammat Maharaji and her son to the effect that the *dhoti* discovered in the accused's house was the one which had been stolen from her house.

In revision I am bound to accept this finding as final. Although the *dhoti* was an article of common use, nevertheless as it had a tear in the border, which was a good identifying mark, I am unable to say that the finding of the courts below as to the identity of this *dhoti* was in any way unjustified.

The question still remains whether these facts are sufficient for the conviction of the applicant.

Section 411 of the Indian Penal Code makes dishonestly receiving or retaining any stolen property, knowing or having belief that the same was stolen property, punishable. Of course it is obvious that there is a distinction between receiving and retaining it, and merely being in constructive possession of it. It was pointed out by Oldfield, J., in the case of 6 All. 224, that an accused person cannot be convicted under section 411 merely on showing that he was in possession of certain property and failed to account for its possession. The prosecution must prove both that the property was stolen and that the accused received it or retained it dishonestly. At the same time it is to be borne in mind that under certain circumstances a Court is entitled to draw a presumption under section 114 of the Evidence Act from the fact of possession. If the possession of an article is proved the court may presume that the person in possession of the stolen goods soon

after the theft is either guilty of theft or of receiving the goods knowing them to be stolen, unless he can account for his possession, *vide* illustration (*a*). The question then remains whether the circumstances of this case are such that it is justifiable to draw the presumption of the guilt of the accused under section 114 from the mere fact that the *dhoti* was found in his house. The room in which this *dhoti* was found is not one in which the accused habitually sleeps. He is not the only occupant of the house; there are his wife and children who also live in it. The *dhoti* is a "*zanana*" one which would ordinarily be worn by a woman. There is no evidence to show that the accused was ever seen in possession of the *dhoti*. It is true that he is the master of the house, and in that way he may be said to be in constructive possession of everything in the house. But in order to infer a guilty intention from the mere fact of constructive possession, it is necessary to show something more which would justify a court in inferring that he had knowledge of its existence in the house. For instance if the articles were in a place which is constantly used by the accused, and being in such a place could not have been overlooked by him, the inference would be justified. Or from its bulk or other circumstances like the locking up of it by him in a box, the court may presume that the accused had knowledge that the article was in the house. In the present case however I find it impossible to say that there is a necessary inference that the accused had knowledge that the *dhoti* was concealed in the room attached to his house. There is no other evidence against him but the fact that the article was discovered in his house. This therefore leaves a reasonable doubt in my mind that the accused himself might not have been the person who actually received this article. It is necessary to suggest who else might have been the person concerned. There is a possibility that any one of the other occupants might have received it and retained it. I therefore feel bound to give the accused the benefit of the doubt. I allow this application, set aside the conviction and sentence passed on him, and direct that he be released.

Revision accepted.

1924 Allahabad 193.

SULAIMAN, J.

Wali Muhammad--Applicant

v.

King-Emperor—Opposite Party.

Crim. Rev. No. 368 of 1923, decided on 17th September, 1923, from the order of the Addl. Sessions Judge, Sharanpur, dated 2nd July, 1923.

(a) *Evidence Act, S. 17—Vague admission is no admission.*

In answer to the question put to the accused as to whether three packets of cocaine were recovered from him he replied that three packets were recovered from him, but he went on to say that they were handed to him by a man named Babu and that the accused did not know what these packets actually contained. [P. 194, C. 1.]

Held that his statement does not amount to an admission that he had cocaine in his possession.

(b) *Crim. Pro. Code, S. 510—Report of chemical examiner cannot be admitted in appeal for the first time especially when it is not formally tendered in evidence.*

Under S. 510 any document purporting to be a report under the hand of a chemical examiner upon any matter duly submitted to him for examination and report may be used as evidence in any enquiry, trial or other proceeding. This however does not imply that without tendering it in evidence it can be made use of for the first time in appeal. It is a piece of evidence that does not require any formal proof but at the same time it must be tendered as evidence and used as such so that the accused may have a chance of questioning it. [P. 194, C. 2.]

M. Ahmad and *H. Kapur*—for the Applicant.

The Assistant Government Advocate—for the Crown.

Sulaiman, J.:—This is a criminal revision from an appellate order, convicting the accused under section 60 (*a*) of the Excise Act for being in possession of cocaine.

The prosecution case was that the accused was caught red handed by a constable while he was buying betals and three packets of cocaine were recovered from him. A number of witnesses were produced to prove that three packets were recovered from the accused by the constable. That evidence was believed by the learned Magistrate. It now appears that some packets, alleged to have been those which were recovered from the accused, were sent on to the Chemical Examiner who sent report to the effect that they contained cocaine. This report however

was never formally tendered in evidence at the trial, nor does it appear from the record of the trial Magistrate's Court, that this report was used as evidence in the proceedings. No copy of it was ever placed on the record of this case. In the judgment the learned Magistrate did not even refer to it, but based his finding that the packets contained cocaine, on the ground that the accused himself admits that he had cocaine in his possession. A reference to the statement of the accused, recorded in the vernacular under section 364 of the Code of Criminal Procedure, shows that the Magistrate's remarks is not accurate. In answer to the question put to him as to whether the three packets of cocaine were recovered from him, he replied that three packets were recovered from him, but he went on to say that they were handed to him by a man named Babu and that the accused did not know what these packets actually contained. His statement should not therefore have been used as an admission that he had cocaine in his possession. Unfortunately, the prosecution did not take care to see that the report was formally tendered in evidence, nor did the Magistrate take the trouble to have it brought on the record. In the absence of that report it is impossible to say that the powder in the packets was necessarily cocaine. There is apparently no other evidence to show that any one tasted it or that any one was satisfied that these packets contained nothing but cocaine.

The accused however was convicted, and an appeal was preferred to the court below. Arguments were heard on the 29th of June, 1923, when it was pressed on his behalf that there was no evidence on the record to show that the packets did contain cocaine. On the 2nd of July the learned Additional Sessions Judge ordered the Government Pleader to produce the report of the Chemical Examiner. A report was sent for, which was on the record of another proceeding to which the accused was no party. After a perusal of this report, and apparently without any further argument, and without any formal order admitting this additional evidence, the learned Additional Sessions Judge dismissed the appeal holding that the report on the file of the other record conclusively established that the packets contained cocaine.

I am of opinion that this additional evidence ought not to have been perused in appeal unless the provisions of section 428 of the Code of Criminal Procedure were complied with. No reasons were recorded, and no formal order admitting it was passed. It was treated as if it were a piece of evidence already on the record. Under section 510 of the Code of Criminal Procedure any document purporting to be a report under the hand of a Chemical Examiner upon any matter duly submitted to him for examination and report may be used as evidence in any enquiry, trial or other proceeding. This however does not imply that without tendering it in evidence it can be made use of for the first time in appeal. It is a piece of evidence that does not require any formal proof, but at the same time it must be tendered as evidence and used as such, so that the accused may have a chance of questioning the identity of the packets. I am satisfied that this was not done in the present case. In failure of the report having been formally brought on the record, there is really no satisfactory evidence to show that the powder contained in these packets was cocaine.

The case must therefore fall to the ground. I set aside the order convicting the accused and acquit him of the charge. He is already on bail. The bail bond will be cancelled.

Revision allowed.

1924 Allahabad 194.

WALSH, J.

Lallu Ram—Applicant

v.

The Crown—Opposite party.

Cr. Ref. No. 379 of 1923, decided on 19th July, 1923, from the Sessions Judge of Ghazipur, dated 9th July, 1923.

Penal Code, S. 1—Nuisance—Public Nuisance—Annoyance even to one person is sufficient.

It is necessary in order to establish a charge of committing a nuisance in a public place to the annoyance of residents or passengers in the locality, to prove that somebody was annoyed. Annoyance to one person is sufficient. If a public servant, likely a municipal employee whose duty it is to look after the cleanliness of the streets sees anybody easing himself in a public place or street he is not unlikely to be annoyed. [P. 195, C. 1.]

K. Varma—for the Applicant.

Walsh, J.:—This case has been referred to the High Court really for the decision

of the question whether it is necessary in order to establish a charge of committing a nuisance in a public place to the annoyance of residents or passengers in the locality, to prove that somebody was annoyed. The Act certainly says so, and I do not see how anybody can seriously doubt it. But annoyance to one person is sufficient, and even annoyance itself is a question of degree, and if a public servant, like a Municipal employee whose duty it is to look after the cleanliness of the streets sees anybody easing himself in a public place or street, he is not unlikely to be annoyed. When you come to think of it, it is his business to be annoyed. He ought to be annoyed. A person trying to keep the streets clean who sees anybody easing himself, would be very wrong if he was not annoyed. In fact his employers would have every right to be annoyed with him, if he was not and therefore if he reports it in his official capacity and gives evidence of the act, it is a reasonable inference to draw that he was annoyed. Whether the *jamidar* in this particular instance attempted to define and put into precise language the degree of annoyance which he felt, does not appear, because the case was summarily tried. But it is reasonable to suppose that he was very much annoyed, and that if he was pressed on the question he would have said so. It turns out that between the offender and the *jamadar* there has been a terrible feud about the refusal to sell cloth on credit, and the *jamadar* according to the defence, harboured feelings of anger and indignation towards the offender. When one comes to picture the scene, if it is correct that in the course of his patrolling the streets in the interests of health and cleanliness this *jamadar*, armed with the authority of the law, saw this individual, against whom he had this grudge, committing an act of nature in one of the very places which was calculated to injure the public interest which the *jamadar* had to look after, one can imagine that his annoyance was very great indeed. It has not been found to be fictitious annoyance or *mala fide*, but the Magistrate has found that the case has been proved. I must assume that he meant what he said and that he was satisfied that the *jamadar* was sufficiently annoyed. I agree with the Sessions Judge that the matter is of importance, but it seems to me to have been hardly worthwhile referring it to the High Court, because, although every one must agree with the Sessions Judge that an ordinary person would consider the act objectionable, it is impossible to say, when the section requires the act to be one done to the annoyance of the public, that annoyance must not be proved. But it is sufficient if one person is annoyed, and as the act complained of can hardly be proved except by some person who comes forward to complain, the annoyance is almost necessarily involved in the complaint. It therefore comes to this, that all that is required is that the act was done in such a way as to annoy a person who complained of it. The proceeding in the court below before the Sessions Judge was revision, and I am not at liberty to consider any point really except that referred to me. Mr. Kamlakant Varma has also contended that a drain by the side of the road does not come within the description contained in the Act of an open place. That is a question of fact. It was not raised in the court below, and presumably a drain by the side of the road is not only in an open place but in a thoroughfare, which is sufficient. It would appear that there must have been an open place to enable the *Jamadar* to see the offence. I merely therefore hold that the conviction was one according to law, and I direct the record to be returned to the Sessions Judge.

Conviction upheld.

1924 Allahabad 195.

SULAIMAN, J.

Mahomed Ismail—Applicant

v.

The Crown—Opposite party.

Cr. Rev. No. 382 of 1923, decided on 15th August, 1923, against the order of the Sessions Judge, Agra, dated 26th June, 1923.

Crim. Pro. Code, S. 107—The accused must have been members of one gang to justify joint trial—In a joint trial evidence against each accused must be considered separately.

There is no direct prohibition against trying a number of persons under S. 107 jointly. But unless it is apparent that the various persons against whom proceedings are taken form a gang, it is highly unfair and unjust that they should be proceeded against jointly. The effect of such a proceeding is that it is unnecessarily protracted and the parties thereby prejudiced. Furthermore

if by any chance such a proceeding is conducted jointly, it is essential that the case of each accused should be considered separately and individually. (20 A. 881, *Foll.*)

When an objection as to the impropriety of the joint proceeding was taken in the first Court and when the evidence has not been taken separately against each accused but has been lumped together and when it is impossible to discover from the judgments of the trial and appellate Courts how much of the evidence was believed and how much rejected.

Held, that the accused has been gravely prejudiced by the proceeding taken against him in conjunction with other accused persons. [P. 197, C. 1.]

M. A. Aziz—for the Applicant.
Government Advocate—for the Crown.

Sulaiman, J.:—This is an application on behalf of Muhammad Ismail from an order passed against him under section 110 of the Code of Criminal Procedure.

Proceedings were taken against the applicant along with three other persons under the above section by means of a police report. So far as the police report is concerned it is conceded that there was no suggestion whatever in it which would show that all the persons against whom the proceedings were started were members of a gang. It also does appear from the judgment of the learned Magistrate that an objection was raised on behalf of the accused as to the impropriety, not to say illegality, of a joint trial.

The learned Magistrate in his judgment observed that although it was true that Ismail was not specifically named in the initial report, and that the police report is silent on the point of the accused belonging to a gang, he thought that inasmuch as the evidence had been led on behalf of the prosecution that the four accused were members of a gang, the objection could not be taken *at that stage*. He came to the conclusion that the accused along with the other persons should be bound over. This order was affirmed on appeal.

The judgments of the trying Magistrate as well as that of the appellate Court have been read over to me, and I have perused them carefully. I regret to say that it is impossible to discover from either of the judgments what the exact case against the applicant was, that is to say, what was the purport of the evidence given against him specifically by the prosecution witnesses.

It is true that in the Criminal Procedure Code there is no direct prohibition against trying a number of persons under section 107 jointly. But at the same time the propriety of such a proceeding is obvious. Unless it is apparent that the various persons against whom proceedings were taken form a gang, it is highly unfair and unjust that they should be proceeded against jointly. The effect of such a proceeding is that it is unnecessarily protracted and the parties thereby prejudiced. Furthermore if by any chance such a proceeding is conducted jointly, it is essential that the case of each accused should be considered separately and individually. As observed by Walsh, J., in the case reported in 20 All. 881 such proceedings should be confined to each person alone unless the case was that he was a confederate or partner with other persons to whom all the evidence is equally applicable.

The mere fact of there having been a joint proceeding would not have induced me to interfere in this case if I were not satisfied that there has been a consequent failure of justice.

The learned Assistant Government Advocate concedes that by reading the judgments of the two Courts it is impossible for him even to sift the evidence against the accused and point out what is the prosecution case as against him. The learned Magistrate remarked in his judgment that 19 witnesses were examined for the prosecution. Out of these he only named five. He went on to add that all these witnesses unanimously declared that the accused were of one gang. This statement is certainly not accurate. I have had the statements of Lala Har Prasad, Thakur Prithi Singh and Syed Ali Husain, the first three witnesses named by him, read over to me, and they do not say that the accused are members of gang. Fakir Chand, another witness named, does say so. The learned Magistrate however did not consider the case against each of the accused separately. By a perusal of his judgment one is led to imagine that all the witnesses necessarily deposed against all the accused in respect of all the offences of which they were charged. This obviously was not so.

The learned Sessions Judge in appeal has fallen into the same error. He remarked that "the accused, or some of them, have been suspected in connection with the following crimes which took place recently". This is followed by a list of the offences. But it is impossible to discover

which of the offences in that list are attributable to the accused or are those in which the applicant was suspected. The evidence for the prosecution has been lumped together, and no discrimination has been made as regards the different accused persons. I have had the statement of three police officers read to me and from their statements which are mentioned in the lower appellate Court's judgment, it appears that so far as the present applicant was concerned there had never been any search of his house—he had not been suspected on any specific occasion, other than the kidnapping of the Musammat Janmata or Musammat Jamo. In fact one Police officer, Ali Hasan, says that he did not know anything against the accused. As to the case of Musammat Janmati, it appears that she had been kidnapped and disappeared. It was suspected that her ornaments were stolen and that she had been done away with. The applicant Ismail was suspected in that action and was in jail but ultimately as there was no sufficient evidence against him he was discharged. On the very day when he came out of jail he was arrested under section 110 of the Code of Criminal Procedure. This is the only instance in which suspicion fell on him as mentioned by the Police officers. There are of course general statements of his being a man of bad character and certain suspicions, which are not specific in their nature. In a case of this kind when an objection as to the impropriety of the joint proceeding was taken in the first court, and when the evidence has not been taken separately against each accused, but has been lumped together, and when it is impossible to discover from the judgments of either courts how much of the evidence was believed and how much rejected, I am bound to hold that the accused has been gravely prejudiced by the proceeding taken against him in conjunction with the other accused persons.

I accordingly allow this application, set aside the order under section 110 passed against him, and cancel the security demanded.

Revision allowed.

1924 Allahabad 197.

SULAIMAN, J.

Habibul Razak—Applicant

v.

King-Emperor—Opposite party.

Cr. Rev. No. 388 of 1923, decided on 14th August, 1923, against the order of the Sessions Judge, Budaun, dated the 2nd July, 1923.

Penal Code, S. 384—Threat to omit to do some act which accused is not legally bound to do is not covered by the section.

After the crops of judgment-debtor were attached by officer of Court, the accused took money from judgment-debtor promising to get the crops released.

Held, no offence was committed.

Before a person can be said to put any person into fear of any injury to that person, it must appear that he has held out some threat to do or to omit to do what he is legally bound to do in the future. On the other hand if all that a man does is to promise to do a thing which he is not legally bound to do and says if money is not paid to him he would not do that thing, such an act does not amount to an offence. [P. 198, C. 2.]

But a threat held out by the accused that he would not release the cattle belonging to complainant and taken away by the accused without his consent, unless he was paid some money for their release, does amount to extortion inasmuch as he did put him in fear of injury to his property, namely the cattle, as he must have felt that his cattle would remain with the accused so long as the money was not paid to him. This would be sufficient injury within the meaning of S. 44 of the Indian Penal Code. [P. 200, C. 1.]

H. M. Ahmad—for the Applicant.

The Assistant Government Advocate—for the Crown.

Judgment:—This is a criminal revision from an order convicting the applicant under section 384 of the Indian Penal Code. The case against the accused is to be split up into two parts, although the sentence is one for both the convictions.

The first charge against the accused was that he extorted a sum of Rs. 45 and a further sum of Rs. 20 from one Jodha Teli. It appears that the Co-operative Bank had a decree against one Behari Brahmin and others. In execution of this decree the amin was sent to the village to attach property belonging to the judgment-debtors. Mr. Tandon, the Assistant Manager, the present accused who is the Secretary of the Society, and the auditor of the Bank also appear to have accompanied the amin to the village. It is said that on the 29th of November, 1921, the accused pointed out

certain crops as belonging to the judgment-debtors, and on the crops having been so pointed out the amin attached them. The document signed by the amin shows that the crops were pointed out by the Assistant Manager as well as by the Secretary. The paper was signed by the Assistant Manager, admitting that he pointed out the crops, but was signed by the Secretary as a witness. The fact, however, remains that neither the Assistant Manager, nor the Secretary had power to attach the crops. It was the amin alone who had authority to do so and there can be no doubt that the act of attachment must be attributed to the amin and to no one else.

The crops attached by the amin however did not as a matter of fact belong to Behari Brahmin. Jodha was a co-sharer of Behari in some fields, though not necessarily of the fields of which the crops had been attached. The crops belonged to Jodha and consequently he protested against the attachment. The story told by some of the prosecution witnesses is that before the attachment took place the accused wanted some money and promised in return not to get these crops attached. This however is said to have happened in the village itself. The accused is not charged with anything that happened in the village, but is charged with having extorted money at Budaun. The occurrence at Budaun was some two days after the attachment had been made. Jodha accompanied by two other persons went to the accused and begged of him to get the crops released. The accused promised to get them released and settled his gratification at Rs. 65, out of which Rs. 45 were paid to him then and there, and the balance was paid in the village some months after.

Both the courts below have accepted the prosecution story that the accused did receive the sum of Rs. 45 and Rs. 20 from Jodha Teli. In revision I cannot say that the courts below were wrong in believing that story. The question still remains whether the facts constituted an offence within the meaning of section 383 of the Indian Penal Code. I have had the statement of the complainant read over to me, and the story told by him as to what happened at Budaun is that when he begged of the accused to get the crops released the accused abused him, threatened him, and said that if he did not pay him the money then, he should go and file objections. I note here that the learned Magistrate who took down the notes of the evidence in English has wrongly translated this portion of Ajodhia's actual statement as implying that he would get him convicted in some case. That he is clearly wrong is borne out by a comparison with the evidence recorded in the vernacular. I am asked on behalf of the prosecution to connect what happened at the village with what happened at Budaun, and to say that the whole thing was a continuation of a single transaction and the accused is guilty on all the facts taken in conjunction. The statement made by the accused in the village would be a threat held out by him that if some money was not paid to him the crops would be attached by the amin whereas the promise held out by the accused at Budaun was that if the money was not paid he would not try to get the crops released; otherwise the aggrieved party would have to go and file objections. In my opinion there is a clear distinction between these two statements. One may cause a fear, the other only raises a hope. Before a person can be said to put any person into fear of any injury to that person, it must appear that he has held out some threat to do or to omit to do what he is legally bound to do in the future. On the other hand if all that a man does is to promise to do a thing which he is not legally bound to do and says if money is not paid to him he would not do that thing, I cannot hold that such an act amounts to an offence. In the present case there can be no doubt that after the attachment had been duly made by the amin, the accused had no authority whatsoever to release the crops. The only authority which could do so would be the authority of the Bank. It is suggested that the accused's father is some high official in the Bank and he has influence with the father and it is suggested that the accused might have hinted that he would persuade his father to get the crops released. Assuming that to be so, even then the act would not be an offence under section 383. If a person promises to speak favourably to a person in authority and to do his best to induce him to do something, and in consideration of this promise receives money, I am not prepared to hold that he has threatened to cause injury to the person who gives the money

and thereby committed extortion. If the accused was not legally bound to do anything to get the crops released, and if he promised to do something on payment of some money, then, unless the act come within the definition of bribe, I am of opinion that he cannot be convicted of extortion.

In this view of the matter, even assuming all the facts found against him in connection with the first charge, his conviction was not proper.

The second charge against the accused was that he extorted a sum of Rs. 5 from one Behari (this man is other than Behari Brahman). He was not a judgment-debtor of the Bank at all. It is said that while Behari was inside his house, and his cattle were tied outside it, the accused took them away, and when Behari came out and protested and asked for their release, the accused said he would not release them unless some money was paid to him. Behari paid Rs. 5 to the accused and got his cattle released. Behari admittedly was not a judgment-debtor of the Bank and it cannot be disputed that legally his cattle could not be attached in execution of any decree of the Bank. Besides the statement of the complainant Behari, two other witnesses, Mukan Ram and Dulli Chamar were produced on behalf of the prosecution to prove the payment of Rs. 5 by Behari. These witnesses have been believed by both the courts below. In the ordinary way I would have been bound to accept these findings as conclusive in revision unless there was something grossly absurd or improbable in the story. I find however that in the course of the judgment of the learned Sessions Judge there is a remark to the effect :—" It must be remembered that Mr. Tandon admitted that he had heard that the appellant's conduct was not satisfactory ". This is a matter which the learned Sessions Judge took into account when considering the case against the accused in connection with the payment of Rs. 5 said to have been made by Behari. Obviously the statement made by Mr. Tandon that he had previously heard that the appellant's conduct was not satisfactory, was not legally admissible against him in this case and it was not therefore a statement which should have been considered at all. It was owing to this circumstance that I felt myself bound in fairness to the accused to go into the evidence again and consider it. At the same time I must point out that this statement was not made by either of the courts below a basis for believing the evidence for the prosecution. The courts below were satisfied in their minds that the story told by the three witnesses for the prosecution was substantially true. That being so, I have to see whether there is anything which would justify me to say that the courts below were wrong in believing these witnesses. If the story told by them were grossly impossible or absurd, I would have no hesitation to differ from the view taken by the courts below. The story told by Behari is that although he had not seen the amin in the village, he found the accused who was an official of the Bank "attaching" cattle. It is true that some months afterwards Behari did make a statement to the Sub-Inspector that he had complained to the amin about the matter and the amin had refused to hear him. On oath however Behari admitted that he had not seen the amin in the village and had not spoken to him at all. There is certainly therefore this fact that Behari paid this sum of Rs. 5, and after that he took no further steps against him, that is to say, he made no complaint to the Bank nor filed any complaint in court. It was long afterwards when an enquiry was set on foot by the Assistant Registrar of Co-operative Banks that he made a statement. At the same time it must be borne in mind that an ordinary villager might very well content himself with getting his cattle released on payment of Rs. 5 and may not think it worthwhile to go all the way to town to make a complaint which would result in a prosecution. Had I been sitting as a court of appeal, it is possible that I might have come to a different conclusion. But in revision when this oral evidence has been accepted by both the courts below, I do not feel justified in saying that the statements of those witnesses are such as cannot possibly be believed. I do not find in the story told by these witnesses anything so absurd or impossible as to make it difficult to give it credibility.

The case as found against the applicant therefore is that he without any right took away cattle belonging to Behari and declined to release them until he was paid a sum of Rs. 5 and that it was on receipt of Rs. 5 that he released

them. A threat held out by the accused that he would not release the cattle belonging to Behari, and taken away by the accused without Behari's consent, unless he was paid some money for their release, does in my opinion amount to extortion inasmuch as he did put Behari in fear of injury to his property, namely, the cattle, as he must have felt that his cattle would remain with the accused so long as the money was not paid to him. This would be sufficient injury within the meaning of section 44 of the Indian Penal Code.

Accepting therefore the finding of fact arrived at by the courts below I cannot hold that no offence under section 383 was committed with respect to the receipt of this sum of Rs. 5.

As I am acquitting the accused of the offence of extorting Rs. 65 and only upholding his conviction as to extorting Rs. 5 I think that a substantial reduction in the sentence would be just.

I accordingly allow this application in part and set aside the conviction and sentence on the accused with regard to extorting Rs. 65 from Jodha and acquit him of that offence. I, however, uphold the conviction for extorting Rs. 5, from Behari but reduce the sentence to the period of rigorous imprisonment already undergone by the accused and a fine of Rs. 100. If the accused has paid anything over and above Rs. 100 the excess amount will be refunded. In default of payment of Rs. 100 the accused will undego rigorous imprisonment for a further period of one week.

Sentence reduced.

1924 Allahabad 200.

WALSH, J.

Nihal Muhammad—Applicant

v.

King-Emperor—Opposite Party.

Cr. Ref. No. 392 of 1923, decided on 24th July, 1923, on reference made by the Sessions Judge, Saharanpur.

(a) *U. P. Municipalities Act, Ss. 178 and 214—Alteration in a wall is alteration in building.*

The expression "an alteration in a building" in S. 178, sub-section (3), must include a part of such building. The definition in S. 214 of a part of a building lays down what is to be read into this expression when it is used. But it is not inconsistent with a wall supplementary to or accessary to a verandah or balcony or house or other larger building, being in itself a building within the meaning of S. 178.

(b) *Criminal trial—Conviction—Fine should not be inflicted in technical offences.*

Penalties must be provided and penalty sections must be used for bad cases where the individual has been contumacious and has palpably acted *mala fide*. But the penalty is only intended *in terrorem* and not to be used vindictively for technical offences. [P. 201, C. 1.]

The parties were not represented.

Judgment:—In dealing with this reference I am even more handicapped than was the learned Judge. It is really a question of fact. To some extent it is a question for experts. These questions of whether buildings correspond with sanctioned plans, many of which are not too precise or accurate in detail, are sometimes very difficult and require expert evidence and explanation, and I am practically without any material at all. It is impossible to decide between the respective merits and opinions of the Sessions Judge and the Magistrate respectively in this case, in a discussion of plans and erections neither of which I have seen. On three points of principle I can express my opinion. A Municipality taking proceedings for a penalty under this Act, ought to make its sanction and orders or conditions for new buildings or erections so conspicuously clear as to leave no room for controversy. If in a particular case before me as a Magistrate they failed to do so, I should dismiss the complaint. Secondly the learned Judge is quite right, and the Magistrate should never have allowed the case to proceed before him without the production of the Municipal file. On the other hand I agree with the Magistrate that to erect a wall, which for this purpose must be part of a building and therefore a building within the meaning of the section quoted by the learned Judge, is in my opinion a material alteration. I think that the expression "an alteration in a building" in section 178, sub-section (3), must include a part of such building. The definition in section 214 of a part of a building lays down what is to be read into this expression when it is used. But it is not inconsistent with a wall supplementary to or accessary to a verandah or balcony or house or other larger building, being in itself a building within the meaning of section 178. To raise a wall above the

prescribed height of the building as provided by the section, would clearly be within the mischief aimed at by the section, and to say that it was only part of the building, when it was the only thing the raising of which mattered to anybody, and therefore could not be dealt with under the section, would reduce these provisions, which are made for the public interest, to an absurdity. Using the best judgment I can on the materials before me, it seems that the person in question, Nihal Muhammad, either rightly or wrongly did attempt technical breaches. On the other hand I agree with the Sessions Judge that the extent of his breach is very indistinctly made out. In questions of building plans, breaches of sanction and conduct in excess of rights conferred by or permitted by a public authority, the object is to enable the public authority to control streets and buildings under the best expert opinion, and it is not so important to inflict a fine upon the person who has committed a breach as it is to compel him to put his building back in accordance with the plan as sanctioned. Penalties must be provided and penalty sections must be used for bad cases where the individual has been contumacious and has palpably acted *mala fide*. But the penalty is only intended *in terrorem* and not to be used vindictively for technical offences. It seems to me therefore that the justice of the case will be met in this way. I reduce the penalty from Rs. 100 to Rs. 5, and I return the case to the Magistrate through the Sessions Judge with the intimation that this order has been passed without prejudice to the right of the Municipality, if so advised, to take such steps as are open to it under the Act, to compel Nihal Muhammad to put his building into conformity with the plan originally sanctioned. I regret that I am unable on this latter point to express a more definite opinion. I have had no legal assistance and I do not know whether the Act enables the Municipality to pull down the building or alter anything which has been erected in breach of the sanction. Such a power certainly exists under the Public Health Act and Metropolis Act in England, and I suspect that it must have been provided somewhere in India.

Sentence reduced. Case remanded.

1924 Allahabad 201.

KANHAIYA LAL, J.

Mahadeo Rai and others—Applicants.

v.

King-Emperor—Opposite party.

Cr. Rev. No. 396 of 1923, decided on the 17th July, 1923, against the order of the Sessions Judge, Ghazipur, dated the 2nd July, 1923.

Penal Code, S. 335—Attack on police attempting to arrest on suspicion of cognizable offence amounts to offence, though police were not in uniforms.

A complaint had been made by a certain girl that she had been raped by two persons named Mahesh and Ram Lal. The Sub-Inspector deputed certain police constables to arrest the accused. When these constables reached the place Mahesh and Ram Lal ran inside the house of Ujagar and when the constables wanted to enter that house to arrest them, they were stopped by the applicants who, armed with lathis, threatened to attack the constables, if they moved further towards the house.

Held: that though the constables were not armed with a warrant of arrest and were not in their uniforms they had sufficient authority under S. 54, Cr. P. C., to effect the arrest.

U. S. Bajpai—for the Applicants.

Judgment:—The accused applicants have been convicted of an offence under section 335, I. P. C., and sentenced to rigorous imprisonment for two months and a fine. They also have been convicted under section 147, I.P.C., and sentenced to rigorous imprisonment for two months each. It appears that a complaint had been made by a certain girl that she had been raped by two persons named Mahesh and Ram Lal. The Sub-Inspector went to hold an investigation and came to know that the two accused persons were present in their houses in the village. He deputed certain police constables to arrest the accused. When these constables reached the place Mahesh and Ram Lal ran inside the house of Ujagar, and when the constables wanted to enter that house to arrest them, they were stopped by the accused applicants who, armed with lathis, threatened to attack the constables, if they moved further towards the house. The contention here is that the constables were not armed with a warrant of arrest and were not in their uniforms, but even if they were not in uniforms and had no warrant of arrest with them they had sufficient authority under section 54, Cr.P.C., to arrest Mahesh and Ram Lal

on the suspicion of having committed the offence with which the girl was charging them. In view of the circumstances there is no sufficient reason for interfering in revision. The application is rejected.

Revision rejected.

1924 Allahabad 202.

SULAIMAN, J.

Sheo Prasad—Applicant.

v.

King-Emperor—Opposite party.

Cr. Rev. No. 407 of 1923, decided on the 15th August, 1923, from the order of the District Magistrate, Etawah, dated the 4th June, 1923.

Crim. Pro. Code, S. 109 (a)—Neither refusal to give names, nor giving false name first and true name afterwards, nor a desire to cancel business amount to concealing presence.

The fact that the accused were seated at a village well does not necessarily justify any inference that they were taking precautions to conceal their presence; nor would the fact that they refused to give their names to an ordinary person justify such an inference.

There is a clear distinction between a request that the business which the accused were going to do should not be mentioned to any one and the request that the fact of their presence in the village should not be mentioned. The former does not necessarily imply that they were taking precautions to conceal their presence in the village.

If people are accosted by the police while going away from the village and give false names in the first instance and then give correct names afterwards, that fact by itself would not amount to taking precautions to conceal their presence with a view to committing an offence. Giving out false names is a concealment of the identity of the individuals concerned but it is not necessarily a concealment of their presence. [P. 203, C. 1.]

G. W. Dillon—for the Applicant.

The Asst. Govt. Advocate—for the Opposite party.

Judgment:—This is an application in revision from a conviction under section 109 (*a*) of the Code of Criminal Procedure.

Both the applicants are residents of the city of Cawnpore and it is not disputed that they have some means of subsistence at that place. On the 7th of April, 1923, the Sub-Inspector of the circle received information that two strangers had arrived in his village Bharthana, and that they were concealing their presence in a house. When he proceeded towards the village his informer pointed out to him two men who were going away from the village across the field, and it is said that they were going by a footpath which is not much frequented. They were pursued and ultimately arrested.

The trying Magistrate relying on the evidence of two witnesses, Kailash Chander and Ganga, came to the conclusion that these accused persons were taking precautions to conceal their presence in that village with a view to committing an offence. This view has been accepted by the learned District Magistrate.

So far as the accused's intention to comit an offence during their visit to the village is concerned, on the evidence in this case there can be no manner of doubt. The evidence is that on a previous occasion they had performed "confidence tricks" on certain villagers, and it was also proved that on this occasion they got the witness Kailash Chander sent for and an offer was made to him to have Government notes doubled by a process professed to have been known to Sheo Prasad. Kailash however was not entrapped as he says that he replied that he would consult his partner before agreeing to get anything like that done. There can be no doubt that the accused had gone to this village with a view to cheat some unwary villager by means of a confidence trick, namely, of doubling notes. This however was not sufficient to convict them under the section named. The prosecution had further to show that they were taking precautions to conceal their presence in that locality. Now neither of the courts below have mentioned any facts which in my opinion would go to show that they were taking precautions to conceal their presence. As however the names of two witnesses relied upon had been named, I have had their evidence read over to me. So far as the evidence of Ganga is concerned it is simply this, that he saw both these accused sitting on a well near the village, and when questioned who they were, one of the accused appeared very angry and refused to give out their names, but the other accused simply stated that they were Thakurs. The fact that they were seated at a village well does not necessarily justify any inference that they were taking precautions to conceal their presence; nor would the fact that they refused to give their names to a person like Ganga justify such an inference. The evidence of Kailash is to the effect that when he was

sent for through a man named Kallu, who is under police surveillance, he was taken inside the house in which the accused were, and before he was told what they would do he was asked to promise not to mention the business to any one else. It is not Kailash Chander's statement that he had been asked not to mention the fact of the presence of the accused in the village to any one. There is no other evidence on the record to show what precautions these accused took while they were in the village to conceal their presence. For instance, there is no evidence to show that they arrived secretly at night, or that they remained all the time indoors, or that they gave false names and addresses to the villagers—or any evidence of that kind. In my opinion there is a clear distinction between a request that Kailash should not mention the business which the accused were going to do to any one and the request that he should not mention the fact of their presence in the village. It is apparent that when the accused intended to commit the offence of cheating they would not like the business to be disclosed to the public generally. That does not necessarily imply that they were taking precautions to conceal their presence in the village.

There is one circumstance however which I must mention. In the course of the judgment the learned Magistrate has referred to the evidence of the Sub-Inspector to the effect that when he asked the accused while going along the fields to give their names, the names which they first gave were not their correct names. It has been contended on behalf of the Government that this amounted to concealing their presence with a view to commit an offence. I however think that this contention cannot prevail. There is no evidence that the accused had given false names when they were in the village. Further, when the accused were going away from the village, they then were not contemplating the committing of an offence, but were presumably running away in order to avoid arrest. If people are accosted by the police while going away from the village and give false names in the first instance and then give correct names afterwards, that fact by itself would not in my opinion amount to taking precautions to conceal their presence with a view to committing an offence. It is true that giving out false names is a concealment of the identity of the individuals concerned but is not necessarily a concealment of their presence. In any case as has already been noticed this happened after the accused had been chased by the police. At that time they were not going to the village to commit any offence but were really bolting away. Even therefore accepting this part of the evidence of the Sub-Inspector—though I must note that there was no such mention by him in the first report, I think that the accused cannot be bound over under section 109 (*a*).

I accordingly allow this application and set aside the order binding over the accused and direct that he be released. The security bond, if filed, will be cancelled.

Revision accepted.

1924 Allahabad 203.

SULAIMAN, J.

Ram Gobind Singh—Applicant.

v.

Lallu Singh and others—Opposite parties.

Cr. Ref. No. 431 of 1923, decided 14th September, 1923, on reference made by the Sessions Judge, Ghazipur, dated the 21st July, 1923.

Crim. Pro. Code, Ss. 492 and 495—Prosecuting Inspector not appearing for prosecution, cannot withdraw the case.

In a criminal case a legal practitioner engaged by the complainant was permitted to conduct the prosecution, and the prosecuting inspector did not actually take part in the case. After the evidence of the complainant had been recorded a charge was framed and after that stage the accused made an application to the District Magistrate requesting that the case be withdrawn on certain terms. The file was sent for. When sending up the file the trying Magistrate addressed a note to the District Magistrate setting forth the facts of the case and winding up with the remark "I therefore would strongly recommend the application for your kind consideration because I do not believe that the accused committed the offence with intent to defraud." On reading the report of the trying Magistrate and perusing the file the District Magistrate accepted the apology of the accused persons as well as the offer of the sum of Rs. 4,500 for a charitable purpose. He ordered that the prosecuting inspector to withdraw the case. This order reached the trying Magistrate's Court before whom a further application was presented by the Court Inspector. On that application the trying Magistrate passed this order "The case has been withdrawn by the District Magistrate. The accused should be acquitted accordingly.

Held: the prosecuting inspector had no such authority. [P. 205, C. 1.]

When a private complaint is filed and then the complainant is given permission to conduct the prosecution and be responsible for its conclusion, it is highly improper that after he has closed his evidence and the charge has been framed the prosecution should suddenly drop without even consulting him. [P. 205, C. 1.]

Laxmi Narain Tiwari—for the Applicant.

A. P. Pandiya—for Opposite party.

Judgment:—This reference must be accepted. A private complaint was filed by Ram Gobind Singh against Lallu Singh and others and the case was being tried by the Sub-Divisional Magistrate concerned. The record shows that a legal practitioner engaged by the complainant was permitted by the trying Magistrate to conduct the prosecution case. In his explanation the District Magistrate has admitted that "it is true that the prosecuting inspector did not actually take part in the conduct of this case". After the evidence of the complainant had been recorded a charge was framed and it was after that stage that the accused persons made an application to the District Magistrate requesting that the case be withdrawn on certain terms. The file was sent for. When sending up the file the trying Magistrate addressed a note to the District Magistrate setting forth the facts of the case and winding up with the remark "I therefore would strongly recommend the application for your kind consideration because I do not believe that the accused committed the offence with intent to defraud." On reading the report of the trying Magistrate and perusing the file the District Magistrate seems to have been of opinion that the case was not one which should be dragged to its bitter end. He accepted the apology of the accused persons as well as the offer of the sum of Rs. 4,500 for a charitable purpose. He ordered that "the P. I. (that is the prosecuting inspector) will withdraw the case. Out of Rs. 4,500, Rs. 200 will be paid to the complainant to defray his expenses and to compensate him." This order reached the trying Magistrate's court before whom a further application was presented by the Court Inspector. On that application the trying Magistrate passed this order: "The case has been withdrawn by the District Magistrate. The accused should be acquitted accordingly."

These are the facts about which there can be no dispute whatsoever. The question for consideration is whether the order passed by the trying Magistrate was legal and whether in any case it ought to be set aside.

On behalf of the accused persons it has been contended that I must assume that the District Magistrate in sending for the file had actually recalled the case or withdrawn it from the court of the trying Magistrate and was himself seized of it and was enquiring into it or trying it and that it was in the course of such an enquiry or trial that he appointed the Court Inspector as a person to conduct the prosecution of this case within the meaning of section 495, Criminal Procedure Code, and that therefore the latter was duly authorised to withdraw the case. On the facts narrated by me such assumptions would be altogether unjustified.

There can be no doubt that section 492, sub-clause (1) of the Criminal Procedure Code cannot apply. Under that section an officer appointed by the Governor General in Council or the Local Government *to be called a public prosecutor* would be such an officer. Court Inspectors of districts are not called by the Local Government as public prosecutors and I have no doubt that they have not been appointed as such. No notification suggesting anything to the contrary has been brought to my notice.

It is also obvious that section 492, sub-clause (2), can have no application. The Code which was in force when this order was passed was the old Code and as it then stood sub-clause (2) could only apply to a case which had been committed for trial to the court of sessions. It could not apply to a case which was actually pending before a Sub-Divisional Magistrate.

The learned Vakil for the accused has relied strongly on section 495, sub-clause (1), but I am of opinion that that also does not apply to the facts of this case. It cannot be disputed that after the complaint had been filed the Vakil engaged by the complainant was the person who had been permitted to conduct the prosecution case and it is not disputed that it was he who was engaged by him and who had been prosecuting the case. The Court Inspector, who never went anywhere near the court when this case was being tried and took no part in the trial and as regards whom there is no order on the record to conduct the prosecution is, in my opinion, not the person who under section 495,

Criminal Procedure Code would have the powers of a public prosecutor. There is nothing on the record to show that the complainant or his vakils were at all consulted before the withdrawal was decided upon. As the learned Sessions Judge has remarked it does seem as if it was done over the heads of those persons.

The question therefore is whether under these circumstances the Court Inspector had authority even with the consent of the trying Magistrate to withdraw the case or not. I am of opinion that he had no such power. He was not the Public Prosecutor appointed by the Local Government and called as such nor was he in this case the person who was permitted to conduct the prosecution. Even assuming however that the Court Inspector with the consent of the trying Magistrate had power to withdraw this case and even without consulting the complainant and his vakil, I am of opinion that this is a case in which the order acquitting the accused persons must be set aside.

When a private complaint is filed and then the complainant is given permission to conduct the prosecution and be responsible for its conclusion, it does seem to me highly improper that after he has closed his evidence and the charge has been framed the prosecution should suddenly drop without even consulting him. If there was no case made out against the accused at all the accused were entitled to have a clear acquittal and not an acquittal on the payment of a price. The learned Vakil who appeared for the accused had strongly pressed that the opinion expressed by the trying Magistrate in his note to the District Magistrate shows that he was convinced that the conviction would not follow. Whether this is so or not I refrain from expressing an opinion. The opinion contained in that private note may or may not be that, but if it is a fact that the trying Magistrate was satisfied that there was no case against the accused he should have acquitted them at once.

In view of the observations made by me above I think it is necessary in the ends of justice that the order of acquittal should be set aside and the case sent back for disposal according to law. The case will, of course, proceed from the stage which it had reached before the order in question was passed.

Reference accepted. Case remanded.

1924 Allahabad 205.

SULAIMAN, J.

Tula Ram—Applicant.

v.

King-Emperor—Opposite party.

Cr. Rev. No. 438 of 1923, decided on 18th September, 1923, from the order of the Sessions Judge, Moradabad, dated 24th July, 1923.

(a) *Penal Code, S. 417—Sending Khilafat notes is no offence.*

Sending Khilafat bonds in an insured postal cover, instead of Government currency notes is no offence under this section. It may amount to an offence of fabricating false evidence. [P. 207, C. 1.]

(b) *Evidence Act, S. 114—Insured postal cover does ensure identity of contents.*

The mere fact that a cover insured for a certain amount is sent, raises no presumption in law that that cover contains the necessary amount of Government currency notes. [P. 206, C. 2.]

S. N. Mukherji—for the Applicant.

The Asst. Govt. Advocate—for the Crown.

Judgment :—This is an application in revision from a conviction under section 417 read with section 511 of the Indian Penal Code.

The facts as found by the courts below, about which in revision there cannot be much dispute, are as follows :—

Some five years ago the accused had borrowed Rs. 562-8-0 as loans on different occasions from the complainant. The complainant was asking for the repayment of the loan, and it is said that a serious demand was made for the return of this money last year. The accused is said to have made promises to repay. Some time before the alleged occurrence, it is also in evidence, that he sent a letter to the complainant saying that he would be sending money under a registered cover. On the 8th of March the accused admittedly sent a registered and insured cover to the address of the complainant. When this cover was received by the complainant he did not open it at the post office but took it home and opened it in the presence of a number of witnesses. On opening it he discovered that instead of five Government currency notes of Rs. 100 each, there were five Khilafat bonds, which are of course of no money value. On this he reported the matter to the post office, which was followed by an enquiry. During the enquiry the accused's statement was taken,

as it is fully borne out by Ex. H, and in that statement he put forward the story that as a matter of fact he had sent Government currency notes and not the Khilafat bonds.

He was put on his trial and the charge framed against him was worded as follows : that he on the 8th of March, 1923, at Moradabad cheated Krishen Das Harrumal by dishonestly inducing them to receive and accept the insured letter Ex. H containing Islamic Unity Bonds which they would not have accepted if they were not so misled and caused them damage.

It is to be noted that there was no charge of any attempt to cheat the postal authorities. The trying Magistrate convicted the accused under section 417, but on appeal that conviction was altered to one under section 417, read with section 511, that is to say an attempt to cheat.

The question for consideration in this revision is whether on the facts stated above the accused has been rightly convicted of the offence of attempting to cheat.

The learned Sessions Judge has also sent up a reference recommending that the sentence of three months' rigorous imprisonment and a fine of Rs. 200 should be enhanced. In his judgment he has relied on the decision of a case in the Patna High Court, decided by a Division Bench of that Court, namely, the case of *Sadho Lal* v. *Emperor* (1). The facts of that case I must say were very much similar to the facts of this case, and the learned Judges of the Patna High Court upheld the conviction under section 417 read with section 511.

It is obvious that no question of an offence of any actual cheating having been committed arises in this case. Under section 415 of the Indian Penal Code mere deceiving a person fraudulently is not sufficient unless that deception is coupled with dishonestly inducing that person to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induce the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission is likely to cause damage or harm to that person. It is conceded that in the present case no offence of cheating was committed.

I have then to see whether the accused can be convicted of an attempt to cheat. There can be no doubt that the sending of these worthless bonds was not by way of a mere joke. In his statement before the postal authorities, as well as in his defence at the trial, the accused stuck to his story that he had in fact sent Government currency notes. In cases of this kind one may very well imagine that the object is to cheat the postal authorities and try to recover the amount for which the contents were said to have been insured. But that is not the offence with which the accused has been charged. I may therefore leave that possibility entirely out of account.

The question to be answered is whether the accused did attempt to cheat the complainant, and if so in what way. It cannot be imagined that the accused expected that on the receipt of these false notes the complainant would be induced either to give a valid discharge of his debt, or to grant him any receipt, or to deliver any property to him, or to consent to retaining any property.

The point to be further considered is whether the object was not to induce the complainant to do or omit to do anything which he would not have done or omitted to do. The only possible suggestion that has been made, and that can be made, is that by these means of fraud the accused hoped that when a suit for recovery of the debt was instituted, he would have in substance some sort of evidence to bolster up a defence that the debt had been discharged. I cannot see how on receipt of these false bonds the complainant would have been prevented from bringing a suit altogether. The mere fact that a cover insured for a certain amount is sent raises no presumption in law that that cover contains the necessary amount of Government currency notes. It is therefore not easily conceivable what is the thing which the complainant would have done or omitted to do if the fraud contemplated by the accused had succeeded. The only thing that can be said is that the accused imagined that he would have had some sort of a proof that the debt had been paid off.

If however that be the view, the offence that the accused committed was an attempt to cause a circumstance to exist, intending that such circumstance may appear in

(1) (1916) 1 Pat. L.J. 391=3 Pat. L.W. 99=17 Cr. L.J. 272=34 I.C. 992.

evidence in a judicial proceeding or proceeding taken by law before a public servant or before an arbitrator, and such circumstance so appearing in evidence, may cause a person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion on any point material to the result of the proceeding. Then the offence would be an attempt to fabricate false evidence within the meaning of section 192 of the Indian Penal Code. The accused however has not been charged with any such offence.

The judgment of the Patna High Court referred to by the learned Sessions Judge does not clearly set forth the grounds on which the learned Judges thought that the case fell under section 417 read with section 511. In the present case I am of opinion that it is impossible to say that the complainant would have been induced to do a thing, or omit to do a thing in consequence of what was done by the accused.

In this view of the matter I hold that no offence under section 417 read with section 511 was committed. Of course I do not mean to say that no offence of any kind whatsoever was committed. I accordingly allow his application, set aside the conviction and sentence passed on the applicant and acquit him of the offence with which he was charged. He should be released at once, and the fine if paid be refunded.

Revision accepted.

1924 Allahabad 207.

WALSH, J.

Subedar and others—Appellants.

v.

King-Emperor—Opposite Party.

Cr. App. No. 446 of 1923, decided on 17th July, 1923, against the order of the Addl. Sessions Judge, Aligarh, dated 18th April, 1923.

Crim. Pro. Code, S. 154 — Admission of guilt is not first information,

A statement made by the accused implicating himself and others cannot be called 'first information report' so far as he is covered.

Saila Nath Mukherji—for Appellants.

The Government Pleader—for Crown.

Judgment.:—In this case six men have been convicted of the offence of making preparation for a dacoity and sentenced to varying terms of imprisonment of some severity. The first two Subedar and Ram Chander have already been convicted of a dacoity and sentenced to eight years' imprisonment, which conviction and sentence has been confirmed by me in the connected case. I have no doubt whatever as to the guilt of all the appellants. The same approver Narain who gave evidence in the connected case has also given evidence in this case.

I should not therefore interfere, or say anything about the details of the case, if it were not for one unfortunate circumstance in the way in which the learned Judge has dealt with one feature in the evidence. A technical point has been argued on behalf of the appellants, and in my opinion it is a good one. With regard to some of the accused it happens to possess little or no importance. I will deal with the way in which it affects the case of the appellants in detail in a moment. But it is a point of general importance affecting other accused, and a point upon which the learned Judge ought never to have made a mistake at all. The point is really an elementary one. I have no doubt the learned Judge is quite familiar with sections 25, 26 and 27 of the Evidence Act, but the complaint against his judgment is that he has misapplied the sections. The point arises in this way. The approver and one of the appellants were arrested practically redhanded. They made statements to the officer who arrested them involving admissions of guilt. They went further and gave a list of the other members of the gang. Thereupon the officer made a report in writing to his superior, containing the information which he had received, including the names of those other persons received from the two men arrested. Somehow or other, the learned Judge has described this police report, which is merely the report of a confession, as "the first information report." Now the first information report is a well-known technical description of a report under section 154, Criminal Procedure Code, giving first information of a cognizable crime. This is usually made by the complainant, or by some one on his behalf. The language is inapplicable to a statement made by the accused. The novelty of a statement by an accused person being called the first information report was to me so strange, that when counsel for the appellants addressed his argument to me

attacking the Judge's use of the first information report, I took no notice of the argument. The learned Judge realized that he was dealing with a confession, but he momentarily failed to appreciate that the document itself was inadmissible, and that the only way in which the information relied upon could be used was by section 27. That is to say, with regard to the other accused, the officer giving evidence might say: "I arrested them in consequence of information received from Narain and Thakuri. When I arrested them they made a statement to me which caused me to arrest these people". The use which can legitimately be made of such information is merely this, that when direct evidence is given against the accused at the trial and there was evidence against the accused, it is open to the defence to check such evidence by asking whether the name of a particular accused was mentioned or not at the time. So that it becomes evidence which may be used to test the consistency of an approver's story, and at any rate information which leads to the discovery of the accused in question. It is no evidence of the guilt of the accused, and the mischief into which the learned Judge has fallen and which has been rightly complained of, is that he has used it throughout as evidence of guilt. In discussing the individual cases he consistently says in the forefront of the points against the individual accused, that "his name occurs in the first report," and he acquits some because their names do not appear in the first report, and in his general discussion in the judgment he says that "the first information report in question is of the greatest importance". As regards four of the accused I am quite satisfied that there was abundant evidence without this inadmissible document. Khuba was arrested in the village, where several of the dacoits came from, along with Chiranji who was armed with a loaded weapon. He has been identified as being with other members of the gang in two different places by three witnesses. He unfortunately has a squint. I do not understand why a squint should be regarded as a bar to a legitimate identification. It seems to me rather an aid than otherwise. It is quite true that if there is a dishonest investigation an Inspector might tell the witnesses that one of the persons he wanted identified had a squint, and it might be well, if there are many persons awaiting trial with this abnormality, that some of them might be put amongst the crowd for identification. But a man might just as well object to an identification because he happens to wear a black moustache. People with remarkable features take that risk when they take up an evil course. Chiranji has been sworn to by the approver, and as the judge says his arrest with a loaded pistol is an incriminating fact against him, and he has been identified by some of the witnesses. Umrai was with the two appellants whom I have just mentioned and he has also been identified. Thakuri was with Narain when they were both arrested hiding soon after day-break with a loaded gun and ammunition. In the case of those four I have no hesitation in confirming their conviction and sentences. The case of Ram Chander and Subedar is not quite so simple. Omitting the objectionable report, there is only the identification of witnesses who have made a fair proportion of mistakes, and if this was the only thing against them, I should have felt some difficulty in deciding whether I ought not to order a new trial. But I propose to take a short and common sense course which cannot possibly prejudice the accused. They have already received 8 years for dacoity. If I had the power I would make the sentence in this case run concurrently. After the 8 years their power for mischief will be very much diminished and it seems an adequate sentence. They must have been guilty of some preparation, if not this preparation, and I therefore uphold this conviction and having no jurisdiction to order the sentence to run concurrently, I reduce the sentence to one of one day to date from the judgment in the sessions trial. I have taken the pains which I have done to deal with this question, because I thought it right that the attention of the Sessions Judge should be drawn to the point, and that he should realise that in a case of this kind, if the other evidence or other circumstances have raised a doubt as to the sufficiency of the evidence in the case, the time and trouble spent in this case, would have been thrown away because I should have had to order a new trial. Subject to the above modifications the appeals are dismissed.

Sentences reduced.

1924 Allahabad 209 (1).

SULAIMAN, J.

Brij Behari Lal—Applicant.

v.

King-Emperor—Opposite party.

Cr. Rev. No. 454 of 1923, decided on the 18th September, 1923, from the order of the Sessions Judge, Ghazipur, dated 4th August, 1923.

Crim. Pro. Code (1923), S. 345 (5-A)—Compounding of offence is allowed in revision.

Under the new Code, S. 345, sub-clause (5-A), a High Court acting in the exercise of its powers of revision under S. 439, may allow any person to compound any offence which he is competent to compound under this section and under Sch. 2, Chapter V, an offence under S. 420, Penal Code, is made compoundable by the new Code.

G. W. Dillon and *S. N. Verma*—for Applicant.

Judgment:—In this revision an application has been filed on behalf of the original complainant supported by an affidavit, praying that permission be granted to compound his case.

The complainant had filed a complaint against the accused on the allegation that the latter had cheated him in respect of a sum of Rs. 210, which had been paid by the complainant for the purchase of certain shares of the Allahabad Tannery, Ltd. The accused was convicted by the trial court and that conviction was upheld on appeal. The sentence passed on him was one of rigorous imprisonment for six months and a fine of Rs. 100. An application for revision was filed on behalf of the accused on the ground that there was no sufficient evidence on the record to prove his guilt. Acting under the revisional powers of this Court I sent for the record and the revision is still pending.

In the affidavit filed in this Court to-day the complainant admits that he has received Rs. 210, of which it has been alleged that he has been cheated. In his application which has also been verified in court by him he is agreeable to compromise the matter and allow the case to be compounded.

Under the new Code of Criminal Procedure, section 345, sub-clause (5-A), a High Court, acting in the exercise of its powers of revision under section 439, may allow any person to compound any offence which he is competent to compound under this section and under Sch. 2, Chapter V, an offence under section 420 of the Indian Penal Code is now made compoundable.

As the amount in question was a small sum which has been received in full by the complainant and he is ready and willing to compound the matter I grant the necessary permission.

As a result, the composition of the offence, mentioned above, shall have the effect of the acquittal of the accused; the fine if paid must be refunded and the accused released forthwith so far as this case is concerned.

Case allowed to be compounded.

1924 Allahabad 209 (2).

SULAIMAN, J.

Sarda Saran—Applicant.

v.

King-Emperor—Opposite party.

Cr. Rev. No. 459 of 1923, decided on the 8th October, 1923, from the order of the Sessions Judge, Cawnpore, dated 24th July, 1923.

Penal Code, S. 420—Getting money without a request or inducement to that effect, is no offence.

The applicant Sarada Saran was a temporary clerk at Lucknow, and took leave from the 23rd January 1923, till the 31st of January of that year. While he was on casual leave he went to Cawnpore, and was appointed a permanent head clerk of the Cawnpore Cantonments by a temporary Cantonment Magistrate. He applied to the Lucknow authorities for an extension of his leave but originally this leave was not granted. His casual leave expired on the 31st January, 1923. On the 2nd of February 1923, he had been informed that he was ineligible under the rules for a permanent appointment. Captain Pocock, told the accused that he could not consider his retention in the Cantonment Magistrate's office, whereon the accused informed him that he had resigned his post in the Military Accounts Department, and that it would entail considerable loss to him if he did not retain him. He even offered to accept the position of an apprentice clerk. Captain Pocock could not retain him in his office, and so he paid him a month's pay in lieu of notice amounting to Rs. 145. The accused took the pay in lieu of notice and went back to Lucknow. He then got his leave extended and rejoined on the 5th of February. He again drew his pay at Lucknow, where the accused made it clear that he had already drawn his pay for the month at Cawnpore and he would have to refund one of the two sums.

Held, that it is very difficult to say that the accused induced Captain Pocock to pay him Rs. 145. [P. 210, C. 1.]

Gulzari Lal and *R. N. Prasad*—for Applicant.

The Asst. Govt. Advocate—for the Crown.

Judgment:—This is a criminal revision from a conviction under section 420 of the Indian Penal Code.

The applicant Sarda Saran was a temporary clerk at Lucknow, and took leave from the 23rd of January, 1923, till the 31st of January of that year. While he was on casual leave he went to Cawnpore and was appointed a permanent Head clerk of the Cawnpore Cantonments by a temporary Cantonment Magistrate. He applied to the Lucknow authorities for an extension of his leave but originally this leave was not granted. It is not disputed that his casual leave expired on the 31st of January, 1923. On the 2nd of February, 1923, he had been informed that he was ineligible under the rules for a permanent appointment.

Captain Pocock, prosecution witness No. 3, states that he told the accused that he could not consider his retention in the Cantonment Magistrate's office, whereon the accused informed him that he had resigned his post in the Military Accounts Department, and that it would entail considerable loss to him if he did not retain him. He even offered to accept the position of an apprentice clerk. The witness goes on to say that as he could not retain him in his office, he thought it fit and proper to give him a month's pay *in lieu of notice*, and adds that he was induced to do so on account of the representation made to him by the accused.

The accused took the pay in lieu of notice and went back to Lucknow. It is stated that he then got his leave extended and rejoined on the 5th of February. He again drew his pay at Lucknow but the clerk who paid him has stated that on receipt of it the accused made it clear that he had already drawn his pay for the month at Cawnpore and he would have to refund one of the two sums.

On these facts the accused has been convicted of the offence of cheating.

Cheating is defined in section 415 of the Indian Penal Code as being committed when by deceiving any person fraudulently or dishonestly one induces the person so deceived to deliver any property, etc., and which act causes damage.

There can be no doubt that deception was practised on Captain Pocock. Whether it was intentional or not is a matter which was to some extent in dispute, it being suggested on behalf of the accused that as he had overstayed his leave he honestly believed that he had lost his appointment. The question however still remains whether the accused by deceiving Captain Pocock, induced him to pay him the salary for February in lieu of notice. The charge as framed was that he had cheated Captain Pocock and thereby dishonesly induced him to give him (the accused) one month's pay in lieu of one month's notice, while he was actually drawing pay for that period from another Government department.

Captain Pocock's statement however makes it clear, and the learned Sessions Judge himself has conceded that admittedly the accused did not ask Captain Pocock to give him the sum of Rs. 145 or for the matter of that any other sum. Captain Pocock's own statement is that the accused requested that he be retained, and even offered to accept the position of an apprentice clerk. It is manifest therefore that the statement, if it was knowingly made by the accused, was made with the object of inducing Captain Pocock to retain him in service, or at any rate to accept him as an apprentice clerk. There is nothing to show that at that time the accused even suggested that any compensation should be paid to him.

The question therefore is whether it can be said that the accused by false representation, which he made with the intention of securing his retention as Head Clerk or his employment as an apprentice, can be said to have induced Captain Pocock to pay him Rs. 145, simply because the Captain on that statement thought that that was the most fit and proper thing to do.

The case is certainly not free from difficulty.

In my opinion in order to convict a person for cheating, it is necessary to show that there is a proximate connection between deception practised on the complainant, and his being induced to part with some property. If the connection is too remote, or very indirect, it is difficult to see that the offence of cheating would be complete. I have therefore to see whether the circumstances of this case are such as to make it clear without any reasonable doubt that the payment of one month's salary in lieu of notice was proximately connected with the false representation made by the accused. There is no doubt

that Captain Pocock does say that he would not have made the payments unless he had been told that the accused had lost his appointment.

The other matter which must have influenced Captain Pocock's mind was the circumstance of the accused's sudden dismissal without previous notice. The accused certainly was guilty of an attempt to cheat Captain Pocock in this way, that he deceived Captain Pocock and thereby dishonestly attempted to induce him to retain the accused in his service and thus do an act which he might not otherwise have done. But the accused has unfortunately not been charged with that offence.

What I have to see is whether he can be convicted of having induced Captain Pocock to pay him Rs. 145, in lieu of notice. On the evidence of Captain Pocock himself it is clear that the accused in no way suggested to him that he should be paid any compensation. He certainly did not ask him to pay any sum. All that he did was to request him to retain him in service as permanent Head Clerk, or even as apprentice clerk. Can it therefore be said that the accused induced Captain Pocock to pay him Rs. 145? I think the case is just on the border line, and it is very difficult to say that the accused induced Captain Pocock to pay him Rs. 145. I am far from saying that Captain Pocock would have paid the sum even if he had not been told by the accused that he (the latter) had lost his appointment.

I accordingly allow this application, set aside the conviction and sentence passed on the accused and discharge him. He should be released forthwith. The fine, if paid, will be refunded.

Revision accepted.

1924 Allahabad 211.

SULAIMAN, J.

Shafi and others—Applicants.

v.

King-Emperor—Opposite party.

Cr. Ref. No. 482 of 1923, decided on the 14th September, 1923, made by the Sessions Judge, Budaun, dated 10th August, 1923.

Crim. Pro. Code, S. 233—Theft and beating after an interval, to prevent complainant from lodging complaint, are distinct offences.

Sharfuddin and Nanhe accused were detected while stealing the crop of the complainant Chiddu Chamar, who objected to the theft and was compelled to run away to his house. After this, Sharfuddin and Nanhe hearing that the complainant intended to go to the police station to make a report, went along with the other persons to the complainant's *chaupal* and there caused hurt to Chiddu, and grievous hurt to his father Nanhe.

Held: that the two offences were obviously quite distinct and separate, and there was also an interval of time between their commission. *Held further*: that they were not so connected together as to form the same transaction.

The parties were not represented.

Judgment:—This is a reference by the Sessions Judge of Budaun. The accused persons were tried jointly for offences under sections 379, 147 and 325 read with section 149 of the Indian Penal Code. They were convicted by the trying Magistrate and their convictions were upheld by the appellate court.

An application for revision was presented on behalf of the accused persons to the court of the Sessions Judge, and the legality of the joint trial was questioned.

The facts as found so far are that Sharfuddin and Nanhe accused were detected while stealing the crop of the complainant Chiddu Chamar, who objected to the theft and was compelled to run away to his house. After this Sharfuddin and Nanhe hearing that the complainant intended to go the police station to make a report, went along with the other persons to the complainant's chaupal and there caused hurt to Chiddu, and grievous hurt to his father Nanhe. The two offences were obviously quite distinct and separate, and there was also an interval of time between their commission. By no stretch of language can it be said that these offences were of the same time, nor can it be said that they were so connected together as to form the same transaction.

In this view of the matter I agree with the learned Sessions Judge that a joint trial was illegal. It was held by their Lordships of the Privy Council in the case reported in 25 Madras 61 that such non-compliance with the provisions of section 233 of the Code of Criminal Procedure, was not merely an irregularity but an illegality.

The accused were not satisfied with the joint trial and themselves asked the learned Sessions Judge to set aside the orders on

the ground of the illegality of the joint trial.

I accept the reference, and set aside the convictions of the accused persons, and direct that the accused be tried *de novo* of the offences charged, and the offence of theft be tried separately from that falling under sections 147, 325 and 149. The District Magistrate will send the case to another Magistrate for trial.

Let the record be returned.

Retrial ordered.

1924 Allahabad 212.

SULIAMAN, J.

Lachman and another—Applicants.

v.

King-Emperor—Opposite party.

Cr. Ref. No. 484 of 1923, decided on the 4th October, 1923, by the Addl. Sessions Judge, Aligarh, dated 16th August, 1923.

Crim. Pro. Code, S. 522—Appellate Court cannot pass order under, if trial Court has passed none—But under new Code, High Court can.

An appellate Court has no power to pass an order under S. 522 if the trial Court had made no order at all. (39 Cal. 1050 and 48 I. C. 510, *Appl.*)

But under the new Code brought into effect on the 1st September last the High Court under S. 522 sub clause (3) has in a reference or revision, power to make an order of restoration even though no such order might have been made by the trial or appellate Court. [P. 213, C. 1.]

The parties were not represented.

Judgment:—This is a reference by the learned Additional Sessions Judge of Aligarh. It has been found by the courts below that Sia Ram, complainant was put in possession of the southern portion of the house in dispute by the Civil Court Amin on the 10th of December, 1922, in pursuance of an appellate order of the Civil Court. In spite of the possession having been given to Sia Ram as found by the courts below the accused again took possession of the house forcibly on the 29th of December, 1922. It has been found that force was used and Sia Ram was intimidated and was prevented from getting into the house. Accordingly the accused have been convicted of the offence under section 448 of the Indian Penal Code and there is no question of interference with that order.

The trial court however omitted to pass any order under section 522, Criminal Procedure Code. The appellate court after upholding the conviction and sentence directed that the trying Magistrate should restore rightful person, *i.e.*, Sia Ram again into possession under section 522, Criminal Procedure Code. The learned Additional Sessions Judge has referred this case to the High Court with a recommendation that the latter portion of the order of the appellate court was *ultra vires* and should set aside. Under the old Code of Criminal Procedure there was considerable doubt as to whether an appellate court had power to pass an order under section 522 of the Code of Criminal Procedure where a trial court had made no order at all. Had some order been passed by the trial court under section 522, Criminal Procedure Code, then the appellate court acting under section 423, sub-clause (*d*) of the Criminal Procedure Code had power to make any amendment or any consequential or incidental order that might be just or proper and thus to interfere with that order. Where however the trial court had not made any order under section 522, Criminal Procedure Code, it was certainly very doubtful whether the interference by the appellate court could come within the expression "amendment or any consequential or incidental order that may be just and proper." In the case of *Bhagat Shaha* v. *Sadique Ostagar* (1), followed in 48 I.C. 510, it was held that the appellate court had no jurisdiction to make an order restoring possession of immoveable property where the trial court had not made any order at all. These cases are in no way inconsistent with the rule of law laid down in 27 All. 415 where a trying Magistrate had himself made an order. I therefore agree with the view of the learned Additional Sessions Judge that the appellate court had in this case no jurisdiction to make the order in question.

The case however is a very gross one and in the absence of a restoration of possession the complainant will be forced to institute fresh proceedings in a Civil Court, soon after a successful litigation. This is a fit case therefore for interference by this Court.

Under the new Code of Criminal Procedure (as modified and brought into effect on the 1st of September last) the High Court under section 522, sub-clause (3),

(1) (1912) 39 Cal. 1050=16 C.W.N. 811=13 Cr. L.J. 608=16 I.C. 176.

Criminal Procedure Code has in a reference or revision power to make an order even though no such order might have been made by the trial or appellate court.

Accordingly I set aside that portion of the appellate court's order which directed restoration of possession to the complainant and in place of it make a fresh order directing restoration of possession of that portion of the house which had been delivered over to the complainant in pursuance of the Civil Court decree.

Reference accepted.

1924 Allahabad 213.

SULAIMAN, J.

Onkar—Applicant.

v.

King-Emperor—Opposite party.

Cr. Ref. No. 485 of 1923, decided on 4th October, 1923, ref. made by the Addl. Sessions Judge, Aligarh, dated 14th August, 1923.

Crim. Pro. Code, S. 520—Appellate Court cannot direct restoration, where trial Court has not.

One Onkar filed a complaint under S. 506 against the three accused to the effect that they were demanding under threats the restoration of certain *Bahis* which were in the complainant's possession. These *Bahis* had been in the possession of Onkar for the last 10 or 11 years but the trying Magistrates found that they really belonged to two of the accused. They however, passed no order with regard to the restoration of the *Bahis* but added that if they wanted to get them back they should seek their remedy in a proper Court. In an appeal the Appellate Court directed that the *Bahis* be returned to the accused.

Held: that the offence of criminal intimidation was complete but the order of restoration was bad.

The parties were not represented.

Judgment:—This is a reference by the Additional Sessions Judge of Aligarh.

Onkar, the complainant, filed a complaint under sections 506 of the Indian Penal Code and 107 Criminal Procedure Code against the three accused to the effect that they were demanding under threats the restoration of certain *Bahis* which were in the complainant's possession. It has been found that these *Bahis* had been in the possession of Onkar for the last 10 or 11 years but the trying Magistrates found that they really belonged to two of the accused, Musammat Sabitri and Musammat Deoki. They acquitted the two Musammats but convicted the third accused Nanney. They however passed no order with regard to the restoration of the *Bahis* to the Musammats but added that if they wanted to get them back they should seek their remedy in a proper court.

In an appeal by Nanney, the appellate court, although it did not differ from the finding that the *Bahis* had been in the possession of Onkar for 11 or 12 years and although it upheld the conviction of Nanney, directed that the *Bahis* be returned to Musammats Sabitri and Deoki.

There can be no doubt that an appellate court under section 520, Criminal Procedure Code has power to modify, alter or annul an order made under section 517 or make any further orders that may be just. At the same time there can also be no doubt that the order of the trying Magistrates was under the circumstances quite proper.

It was Onkar who had been in possession of these *Bahis* for 10 or 11 years who complained that the accused persons were threatening him. Although the object of the threat was obviously to obtain possession of the *Bahis* nevertheless the offence of criminal intimidation was complete even though the accused did not have access to the articles in question. Their convictions could also have been upheld if the *Bahis* did not really belong to the accused. So long as it was clear that the complainant had been in possession of these *Bahis* for 10 or 11 years, the question of title need not have been gone into by the criminal courts. That question has, as pointed out by the learned Additional Sessions Judge, become a complicated one and involves the examination of the further questions whether Gopi Nath did or did not purchase the *Bahis* at an auction-sale and whether the sale to Onkar was a *bona fide* one or not. These questions were very properly left to be determined by the Civil Court.

I therefor accept this reference and set aside that part of the order of the appellate court which directed that the *Bahis* be made over to the two Musammats. The *Bahis* if still in the custody of the court should be returned to Onkar from whose possession they have come.

Reference accepted in part.

1924 Allahabad 214 (1).

SULAIMAN, J.

Ram Dayal and others—Applicants.

v.

King-Emperor—Opposite party.

Cr. Ref. No. 492 of 1923, decided on the 4th October, 1923, ref. made by the Sessions Judge, Farrukhabad, dated 11th August, 1923.

Penal Code, S. 272—Mixing pig's fat in ghee for sale is no offence under this section.

Mixing of pig's fat with ghee and selling the mixture would be noxious to the religious and social feelings of both Hindus and Mahomedans but such an act would not come within the meaning of the expression 'noxious as food' which occure in S. 272. The word "noxious" had it stood by itself, might have had a wider meaning.

The parties were not represented.

Judgment:—This is a reference by the Sessions Judge of Farrukhabad. The accused persons were convicted in a summary trial and therefore the record is very meagre. All that appears from the notes of evidence made by the trying Magistrate is that the accused persons were taking out pig's fat and mixing it with ghee which they ordinarily sell. There was no direct evidence that the accused intended to sell the mixture although this might be inferred from the circumstance that they do sell ghee. They have been convicted under section 272 of the Indian Penal Code for adulterating an article of food so as to make such article noxious as food intending to sell it as food or knowing it to be likely that it will be sold as such. It is true that the mixing of pig's fat with ghee and selling the mixture would be noxious to the religious and social feelings of both Hindus and Mohamedans but I am of opinion that such an act would not come within the meaning of the expression 'noxious as food' which occurs in section 272, Indian Penal Code. That expression obviously means unwholesome as food or injurious to health and not repugnant to one's feelings. The word 'noxious' had it stood by itself, might have had a wider meaning, but what I have to consider is the expression 'noxious as food' and not merely noxious.

I therefore think that the conviction under section 272 of the Indian Penal Code was not justified. Of course if the accused had sold the mixture or attempted to sell it on the pretence that it was pure ghee they would have been guilty of quite a different offence, that is to say of cheating or attempt to cheat. I accordingly accept this reference and set aside the conviction of the accused, acquit them of the offence charged and direct that they be released.

Conviction set aside.

1924 Allahabad 214 (2).

SULAIMAN, J.

Ali Ahmad Khan—Applicant.

v.

King Emperor—Opposite party.

Cr. Rev. No. 534 of 1923, decided on the 14th September, 1923, from an order of the Sessions Judge, Bareilly, dated 18th August, 1923.

Crim. Pro. Code, S. 537—Illegality in the conduct of search does not vitiate trial.

Where the discovery of the articles showing the guilt of the accused and found at the search, is proved by direct evidence, any irregularity or illegality in the search can neither vitiate the trial nor affect a conviction. (11 A.L.J. 442, *Foll.*) [P. 215, C. 1.]

S. B. Johri—for the Applicant.

Judgment:—This was a clear case and the only question was whether the accused was in possession of cocaine and used to sell it in his house. On search being made four Government currency notes which had been previously marked by the Excise Inspector and had been handed over to an informer in order to be paid for cocaine as purchase price were actually discovered in a locked box in the house of which the accused had the key. Furthermore, the search witnesses say that as soon as the party raided the house the accused went inside a room and tried to hold up the door against the police but it was forced open. He was also seen going to a table in a corner of a room and picking up some packets which he hurriedly put in his mouth. His mouth was forced open by a police constable and some pieces of paper were taken out but the powder had been swallowed by him. Then the evidence is that certain scales and a knife were discovered which when later on examined by the Chemical Examiner were found to have traces of cocaine on them. The evidence of Baldeo Prasad as well as the informer is to the effect that it was the accused who had sold the packet to the

informer and which was ultimately found to contain cocaine. All these facts have been found by both the courts below against the accused. It is impossible for me to go behind these findings and to say that these witnesses should not have been believed. It has been strongly urged before me that the search that was made was without a legal warrant and was illegal and it is then argued that that vitiates the whole trial. I am unable to agree with this contention. There is no question of drawing any legal presumptions. The discovery of the articles mentioned above is proved by direct evidence. Any irregularity or illegality in the search can neither vitiate the trial nor affect a conviction—*vide* the case reported in 11 A. L. J. 442. In face of the positive evidence it cannot be said that the accused has in any way been prejudiced by any irregular search. I reject the application.

Revision rejected.

1924 Allahabad 215 (1).

SULAIMAN AND RYVES, JJ.

King-Emperor

v.

Aladin.

Cr. Ref. No. 559 of 1923, decided on the 26th October, 1923, ref. by the District Magistrate, Agra, dated 3rd October, 1923.

Arms Act (XI of 1878), S. 4—Empty cartridges are ammunition.

Empty cartridges come within the definition of ammunition in S. 4 of the Arms Act. (32 All. 152, *Foll.*)

The parties were not represented.

FACTS:—In this case the accused Aladin was convicted under section 19 (*f*) of Act XI of 1878 (Arms Act) for being in possession of three empty cartridge cases without licence and was sentenced to six weeks rigorous imprisonment. The defence put forward by the accused was that he had picked them up on the road without knowing what they were.

The District Magistrate taking the view that empty cartridges like these do not come within the definition of ammunition as given in paragraph 4 of the Act referred the case to the Hon'ble High Court. He relied on a case of the Punjab Chief Court *Jawa Khan* v. *K.E.*, No. 20 Punjab Record 1890.

The Reference first came up before Mr. Justice Sulaiman who referred it to a Bench of two Judges.

Judgment:—This is a reference by the learned District Magistrate of Agra recommending that the conviction of Aladin under section 19 (*f*) of the Arms Act be quashed. Aladin was prosecuted for having in his possession three empty cartridge cases. He was convicted and sentenced by the Deputy Magistrate to six weeks' rigorous imprisonment.

It seems to us that empty cartridges come within the definition of ammunition in section 4 of the Act, and we follow the view laid down by a learned Judge of this Court in *Baldeo Singh* v. *King-Emperor* (1). In our opinion therefore the conviction was right. We think however that the sentence was altogether excessive. In our opinion a fine would have been more appropriate than a sentence of rigorous imprisonment for this offence. As the accused has already served some part of his term we alter the sentence to the term already served. As he is on bail he need not surrender. Let the papers be returned.

Conviction upheld.

(1) (910) 32 All. 152=7 A.L.J. 102=10 Cr.L.J. 573=4 I.C. 405.

1924 Allahabad 215 (2).

SULAIMAN, J.

Anis Beg—Appellant.

v.

Emperor—Respondent.

Cr. App. No. 619 of 1923, decided on the 11th August, 1923, from the order of the Sessions Judge, Moradabad, dated 4th July, 1923.

Penal Code, S. 328—Administering Dhatura to cause a girl to fall in love with accused is an offence where delirium was caused.

The accused a boy of about 16 years of age became infatuated with a girl Mt. Chando and began to make advances to her and did various tricks to make her inclined towards him. Ultimately he persuaded Kanhaiya, a boy of about 12 years of age to take five *Peras* one of which contained dhatura in order that they might be given to Mt. Chando and other members of her family. Kanhaiya did distribute these *peras* to various people including Mt. Chando. All the persons who took these *peras* showed symptoms of poisoning, and Mt. Chando was in a state of delirium.

Held: that the intention to persuade Mt. Chando by some mysterious means or other to fall in love with him, cannot be said to be an intention to commit or facilitate the commission of any offence. But dhatura is a very common drug, and it is well known that it is poisonous and a person of the age of the accused must be presumed to know that such a drug is poisonous. [P. 217, C. 1.]

Held further: that if a person by the administration of dhatura is thrown into a delirium, with the possible risk of falling into coma and becoming unconscious for the time being, both bodily pain and infirmity are caused and therefore the accused was guilty under S. 328. [P. 217, C. 1.]

G. W. Dillon—for Appellant.

The Govt. Pleader—for the Crown.

Judgment:—This is an appeal from a conviction under section 328 of the Indian Penal Code, the accused having been charged with poisoning with *dhatura* a number of persons including one Musammat Chando, who is a girl of about 12 years. The accused is about 16 years of age, and it is the prosecution case that he became infatuated with the girl Musammat Chando and began to make advances to her and did various tricks to make her inclined towards him. It is said that he first got her brother Narain to take a cake of soap and crochet needle and ten annas that Musammat Chando might knit him something. He also asked her brother to get him some earth from below her left foot. He then tried to get some sweets sent to her through one Manohar, who refused to take them. Ultimately he persuaded Kanhaiya, a boy of about 12 years of age to take five *peras*, one of which is said to have contained dhatura, in order that they might be given to Musammat Chando and other members of her family. There can be no doubt that Kanhaiya did distribute these *peras* to various people, including Musammat Chando. All the persons who took these *peras* showed symptoms of poisoning. This was in the evening of the 1st of May, 1923. A private practitioner Dr. Dikshit was sent for about 9-15 p. m., and he noticed that Musammat Chando was in a state of delirium. She was picking at the cot and drawing imaginary threads from her fingers. Shanti, a boy, was in a condition of collapse and his heart was failing. The condition of the children of the tailor was also bad. The doctor came to the conclusion that all that was the effect of the *dhatura* poisoning, particularly as he noticed the pupils of these people dilated. At about 3-30 a. m., that night three of these persons were sent to the hospital and were there examined by the medical officer in charge. He found the pupils of Musammat Chando dilated and her condition delirious. The pupils of two others were also found dilated, one of whom, was slightly unconscious but the other person was in his senses. This doctor also came to the conclusion that these persons showed signs of *dhatura* poisoning. None of these doctors were able to see any vomit or stools and they could not give any more definite opinion.

The broad facts of the case connot be much disputed. There is no doubt that the appellant did become infatuated with the girl and did try various tricks to make her favourably inclined towards him. It is the previous conduct of the accused that has made the learned Sessions Judge come to the finding that there was really no "intention" on the part of the appellant to cause any hurt to either of the persons to whom *peras* were given. The accused had pleaded an *alibi* but led no evidence to substantiate that plea. The evidence given by Kanhaiya Lal, supported by the evidence of *halwai* who sold the *peras* to the accused, as well as of Piarey Lal, a passer-by who saw him purchase them and handing them over to Kanhaiya Lal, who was standing close to the confectioner's shop, conclusively establishes that the accused had handed over *peras* to Kanhaiya Lal, which were distributed to the persons already mentioned.

On behalf of the appellant it has been argued very strenuously that he must have been under a mistaken belief that these *peras* would act as a love *philtre*, and his only object in making Mussamat Chando eat them was to make her love him.

It is also suggested that as Kanhaiya Lal is the son of a local hakim, it is highly probable that it was he who had procured this drug. Whether Kanhaiya Lal was in the conspiracy, or not, there can in my opinion be no doubt that the accused must have intended to administer some specific drug which he believed would act as a love philtre.

The medical evidence proves that this drug was *dhatura*. The question then is whether under the circumstances it can be inferred that the accused knew the nature of the drug which was going to be administered.

As I agree with the finding of the learned Sessions Judge that there was really no

intention on the part of the accused to cause hurt to any person, it is clear that the offence cannot fall within the first portion of section 328 of the Indian Penal Code. I am also of opinion that the intention to persuade Musammat Chando by some mysterious means or other to fall in love with him, cannot be said to be an intention to commit or facilitate the commission of any offence. In this view the act cannot fall within the second portion of that section either.

The question remains whether it can be said that the accused knew it to be likely that he will thereby cause hurt to any of those persons. I find it impossible to believe that Kanhaiya Lal would have mixed up this drug in the *peras* without informing the accused what drug it was. Even if Kanhaiya Lal knew all about it, there can in my mind be no doubt that the accused also knew the nature of the drug. I find it impossible to conjecture, or assume, that the drug which the accused wanted to put in the *peras*, was a drug other than the one which the doctors say must have been. If it was sought to be shown that a mistake had been made, and owing to such mistake a wrong drug had been mixed up, it was the duty of the accused to show it. There was no plea of this kind put forward, nor any evidence led. The evidence of Kanhaiya Lal, if believed, negatives it altogether. In any case I am not prepared to assume that the accused was not aware that the drug which was mixed in one of the *peras* at least was anything but *dhatura*, which the doctors found to have been the drug. *Dhatura* is a very common drug, and it is well known that it is poisonous. A person of the age of the accused must be presumed to know that such a drug is poisonous. If he causes such a drug to be administered, he must be presumed at least to know that it is likely that he will thereby cause hurt. The word "hurt" is defined in section 319 of the Indian Penal Code as meaning either bodily pain or disease or infirmity to any person. The bodily pain or infirmity obviously may either be permanent or temporary. If a person by the administration of that drug is thrown into a delirium, with the possible risk of falling into coma and becoming unconscious for the time being, it is clear that both bodily pain and infirmity are caused. "Infirmity" has been defined by one author as inability of an organ to perform its normal function which may either be temporary or permanent. In my opinion this definition seems to be correct. Under the circumstances there can be no doubt that the accused must be deemed to have had knowledge that the administering of the drug was likely to cause hurt within the meaning of section 319 of the Indian Penal Code.

It is very fortunate that none of the persons, who took the *peras*, died. The boy Shanti however was in a very serious condition of collapse, and at one time it was seriously feared that his heart was failing. Luckily he escaped death. Musammat Chando also was comparatively very seriously ill. Under the circumstances although the accused cannot be said to have actually intended to cause any hurt to either of these persons, yet as his act was a grossly rash one. I think that the sentence of one year's rigorous imprisonment does not err on the side of severity. The result is that this appeal fails and it is dismissed. The appellant who is on bail must surrender at once.

Appeal dismissed.

1924 Allahabad 217.

RYVES AND DANIELS, JJ.

Pateshwari Prasad—Defendant-Appellant.

v.

Shanker Dayal—Plaintiff-Respondent.

S. A. No. 946 of 1923, decided on the 22nd June, 1923, against the decree of the District Judge of Gorakhpur, dated 23rd February, 1923.

Evidence Act, S. 71—Attesting witnesses won over by the other side—Evidence of writer sufficient.

Where it was found by the Courts below that the attesting witnesses had been won over and gave evidence hostile to the plaintiff, and the plaintiff examined the writer of the deed to prove execution under S. 71 and his evidence was accepted. *Held*: that the contention that it is necessary that this witness should have been able to swear that both the attesting witnesses were present when the executant signed the deed and that they witnessed it is untenable. (17 A.L.J. 141 and 1922 Pat. 415, *Foll.*)

The law provides that the attesting witnesses, if available, must be called and that in their absence no other evidence to prove execution shall be accepted: If they are dead or have been won over by the other side the person claiming under the document is allowed to prove it as best he can. It

is sufficient if he can prove execution by any evidence that may be available.

P. L. Banerjee—for the Appellant.

Judgment:—The only plea urged in this appeal is that the mortgage sued on was not proved. It has been found by the courts below that the attesting witnesses had been won over and gave evidence hostile to the plaintiff. The plaintiff examined the writer of the deed to prove execution under section 71 of the Evidence Act and his evidence has been accepted. The appellant's contention is that it is necessary that this witness should have been able to swear that both the attesting witnesses were present when the executant signed the deed and that they witnessed it. This point is concluded against him by the authority both of this High Court and of the Patna High Court. In *Narain Das* v. *Dilawar* (1) it was held by a Bench consisting of Richards, C.J., and Banerji, J., that if the mortgage appeared on the face of it to have been executed in the presence of more than one person and it was proved in the manner prescribed by section 71 of the Evidence Act, this was sufficient. In *Laksman Sahu* v. *Gokhul Maharana* (2) the question was still more specifically dealt with. The relevant passage in the judgment of Das, J., who delivered the leading judgment is as follows:—"The learned Vakil who has argued this case on behalf of the respondent urges before us that the proof of execution will not help the plaintiff; it must be proved that the document was properly attested. In my opinion so far as section 71 of the Evidence Act is concerned, execution includes attestation, for section 71 only operates if the attesting witness denies or does not recollect the execution of the document."

We think that these rulings correctly express the intention of section 71. The main object of attestation is to secure unimpeachable evidence of the execution of the document. The law provides that the attesting witnesses, if available, must be called and that in their absence no other evidence to prove execution shall be accepted. If they are dead or have been won over by the other side the person claiming under the document is allowed to prove it as best he can. It is sufficient if he can prove execution by any evidence that may be available. It would be laying an impossible burden on him to require that he should be able to produce a witness who could not only prove execution but was also able to swear that both the attesting witnesses were present and that they attested the deed. We accordingly dismiss the appeal under Order 41, rule 11.

Appeal dismissed.

(1) (1919) 41 All. 250=17 A.L.J. 141=52 Ind. Cas. 830.
(2) 1922 Pat. 415=1 Patna 154=70 I.C. 298.

✓ **1924 Allahabad 218.**

(FULL BENCH).

PIGGOT, LINDSAY and SULAIMAN, JJ.

M. Muhammad Jan—Plaintiff-Appellant.

v.

Shiam Lal and others—Defendants-Respondents.

Ex. S. A. Nos. 1430 and 1431 of 1922, decided on the 14th December, 1923, from the decree of the District Judge, Budaun, dated 31st July, 1922.

(a) *Civ. Pro. Code, O. 20, r. 14—Deposit made on re-opening day the Court being closed on the day of deposit, is valid—Limitation Act, S. 4.*

By an appellate decree, the plaintiff in two pre-emption cases was given one month from the 27th of September, 1921, within which to deposit certain money, if he desired to obtain the benefit of the decree in his favour. The Civil Courts closed for the vacation in that year on the 30th of September and re-opened on the 4th November. On that date the successful plaintiff made the deposit required by the decree.

Held: that the deposit tendered by Muhammad Jan the plaintiff on the 4th November, 1921, was in time under the terms of the decree. Although the parties themselves cannot extend the time for doing an act in Court, yet if the delay is caused, not by any act of their own, but by some act of the Court itself, such as the fact of the Court being closed, they are entitled to do the act on the first opening day. (18 Cal. 631, 22 Mad. 179, *Appr*; 19 A.L.J. 79, 3 All. 850 and (1884) A.W.N. 217, *Affir.*; 41 All. 47, *Overruled.*) [P. 219, C. 2.]

Iqbal Ahmed—for the Appellant.

S. A. Haidar—for Respondents.

Piggot, J.:—The facts out of which the two appeals before us arise are stated in the referring order of the 22nd June, 1923. In substance they amount to this: By an appellate decree, the plaintiff in two pre-emption cases was given one month from the 27th of September, 1921, within which to deposit certain money, if he desired to obtain the benefit of the decrees in his favour. The civil courts closed for the

vacation in that year on the 30th of September and reopened on the 4th of November. On that date the successful plaintiff made the deposit required by the decree. The courts below have held that it was too late, more than thirty days having elapsed since the 27th of September, 1921. There was authority of this court for the view thus adopted. This is to be found in the case of *Hirday Narain* v. *Alam Singh* (1). The attention of the courts below was not drawn to the fact that, since the decision above referred to a Bench of this Court, in the case *of Reoti Ram Sita Ram* (2) had arrived at a different conclusion. The matter has been referred to a Full Bench in order that these conflicting decisions may be reconsidered. The position is so far an unfortunate one that in *Reoti Ram's* case the attention of the Bench was not called to the decision in *Hirday Narain's* case, while on the other hand the decision in *Reoti Ram's* case is founded upon an older decision of this Court which was not laid before the Bench which decided *Hirday Narain's* case. The older decision in question is the case of *Dabi Din Rai* v. *Muhammad Ali* (3). We now find moreover that another Bench of this Court, in the case of *Bisheshar Naik* v. *Said-ud-din* (4), had held a deposit made under circumstances precisely similar to those which we are now considering to have been made in time. The question for determination is whether the deposit made by the plaintiff Muhammad Jan was or was not within time under the terms of the decree. We have no desire to discuss any question as to the powers of the Court to extend that time; nor do we hold that the case falls within the provisions of section 10 of the General Clauses Act. As regards the decisions of this Court there is clearly a preponderance of authority in favour of the plaintiff appellant. The current of authority is broken only by the decision in *Hirday Narain's* case. The facts in that case were to this extent peculiar, that the deposit made by the plaintiff was not made actually on the first possible day after the reopening of the courts, but one day later. It is true that a point was made in argument of the fact that, on the first available day, the treasury where the deposit was required to be made was only open for one hour; but we do not know how far this circumstance may have affected the decision of the Hon'ble Judges. There are two cases of other High Courts which are in our opinion in point. In the case of *Shooshi Bhushan Rudro* v. *Gobind Chander Roy* (5) the Calcutta High Court, relying upon certain Engligh cases, made the following observations:—

> "The broad principle there laid down "is that, although the parties themselves "cannot extend the time for doing an act "in court, yet if the delay is caused, not by "any act of their own, but by some act of "the Court itself, such as the fact of the "court being closed, they are entitled "to do the act on the first opening day".

They go on to remark that this principle had been affirmed in older cases of the same court.

The same principle was laid down by another Bench of the same Court in the case of *Peary Mohan* v. *Ananda Charan* (6) in which again two older cases are referred to. We desire to refer also to the case of *Sambasiva Chari* v. *Ramasami Reddi* (7). The significance of that case lies in the fact that the Hon'ble Judges repelled contentions based upon the statutory provisions of the Indian Limitation Act and of the General Clauses Act; but nevertheless held that there is a generally recognized principle of law under which parties who are prevented from doing a thing in court on a particular day, not by any act of their own, but by the court itself, are entitled to do it at the first subsequent opportunity. It is quite true that this case, as well as *Shooshi Bhushans Rudro's* case, was laid before the Bench of this court which decided *Hirday Narain's* case. The learned Judges there remarked that these cases have nothing to do with the question then being argued before the court. Strictly speaking this remark is correct, as the Hon'ble Judges were then dealing with a pre-emption decree prescribing a certain period for the doing of a certain act; but it does seem to us that the general principle affirmed in the Calcutta and Madras cases is applicable and is sound in law. In view of these considerations and, taking account of the fact that

(1) (1919) 41 All. 47=16 A.L.J. 892=48 I.C. 359.
(2) (1921) 19 A.L.J. 49=60 I.C. 894.
(3) (1881) 3 All. 850=(1881) 1 A.W.N. 100.
(4) (1884) A.W.N. 217.
(5) (1891) 18 Cal. 231.
(6) (1891) 18 Cal. 631.
(7) (1899) 22 Mad. 179.

the general current of authority in this Court has been opposed to the decision in *Hirday Narain's* case, we think that that case should now be overruled and the law affirmed as settled by two previous decisions and one subsequent one. In our opinion the deposit tendered by Muhammad Jan the plaintiff on the 4th of November, 1921, was in time under the terms of the decree and should have been accepted. We therefore allow these appeals, set aside the order of the court below and dismiss the application of the defendants to have the decree of the 27th of September, 1921, executed as a decree in their favour. The appellant will have his costs throughout. It will be for the plaintiff Muhammad Jan to make such further application to the trial court as he may be advised, if he desires to obtain execution of thedecree in his favour.

Appeal allowed.

---

* 1924 Allahabad 220.

(FULL BENCH).

PIGGOT, LINDSAY AND SULAIMAN, JJ.

Sardara and others—Appellants.

v.

King-Emperor—Respondent.

Cr. App. No. 665 of 1923, decided on the 14th December, 1923, against the decision of the Sessions Judge, Moradabad, dated 13th July, 1923.

(a) *Criminal trial—Conviction—Severity of sentence should be lessened because of service to crown.*

Where the accused has rendered service to crown, in giving evidence against some members of his gang which evidence resulted in their conviction, his conviction was altered from one of death to that of transportation for life. [P. 223, C. 1.]

(b) *Criminal Pro. Code, S. 337—Statements previous to tender of pardon are admissible against the approver.*

A previous admission made by accused, who was subsequently tendered pardon, is admissible in evidence against him. (11 All. 79, *Dist.*)

M. L. Sandal—for the Appellant.

The Government Advocate—for the Crown.

Piggot, J.:—In this case Sardara, Bansi and Pokha, described as *pasias* by caste, residents of the same village, mauza Meoli, in the Rampur State, were put on their trial on a charge framed under section 396, I.P.C., in respect of a dacoity committed on the 27th June, 1922, at a village called Majhaula, in the Bahjoi police circle of the Moradabad District. The learned Sessions Judge has convicted all three accused and the record is before us for confirmation of sentence of death passed by the sessions court. The accused have submitted petitions of appeal and the case has been argued by Counsel on their behalf. The commission of a serious dacoity on the date and at the place specified in the charge is proved by abundant evidence and is not contested. The villagers seem to have expected succour from a fort belonging to a local Raja and as the dacoits, who were somewhere about thirty in number, were leaving the house which they had plundered, they found it necessary to fire on the assembled villagers in order to clear a passage for themselves. The evidence is that either two or three shots were fired, that two villagers were killed on the spot and others wounded. It will be convenient to consider at once the circumstances under which the three appellants came to be implicated. More than a month later, that is to say, on the 30th July, 1922, the police in the Etah District arrested under circumstances of grave suspicion, certain persons who were endeavouring to travel by train from the railway station of Kasganj or other railway stations on the same line in that district. Amongst the persons so arrested were these three accused, Sardara, Bansi and Pokha. The learned Sessions Judge does not say that they were arrested together; but he says that they were arrested under circumstances warranting the inference that they had gone to the Etah District on one and the same business. Sardara was produced before a Magistrate on the 1st of August, 1922, the next day but one after his arrest. To that Magistrate he made a detailed confession, admitting his complicity in dacoities which had just been committed in the Etah District and also referring to other dacoities committed by the same gang in other districts. Amongst the dacoities referred to in this confession is this offence committed at Majhaula for which the three accused have now been tried and convicted. In consequence of this statement the three accused were placed, along with a number of other under-trial prisoners, in the Etah Jail on the 17th of August, 1922, when witnesses from Majhaula were brought to see if they

could identify any of them. Evidence as to this identification proceeding has been given by the Magistrate under whose supervision it was conducted. The result, so far as we are concerned, was that one witness, by name Angan Lal, picked out the accused Sardara and Bansi from amongst the entire number of persons paraded before him for identification. He has been consistent throughout in his statement in respect of these two men. He says they were amongst the decoits who committed the offence at Majhaula and that Sardara had a gun. It was a dark night, but the dacoits had lit torches inside the house and, when they were leaving the house, the witness deposes that they passed quite close to him. This witness made no mistake in his identification; that is to say, he did not profess to recognize any of the persons placed before him except Sardara and Bansi. One other witness, by name B ba Ram, picked out the accused Bansi and Pokha as persons whom he recognized as having been amongst the dacoits at Majhaula; but he also picked out and made the same assertion concerning an under-trial prisoner who admittedly had nothing whatever to do with the dacoity at Majhaula. His evidence is therefore discounted to this extent, that he has shown himself capable of making a wrong identification. We need not refer for the moment to the proceedings taken in the Etah and Aligarh districts in respect of the dacoities committed there. The record of the present trial shows that when these three accused persons were placed on their trial at Moradabad they simply pleaded not guilty. There is nothing in the statement of Sardara to the effect that he had been tendered a pardon in the Etah District. He did not make a statement to this effect before the Committing Magistrate at Moradabad, nor did he enter any such plea in the sessions court. In his petition of appeal to this Court what he says is that, having been tendered a pardon, he gave evidence as a prosecution witness in connection with one dacoity committed in the Etah District and one dacoity committed in the Aligarh District. He adds that, as a matter of fact, he knew nothing whatever, about any dacoity committed in the Moradabad District, but that after his arrest the police had suggested to him that he should include this Moradabad dacoity in his statement and he had fallen in with the suggestion.

It was after examining this petition of appeal that the question was raised before the Bench hearing the said appeal as to whether Sardara ought to have been tried at all by the Sessions Judge of Moradabad. It is quite true that he did not plead in that sessions court any pardon in bar of his trial; but in the case of a prisoner of this class, not represented by Counsel, it would not be fair to press such a point against him. This Court has therefore undertaken to investigate the question whether there was or was not in existence a Magistrate's order, having the effect of a valid tender of pardon in respect of this offence at Majhaula of which Sardara has now been convicted, which pardon the said Sardara could have pleaded in bar of his trial. In the record of the Etah dacoity, Sessions Trial No. 57 of 1922, we do not find any formal order drawn up by the Committing Magistrate, or by any other Magistrate, of the kind presupposed by the provisions of section 337 of the Code of Criminal Procedure. We do find however something which may be treated as, for practical purposes, the equivalent of such a proceeding. It appears that on the 6th September, 1922, Sardara was produced before Mr. Abdul Haq, a Magistrate of the first class. The Magistrate began his examination of Sardara by recording the following question :—

"Are you prepared to accept a pardon upon this condition, that you shall state accurately and fully all the facts known to you concerning (or connected with) the Nagla Kunji dacoity?"

The accused replied, "yes, I am so prepared".

Upon this a statement was recorded bearing on this dacoity at Nagla Kunji. There is nothing in that statement which refers to the offence for participation in in which Sardara has now been convicted. Accepting this record as proving the tender of a pardon to Sardara under the conditions prescribed by section 337 of the Code of Criminal Procedure we are satisfied that this tender was only in respect of the offence then under investigation by Mr. Abdul Haq, Magistrate of the first class. That was the offence of dacoity committed at Nagla Kunji in Etah District. The pardon as tendered has clearly no reference to the dacoity committed more than a month previously at this village of Majhaula in the Moradabad District. Reference might of course be made to section 339 (2)

of the Code of Criminal Procedure; but we are bound to note that the statement which has been tendered in evidence against Sardara at this trial is not the statement which he made to Mr. Abdul Haq on the 6th of September, 1922, nor any other statement made by him subsequently to the tender of pardon. What is being put in evidence is his original confession before another Magistrate made on the 1st of August, 1922. We are satisfied that there is nothing in section 339 of the Criminal Procedure Code which forbids this confession of the 1st of August, 1922, from being put in evidence. We have been referred to, and have carefully considered, the ruling of a learned Judge of this Court in the case of *Queen-Empress* v. *Ganga Charan* (1). That case is certainly distinguishable. In the first place, the statement which was being put in evidence against the accused Ganga Charan in the reported case was the very statement which he had made after a pardon had been tendered to him and on the strength of that tender of pardon. In the second place, the learned Judge of this Court, having gone into all the circumstances under which pardon had been tendered to and accepted by Ganga Charan, satisfied himself that the offences for which Ganga Charan was afterwards being put upon his trial in another district (and indeed in another province) were so connected with the offences in respect of which he had accepted the tender of pardon, and had given evidence as a witness at the first trial, that they were covered by the terms of the pardon which had been tendered to Ganga Charan. For the reasons already indicated we are unable to say the same of the offence committed at Majhaula with which we are concerned in the present case. We hold therefore that, apart altogether from the fact that no pardon was pleaded in bar of trial in the present case, there was as a matter of fact in existence no pardon which could legally have been pleaded by Sardara in bar of his trial in respect of the offence for which he was tried and convicted by the Sessions Judge of Moradabad.

We now come to the evidence in the case. Sardara has been convicted on the confession made by him on the 1st of August, 1922, taken with the evidence of Angan Lal. In our opinion he was rightly convicted upon this evidence. There is no reason whatever to distrust the *bona fides* of Angan Lal's evidence, and he showed himself capable of identifying two men accurately out of the dacoits whom he had seen at Majhaula. Moreover, Sardara's confession, made on the 1st of August, 1922, has been proved in the present case by the Magistrate who recorded it, and we have the Magistrate's testimony to the fact that it was made voluntarily. It seems altogether a farfetched suggestion that the police of the Etah District, the moment these men arrested under suspicious circumstances had fallen into their hands, should have thought of coaching one of them to make a full confession in respect of a dacoity committed more than a month previously in another district. There is no room for the suggestion that this confession of the 1st of August, 1922, was prompted by any promise of pardon. The Magistrate who recorded it took pains to satisfy himself on this point; moreover, the promise of pardon was made more than a month later in consequence of this confession, and not this confession in consequence of any promise of pardon. We are satisfied that Sardara has been rightly convicted.

As regards Bansi we come to the same conclusion. There are two identification witnesses against him and the cumulative effect of such evidence is always important. He is also implicated in the retracted confession of Sardara.

We are less satisfied with regard to Pokha. The only identification evidence against him is that of the witness Biba Ram, who proved himself capable of making a *bona fide* mistake in identity. He is only implicated in Sardara's confession in vague and general terms. The circumstances of his arrest, on which considerable stress is laid by the learned Sessions Judge, would no doubt serve to supply a considerable degree of corroboration of Sardara's assertion that this man Pokha, along with Bansi, was concerned in the dacoity committed at Nagla Kunji in the Etah District immediately prior to their arrest; but it does not supply any real corroboration of Sardara's statement that Pokha, along with Bansi and others, had been concerned in the Majhaula dacoity more than a month previously. In our opinion the evidence against Pokha falls short of satisfactory or conclusive proof. We

(1) (1888) 11 All. 79 = (1888) A.W.N. 289.

accept his appeal, set aside the conviction and sentence against him and direct that, so far as this matter is concerned, he be set at liberty. We have finally to consider the question of sentence as against Sardara and Bansi. The learned Sessions Judge, in entire ignorance of the facts we have ascertained as to the previous dacoity cases in the Etah and Aligarh districts, was no doubt justified in passing sentence of death upon Sardara in the present case. The dacoity was a serious one, the murder of two villagers was a cruel and wanton act and the act itself was brought very close to Sardara by evidence that he was himself carrying a gun at the time. We think however that the public service done by Sardara in giving evidence for the Crown in two cases in the Etah and Aligarh districts, which we know to have resulted in the conviction of other members of the gang, deserves recognition at least to this extent, that he may be permitted to save his own neck from the rope. If we set aside the sentence of death against Sardara we feel that we must do the same in the case of Bansi. Accordingly, we accept the appeals of Sardara and Bansi to this extent only, that, while affirming the conviction recorded in respect of each of them, we set aside the sentence of death and, in lieu thereof, direct Sardara and Bansi to undergo transportation for life.

Convictions altered.

1924 Allahabad 223.

RAFIQ AND STUART, JJ.

Mukarram Ali Khan—Defendant-Appellant.

v.

Anjuman-un-nissa Bibi and *Asghar Ali Khan*—Plaintiff-Defendant-Respondents.

S. A. No. 1592 of 1920, decided on the 24th October, 1922, from the decree of the District Judge, Budaun, dated 26th July, 1920.

Mahomedan Law—Waqf—Provision for maintenance of relatives and dependents does not invalidate.

A dedication for the purposes of charity, including maintenance of relatives and dependents, and for the reading of the *fateha* for the salvation of the soul of dedicator constitutes a valid waqf. [P. 224, C. 1.]

S. M. Sulaiman and *S. N. Sen*—for the Appellant.

Iqbal Ahmad—for the Respondents.

Judgment:—The only point which requires decision in the present appeal is whether the property in dispute is waqf property or not. The plaintiff respondent, Musammat Anjuman-un-nissa, purchased the property in suit from Asghar Ali Khan, defendant, respondent No. 2, on the 14th of November, 1917. Soon after her purchase she made an application to the Revenue Court for mutation of names in her favour. The defendant-appellant, Mukarram Ali Khan, who is a cousin of Asghar Ali Khan, objected to the mutation of names in favour of the vendee on the ground that the property in respect of which mutation of names was sought was waqf property, and hence the vendor of the plaintiff-respondent No. 1 had no right to convey it.

Both parties gave evidence and the claim of the plaintiff was decreed. The decree of the first court was upheld in appeal. Mukarram Ali Khan has come up in second appeal before us and contends that the property in suit was dedicated prior to 1854 to certain charitable purposes and that the decisions of the court below as to the validity of the waqf are erroneous. It appears from the materials on the record that there has been litigation in respect of this property prior to the present dispute. The former litigations were in 1901-1902 and 1915-1917. In the former litigation of 1901, which arose out of partition proceedings, the decision of the District Court was adverse to the contention of the defendant-appellant. On the other hand, in the litigation of 1915-1917, which ended in this Court, the decision was in favour of the contention of the defendant-appellant. Both parties to the present appeal call to their aid the decisions of 1902 and 1917, contending that the matter is *res judicata*. We think that the question of *res judicata* does not really arise in the present case as some of the parties to the former litigations were different. The real point, as we have already remarked, for consideration is whether the property in question is waqf. We find from the papers on the record that one Mardan Ali Khan was the owner of the property in suit and some other considerable landed property. According to the statement of the defendant-appellant, he (Mardan Ali Khan) dedicated the property in suit to certain charitable and religious objects. After his death there was a dispute between his descendants and the

matter was referred to arbitration. The award given by the arbitrators found the property now in suit as waqf property dedicated by Mardan Ali Khan for the purposes of charity, including maintenance of his relatives and his dependents, and for the reading of the *fateha* for the salvation of his soul. Now we have to consider whether the above-mentioned objects would constitute objects of a valid waqf. The contention on behalf of the plaintiff-respondent No. 1, the vendee, is that the dedication was really for the benefit of Mardan Ali Khan's descendants and for keeping the property in his family, and that the mention of the dependents, the charitable purposes and the *fateha* was merely a pretence to evade the law under which a dedication for the maintenance of the members of a family was, at that time, invalid. We have given due consideration to the argument of the learned Counsel for the plaintiff respondent No. 1, but we find ourselves unable to agree with him. We think that the real object of Mardan Ali Khan was to dedicate a portion of his property for the reading of the *fateha* and for *umur-i-khair* (charitable purposes) including the maintenance of his poor relatives and dependents. Such a dedication is, it is not denied, valid under the Muhammadan law. The opinion of the learned Judge of the lower appellate court that the objects of the waqf were uncertain and illusory, is not sound and is not supported by any valid reasons. We, therefore, hold that the waqf in question was a valid waqf. We allow the appeal and set aside the decrees of the courts below and dismiss the suit of the plaintiff respondent No. 1 with costs in all courts.

Appeal allowed.

1924 Allahabad 224.

SULAIMAN, J.

Chedi—Applicant.

v.

Ram Lal—Opposite Party.

Cr. Ref. No. 371 of 1923, decided on 11th August, 1923, from the decision of the Addl. District Judge, Allahabad, dated 23rd June, 1923.

Crim. Pro. Code, S. 250—Appellate Court cannot act under this section.

It is only the trying Magistrate who, if he discharges accused persons, can order compensation to be paid. The appellate Court has no jurisdiction to proceed under S. 250. (28 All. 625 and 39 Cal. 157, F.B., *Foll*)

S. Sinha—for the Applicant.

Sulaiman, J.:—This is a reference by the Additional Sessions Judge at Mirzapur. It appears that there were two trials before a Magistrate of the third class. Ram Lal was convicted under section 447 of the Indian Penal Code in one and three other accused persons were convicted under section 352 of the Indian Penal Code in the other. Both these accused persons preferred an appeal to the District Magistrate, who allowed their appeals, set aside the convictions and released the accused. In addition to this he called upon the complainant to show cause why he should not be ordered to pay compensation under section 250 of the Criminal Procedure Code. Eventually he ordered the complainant to pay Rs. 20 as compensation to Ram Lal and Rs. 10 each to the other three accused.

The learned Additional Sessions Judge has referred these cases to this Court with a recommendation that the order awarding compensation should be set aside as being without jurisdiction.

In my opinion this reference must be accepted. The wording of the section is very clear. It is only the trying Magistrate who, if he discharges accused persons, can order compensation to be paid. The appellate court has no jurisdiction to proceed under section 250. This was the view taken by Stanley, C.J., in the case of *Balli Pande* v. *Chittan* (1). That case has been followed by the Full Bench of the Calcutta High Court in the case of *Mehi Singh* v. *Mangal Khandu* (2). In my opinion therefore the order passed by the District Magistrate directing compensation to be paid was *ultra vires*. I accept this reference and set aside that part of the District Magistrate's order which directed that the complainant should pay compensation to the various persons. The compensation if paid will be refunded.

Reference accepted.

---

(1) (1906) 28 All. 625=3 A.L.J. 382=(1906) A W.N. 145=3 Cr. L J 441.

(2) (1912) 39 Cal. 157=16 C W N. 10=14 C.L.J. 437=12 Cr. L.J. 529 (F.B.).

1924 Allahabad 225 (1).

WALSH AND RYVES, JJ.

Kirpa Kishen Kishori—Applicant

v.

Babu Lal and another—Opposite parties.

Civ. Rev. No. 153 of 1922, dated 12th April, 1923, from the Addl. Sub-Judge, Aligarh, dated 25th September, 1922.

(a) *Civ. Pro. Code, S. 151—Decree set aside for want of guardian—Procedure.*

Where the previous suit had failed for want of a lawful guardian, the proceedings in it including the decision are a nullity from the point when the improper appointment of the guardian was made. It is not a commencement of a fresh suit. It is not an application for rehearing, because in the eye of law there has been none. It is not an application to restore. It is an application to revive it by the appointment of a proper guardian so that from the date of such appointment it becomes a properly constituted suit in which the differences between the parties can be decided.

(b) *Civ. Pro. Code, O. 32, r. 3—Improper appointment of guardian* ad litem*—Effect.*

The improper appointment of a guardian has the effect of invalidating the proceedings in the suit including the decision, from the point the improper appointment was made. (39 All. 8, *Foll.*).

Durga Prasad—for the Applicant.

Ibn-i-Ahmad—for the Opposite parties.

Judgment:—We think the Judge has taken an altogether erroneous view in the matter. It is not perhaps surprising as it is a very technical point, and it is extremely difficult to see one's way clear through the proper procedure but the matter is made absolutely clear by the luminous judgment of late Sir Sunder Lal in *Bhagwan Dayal* v. *Param Sukh Das* (1) and if the Judge had had this decision brought to his notice and explained, he no doubt would have taken the view that we now take. We agree with the decision in that case. The *ratio decidendi* is that the previous suit having failed for want of a lawful guardian the proceedings in it including the decision are a nullity from the point when the improper appointment of the guardian was made. It is not therefore a commencement of fresh suit. It is not an application for rehearing because in the eyes of law there has been none. It is not an application to restore. It is an application to revive it by the appointment of a proper guardian so that from the date of such appointment it becomes a properly constituted suit in which the difference between the parties can be decided. We return the record to the Court below, making the order which the lower Court ought to have made, namely, that the suit be revived as from the point at which the application for appointment of guardian is to be made. No appointment is now necessary in the case of Babu Lal who has become *sui juris*, but the other minor still requires a lawful guardian, and the plaintiff must apply to the trial Court in due course for the appointment of a lawful guardian. It is understood that this order of revival is only as against the persons who were formerly sued as minors. There is a suggestion in the judgment under revision that some decision on the merits was come to in the original suit. Whether that is so or not it must be clearly understood that, as against these two persons who were then sued as minors, there is no previous decision on the merits. If there was a previous decision it must be disregarded by the lower Court. The whole case is to be tried *de novo* starting its new life from the date of the application for the appointment of a guardian. The application is allowed with costs.

Application allowed.

(1) (1917) 39 All. 8=14 A.L.J. 818=36 I.C. 866.

1924 Allahabad 225 (2).

WALSH AND RYVES, J.

Teja—Defendant-Appellant

v.

Tika Ram—Plaintiff-Respondent.

F. A. F. O. No. 180 of 1923, decided on 4th July, 1923, from the order of the Addl. Sessions Judge, Aligarh, dated 2nd November, 1922.

Decree — Setting aside—Decree wrong but not challenged by the party concerned—Cannot be challenged for him by any one else.

Nanhe and Teja were brothers who together formed a joint family. They owned an ancestral house. On the 4th February, 1908, Nanhe mortgaged the whole house to Tika Ram. Tika Ram sued on his mortgage and got a preliminary decree for sale in 1912. Before Tika Ram could get an order for sale under O. 34, r. 5, Teja the other brother brought a suit to avoid the mortgage on the ground that Nanhe as a member of an undivided joint Hindu family could not make a valid mortgage of the ancestral house without his consent and in the absence of legal necessity and for a declaration that the house could not be sold under the mortgage decree. The suit was decreed on January 4th, 1918. Thereupon Tika Ram abandoned his rights under the mortgage and

asked the Court then seized of the execution proceedings to pass a decree under O. 34, r. 6 and that was done. The effect of that was to give Tika Ram a simple money decree against Nanhe. Nanhe was a party to these proceedings, but he did not contest the application nor did he appeal from the order passed. In execution of that decree the right, title and interest of Nanhe in the house in suit was put up for sale and was purchased by Tika Ram who then brought a suit for partition for half the house on the allegation that Nanhe's right, title and interest in the whole house amounted to half. Teja having failed to set aside the sale in the execution department filed a counter suit for declaration that the execution sale in favour of Tika was invalid and that he (Tika Ram) was not entitled to partition the house,

Held, that the Court passed an order which it should not have passed having regard to the provisions of the Code. But it was seized of the execution of the case and it did pass that decree. Whether right or wrong that decree not having been challenged by Nanhe, the party concerned and any one who stands in his shoes as Tika Ram does in this case, cannot go behind it. Tika Ram although in the inception his title was impeachable, has now acquired an absolute title which is good against all the world and therefore good against Teja. (25 Bom. 337 (P.C.), *Foll.*; 18 A.L.J. 628, *Dist.*) [P. 227, C. 1.]

Haribans Sahai—for the Appellant.

Panna Lal—for the Respondent.

Ryves, J.:—The facts, as now found, under which this appeal arises are as follows :—

Nanhe and Teja were brothers who together formed a joint Hindu family. They owned an ancestral house. On the 4th February, 1908, Nanhe mortgaged the whole house to Tika Ram. Tika Ram sued on his mortgage and got a preliminary decree for sale in 1912. Before Tika Ram could get an order for sale under Order 34, rule 5, Teja, the other brother, brought a suit to avoid the mortgage on the ground that Nanhe, as a member of an undivided joint Hindu family, could not make a valid mortgage of the ancestral house without his consent and in the absence of legal necessity, and for a declaration that the house could not be sold under the mortgage decree. That suit was decreed on January 4th, 1913. Thereupon Tika Ram abandoned his rights under the mortgage, and asked the Court, then seized of the execution proceedings, to pass a decree under Order 34, rule 6, and that was done. The effect of that was to give Tika Ram a simple money decree against Nanhe. It is to be noted here, that Nanhe was a party to these proceedings. He did not contest the application, nor did he appeal from the order passed. It is also to be noted that Tika Ram's suit was brought within 6 years of the mortgage, and that he was entitled, at the date of his suit to get a simple money decree, if the mortgage, on the basis of which he sued, was found to be for any reason invalid. In execution of that decree the right, title and interest of Nanhe in the house in suit was put up for sale and was purchased by Tika Ram, who then brought a suit for partition of half the house on the allegation that Nanhe's right, title and interest in the whole house amounted to half. Teja having failed to set aside the sale in the execution department, filed a counter suit for a declaration that the auction-sale in favour of Tika Ram was invalid and that he (Tika Ram) was not entitled to partition the house. Both suits were tried together. The trial Court decreed Teja's suit and dismissed Tika Ram's. Tika Ram appealed. The lower appellate Court dismissed Teja's suit and remanded Tika Ram's suit to the first Court to carry out the partition. Teja appeals from that order of remand in this case, and in the connected second appeal which is also before us.

The main contention is that the decree passed under Order 34, rule 6 was a nullity as being beyond the jurisdiction of the Court, and that it therefore conveyed no title to Tika Ram, on the ground that there having been no confirmation of the preliminary decree and no sale under Order 34, rule 5, the Court had no jurisdiction to grant a decree under Order 34, rule 6; and reliance was placed on a recent decision of this Court in the case of *Darbari Mal* v. *Moola Singh* (1). It seems to us that that case has no application here, because in that case it was the judgment-debtor who objected to the passing of the decree under Order 34, rule 6. In this case no doubt Nanhe might, if he had been so advised, have raised an objection to the Court passing this decree, or he might have appealed from that decree. But it seems to us that inasmuch as he (Nanhe) has accepted that decree Teja cannot challenge it. We will assume that it is correct to say that a decree under Order 34, rule 6 should only be passed when there has been a sale over, and that the decree in this case under Order 34, rule 6 was erroneous. It seems to us, however, that the well-known Privy

(1) (1920) 42 All. 519=18 A.L.J. 628=56 I.C. 139,

Council case of *Malkarjun* v. *Narhari* (2), applies to this case. Here, (as there), the Court passed an order which, it may be conceded, it should not have passed having regard to the provisions of the Code. But it was seized of the execution of the case and it did pass that decree. Whether right or wrong that decree, not having been challenged by Nanhe, the party concerned, it seems to us that he, and any one who stands in his shoes, as we think Tika Ram does in this case cannot go behind it. So far as the appellant is concerned, he challenges the title of Tika Ram to ask for partition or to stand in any way, so far as he, Teja, is concerned, in the capacity towards him of a co-sharer. But the result of the views expressed in the foregoing observations is that Tika Ram, although in the inception his title was impeachable, has now acquired an absolute title which is good against all the world, and therefore good against Teja.

Teja, in equity, has really no case. If Teja had asked to be joined as a defendant in Tika Ram's suit in 1912, as he could have done, and raised the same defence that he subsequently raised, Tika Ram might have abandoned the mortgage and asked for a simple money decree against Nanhe as he was entitled to do, (the suit having been brought within 6 years of the bond), and if so, he probably would have got as he was entitled to get a simple money decree against Nanhe. In execution of that decree he could undoubtedly have attached and sold Nanhe's share in the house, and if he purchased it, he would have been entitled to partition the house. We cannot see under the actual circumstances of this case that Teja's interests are damnified. On a partition Teja is only entitled to half the house. Nanhe could have partitioned it, and Nanhe's representatives can do so also. No injustice is done to Teja. The half share of Teja in the house is not imperilled. But Teja cannot be allowed "to pull the chesnuts out of the fire" for Nanhe's benefit.

No doubt it is very inconvenient for Teja, that the ancestral house should be partitioned, but to avoid this he had only to pay up the debt due by Nanhe, his brother. The learned Counsel for the respondent says that his client will not press his right to partition the house, if his debt is paid up in full to date. This seems to us to be most natural and satisfactory solution of a litigation, which does not impress us as being particularly honest on Teja's part.

The other points raised, though pressed by Mr. Haribans Sahai with his usual ability and pertinacity, are in our opinion untenable.

We dismiss the appeal with costs including in this Court fees on the higher scale, if the certificate has been filed.

This judgment covers the connected second appeal, which we dismiss with costs.

Appeals dismissed.

(2) (1901) 25 Bom. 337=27 I.A. 216=5 C.W.N. 10=2 Bom. L.R. 927=10 M.L.J. 363=7 Sar. 739 (P.C.).

1924 Allahabad 227.

LINDSAY AND SULAIMAN, JJ.

Dhanraj Misir—Plaintiff-Appellant

v.

Rameshwar Misir—Defendant-Respondent.

S. A. No. 488 of 1922, decided on the 22nd November, 1923, from the decree of the Subordinate Judge, Basti, dated 7th January, 1922.

Pre-emption—Wajib-ul-arz—Construction—Preference among co sharers inter se.

Two *Wajib-ul-arzes* were produced by the plaintiff in support of the custom of pre-emption. The first one of 1860 provided that every co-sharer has a right to transfer his share but at the time of transferring it, it is incumbent on him to inform the near co-sharer (*hissedar qaribi*) and in case of his refusal the other co-sharers of the village, and in case of both these sets of co-sharers refuse, then he is entitled to sell it to whomsoever he likes.

The other *wajib-ul-arz* of 1886 provided that when a co-sharer wishes to sell his share the right of a co-sharer who is a near relation, then of a co-sharer who is a distant relation, then all co-sharers in the patti and then co-sharers in the *nambardari* and then the other co-sharers of the village shall have a priority and preference. In the case of refusal by them the co-sharer has a right to sell it to any one he likes.

Held: that having regard to the language of both the wajib-ul-arzes there was a right of preference *inter se*. (7 A.L.J. 610, *Dist.*) [P. 228, C. 1.]

G. Agarwala—for Appellant.

N. Upadhiya—for Respondent.

Sulaiman, J.:—This is a plaintiff's appeal arising out of a suit for pre-emption. The first Court decreed the claim but on appeal the suit has been dismissed.

Both the Courts below agree that there is a custom of pre-emption in this village. The Court of first instance was further of opinion that under that custom a nearer co-sharer was entitled to a preferential right as against a distant co-sharer. The lower appellate Court has come to a contrary conclusion.

Two *wajib-ul-arzes* were produced by the plaintiff in support of the alleged custom.

The first one was of 1860 which provided that every co-sharer has a right to transfer his share but at the time of transferring it, it is incumbent on him to inform the near co-sharer (*hissedar qaribi*) and in case of his refusal the other co-sharers of the village, and in case both these sets of co-sharers refuse, then he is entitled to sell it to whomsoever he likes.

Reading this clause there can be no doubt whatsoever that under the custom it was the right of the near co-sharer to have the first offer. If without any such offer having been made to the near co-sharer in the first instance property was sold to a distant co-sharer the near co-sharer could obviously urge that the custom had not been complied with. The wording of this *wajib-ul-arz* makes it clear that there was a preference *inter se* between the co-sharers.

The other *wajib-ul-arz* was of the year 1886 which provided that when a co-sharer wishes to sell his share the right of a co-sharer who is a near relation, then of a co-sharer who is a distant relation, then all co-sharers in the patti and then co-sharers in the *nambardari* and then the other co-sharers of the village shall have a priority and preference. In the case of refusal by them the co-sharer has a right to sell it to any one he likes. This *wajib-ul-arz* also in our opinion gives a preference *inter se*. When it is read in connection with the previous one, no doubt is left in our minds.

The learned Judge of the Court below has in his judgment remarked that the case reported in *Mathura Singh* v. *Ramlal Singh* (1) marks a departure from the rules of law laid down in the previous cases and particularly in the case of *Gurdial* v. *Mathura Singh* (2). That is not correct. The *wajib-ul-arz* in the case reported in 7 A.L.J. 610 clearly provided that in the case of a sale or mortgage the transferor was bound to transfer first to a co-sharer in the patti and then to pattidars of the mahal, then to owners of other mahals, and in case of their refusal to outsiders. It was then held that if the transferor had not transferred the property to a co-sharer in the patti the latter had a right of pre-emption. This was obviously correct. Whereas in the other case the *wajib-ul-arz* was to the effect that *in case of a* transfer of property the *right to claim pre-emption* would be as follows :—

First to *warisan ek jaddi qaribi* ; then to *hissedar* of the patti, and then to co-sharers in the village.

It was held that that evidence was insufficient to prove the plaintiff's case that in case of a transfer to a co-sharer there was a preferential right in a nearer co-sharer. It is noteworthy that the wording of that *wajib-ul-arz* referred to a case where a transfer had taken place, and provided for a right to claim pre-emption.

In the present case we have no doubt in our minds that, having regard to the language of both the *wajib-ul-arzes*, there was a right of preference *inter se*.

The learned vakil for the respondent has urged that in that view of the matter the case ought to go back for a finding as to whether the plaintiff is in fact the near relation of the vendor. The Court of first instance distinctly found that the plaintiff and the defendant vendor were near relations ; and that the evidence of the plaintiff's witnesses was to that effect. When the defendant went up in appeal before the District Judge the point was not clearly taken that the finding was wrong. There is really no satisfactory evidence on behalf of the defendant to rebut the evidence of the plaintiff.

We therefore accept the finding of the first Court that the plaintiff is a near relation and a co-sharer and therefore comes in the first category, whereas the defendant does not come in that category. This being our view the appeal must prevail. The decree of the lower appellate Court is set aside and that of the Court of first instance restored with costs.

Appeal allowed.

(1) (1921) 19 A.L.J. 903.
(2) (1910) 7 A.L.J. 610=6 I.C. 920.

1924 Allahabad 229 (1).

SULAIMAN, J.

Gulab—Plaintiff-Appellant

v.

Bhagwan Das and others—Defendants-Respondents.

S. A. No. 751 of 1922, decided on the 31st October, 1923, from the decree of the Additional Sub-Judge, Bareilly, dated 4th April, 1922.

Agra Tenancy Act, S. 4—Land let for planting grove is not holding and rights are transferable.

A plot neither let nor held for agricultural purposes, but let for the planting of a grove is incapable of cultivation, where a grove exists on it, and the rights of such a tenant are transferable. The plot is neither land within the meaning of the Act nor a holding. (19 A.L.J.R. 616, *Foll.*)

But when the holdings themselves are not transferable they cannot become transferable after the planting of trees. (5 A.L.J.R. 99 and 14 A.L.J.R. 833, *Dist.*)

Durga Prasad—for Appellant.

N. P. Asthana—for Respondents.

Sulaiman, J.:—This is a plaintiff's appeal arising out of a suit for ejectment. The plaintiff is the zamindar and his allegation was that the defendants were non-occupancy tenants of the land on which some trees stood, and they had wrongly transferred them. The lower appellate Court has found that the land had been taken from the zamindar for planting a grove on payment of a *nazrana*. The grove was thickly planted and was planted about the time when the land was taken. It has been in existence for 32 years and in its present condition is incapable of cultivation. It accordingly found that defendants Nos. 3 to 6 were not non-occupancy tenants of any holding, but had the rights of grove-holders on this plot. This finding is fatal to this appeal. In section 4 of the Agra Tenancy Act holding is defined as a parcel or parcels of land held under one tenure or one lease or engagement and the word lease is defined as land which is let or held for agricultural purposes. The finding of the Court clearly shows that this plot was neither let nor held for agricultural purposes, but that it was let for the planting of a grove and a grove exists on it and it is incapable of cultivation. The plot therefore is neither land within the meaning of the Act nor a holding. There can therefore be no bar to the transferability of the rights of the defendants (*vide* the case of *Jalesar Sahu* v. *Raj Mangal* (1)). The finding of the Court below that under the circumstances the rights are transferable cannot be impugned.

Reliance has been placed on the case of *Ganga Dei* v. *Badam* (2) and the case of *Daya Kishen* v. *Mohammad Wazir Ahmad* (3). Both these cases however are distinguishable inasmuch as in those cases trees had been planted on agricultural holdings which had existed from before. When the holdings themselves were not transferable they could not become transferable after the planting of trees. I dismiss the appeal with costs.

Appeal dismissed.

(1) (1921) 43 All. 606=19 A.L.J. 616=62 I.C. 437
(2) (1908) 30 All. 134=5 A.L.J. 99=3 M.L.T. 194 (1908) A.W.N. 51.
(3) (1915) 13 A.L.J. 833=30 I.C. 565.

1924 Allahabad 229 (2).

LINDSAY AND SULAIMAN, JJ.

Bhullen Singh—Plaintiff-Appellant

v.

Kushi Ram and others—Defendants-Respondents.

S. As. Nos. 1187 and 1188 of 1922, decided on 3rd December, 1923, from the decree of the Additional Judge, Meerut, dated 3rd May, 1922.

Evidence Act, S. 92—Vendee can give oral evidence in a pre-emption suit to explain the character of the sale deed.

In a suit for pre-emption against the vendee, the vendee can adduce evidence for the purpose of showing that a document which on its face purported to be a deed of sale was in reality a deed of relinquishment. S. 92 excludes the admission of any oral agreement or statement as between the parties to an instrument or their representatives in interest, but the plaintiff in a pre-emption suit is not such a party. [P. 230, C. 1.]

S. N. Sen—for Appellant.

K. N. Katju—for the Respondents.

Lindsay, J.:—By a document executed on the 7th of August 1920 purporting to be a sale deed, certain property was transferred by one Shib Sahai in two *mahals*, namely, *mahal* Ishk Lal and *mahal* Ghasi Ram.

The result of this transfer was to provoke two suits for pre-emption which have given rise to the two appeals before us. In one case the plaintiff was Challoo who is the appellant in second appeal No. 1187

In the other case the plaintiff was Bhullan Singh, the appellant in S.A. No. 1188.

It was found by the Courts below that a custom of pre-emption existed in this village.

Both courts however dismissed both the suits on the ground that the document of the 7th of August 1920 which purported to be a sale-deed was not in fact a sale-deed and was not evidence of a real transaction of sale giving rise to a right to pre-empt.

The decision of the Courts below is attacked here on the ground that they were both wrong in allowing evidence to be given regarding the nature of this deed. It has been strongly contended that on the language of section 92 of the Indian Evidence Act it was not open to the vendee to raise this question or to adduce any evidence for the purpose of showing that a document which on its face purported to be a deed of sale was in reality a deed of some other character.

That contention however appears to us to be unsustainable, regard being had to the language of section 92. That section excludes the admission of any oral agreement or statement as between the parties to an instrument or their representatives-in-interest for the purpose of contradicting, varying, adding or subtracting from its terms. In no way can it be contended that either of the plaintiffs in these suits was a party to the instrument or was in any sense a representative of any party to the instrument, and we hold therefore, that it was open to the vendee as against the plaintiff, to produce evidence for the purpose of showing that the document upon which the two suits were based was not in fact a document of sale.

The evidence which was led before the Court may be put shortly as follows:—It appears that Shib Sahai who poses as the vendor in this deed had, as far back as the year 1903, brought a suit for arrears of rent against the persons who are now described in the document as the purchasers.

That suit apparently failed on the ground that Shib Sahai could not establish in fact that the defendants in the suit for arrears of rent were his tenants. It further appears that the defendants in that suit denied Shib Sahai's title. Nothing further was done until about the year 1918 when the settlement operations were going on. It seems that an application was made by the adversaries of Shib Sahai to the Settlement Officer claiming that they might be entered as proprietors.

Notice of this application was apparently given to Shib Sahai and on the 28th of April 1919 the application of the defendants was disallowed.

Thereupon the defendants, that is Khushi Ram and others, filed an appeal in the Revenue Court contesting the decision of the first Court. The appellate Court ordered a remand of the case and it was while this matter was under disposal that the document in question was executed.

The case for the defendants was that the deed, although it purports to be a deed of sale, was not in reality a deed of sale but merely a relinquishment by Shib Sahai of whatever claims he had still left over the property in consideration of payment to him of a sum of Rs. 2,500.

We may note that the plaintiffs admit that the property described in this document of the 7th of August 1920 is worth Rs. 10,000. The defendants on the other hand say that it is worth Rs. 14,000.

The Courts below came to the conclusion that the document in reality amounted to nothing more than a settlement of the dispute between the parties which was then pending in the appeal. Shib Sahai agreed to withdraw his claim on payment of the sum of Rs. 2,500 and this was effected by the execution of the document now in question. We think that the courts below were right in taking this view of the case. We are quite satisfied that the evidence which was led for the purpose of showing the character of the document was admissible and we also agree that the courts have come to a correct conclusion on the facts. The result therefore is that both these appeals fail and are dismissed with costs.

Appeals dismissed.

1924 Allahabad 230.

SULAIMAN, J.

Ram Adhin and others

v.

King-Emperor.

Cr. Rev. No. 487 of 1923, decided on the 13th August, 1923, from the order of the District Magistrate, Allahabad, dated 10th August, 1923.

(a) *Penal Code, S. 147—Conviction of four out of many is not illegal.*

Where there were originally 13 persons charged under S. 147, Penal Code, nine of whom have been acquitted the conviction of remaining four is not illegal, if it is found that a very large number of persons had joined in the attack.

(b) *Crim. Pro. Code, S. 106—Order under, must be passed at the time of passing sentence.*

An order under S. 106 must be passed at the same time when there is a conviction and passing of sentence and not at a subsequent stage.

Ram Nama Prasad—for Applicants.

Sulaiman, J.:—This is an application in revision. Two main points have been urged strongly. The first one is that inasmuch as there were originally 13 persons, nine of whom have been acquitted, the conviction of the remaining four under section 147 of the Indian Penal Code was illegal. As to this I may point out that the learned District Magistrate has gone into the question and has come to the conclusion that there can be no doubt that a very large number of persons had joined in the attack. The only doubt which he felt was as to the identity of most of the 13 persons named and he had no doubt in his mind that more than five persons had taken part in the beating. The conviction under section 147 is therefore not illegal.

The next point urged is that the order under section 106 of the Code of Criminal Procedure was improper inasmuch as no notice to show cause had been issued to the applicants. On their behalf it is contended that the proper procedure for the appellate Court to adopt was to dismiss the appeal and issue notice to the applicants to show cause, and that after they had an opportunity of showing cause, they could have been bound over under section 106. In my opinion this procedure would have been altogether *ultra vires*. Under section 106 whenever any person accused of rioting, assault, etc., is *convicted* the Court (and so also may the appellate Court) *may at the time of the passing of the sentence* on such persons order him to execute a bond, &c. It is clear in my mind that an order under section 106 must be passed at the same time when there is a conviction and passing of sentence. If it was passed at a subsequent stage it would have been altogether without jurisdiction. If the Magistrate had decided to start proceedings subsequently the only procedure open to him would have been that prescribed by section 107. I do not consider that on the facts the sentence of one month is in any way severe. The application is dismissed.

Revision rejected.

1924 Allahabad 231.

SULAIMAN, J.

Nohar Ahir—Defendant-Appellant

v.

Partab Ahir—Plaintiff-Respondent.

S. A. No. 792 of 1922, decided on the 15th November, 1923, from the decree of Sub-Judge, Azamgarh, dated 15th February, 1922.

(a) *Civ. Pro. Code, O. 41, r. 27—Additional evidence not tendered in lower appellate Court though possible, cannot be admitted in High Court in second appeal.*

Where an order of Revenue Court was passed as early as the 13th of May 1921, and the appeal was disposed of by the lower appellate Court on the 15th February, 1922, and the defendant made no attempt whatsoever to tender the order of Revenue Court which was within his knowledge and power before the lower appellate Court nor was the attention of that Court directed to this matter.

Held: that it was too late for the defendant to try to tender it in the High Court. [P. 232, C. 1.]

(b) *Jurisdiction—Civil or Revenue Court—Suit for declaration of joint tenancy lies in Civil Court.*

A suit for a declaration that the plaintiff is a joint tenant with the defendant and is entitled to joint possession is cognizable exclusively by the Civil Court. (8 A. L. J. 1009 and 35 All. 14, *Ref.*). [P. 232, C. 2.]

(c) *Civ. Pro. Code, S. 100—Finding as to joint tenancy is one of fact.*

The finding that a holding was a joint holding of the parties is one of fact. [P. 232, C. 2.]

S. S. Sastry—for Appellant.

Iqbal Ahmad—for the Respondent.

Sulaiman, J.:—This is a defendant's appeal arising out of a suit for joint possession of the plaintiff's share in certain tenancy lands.

The main defence put forward on behalf of the defendant was that these lands were not joint tenancies at all but belonged exclusively to the defendant and that the plaintiff was the defendant's sub-tenant.

The Court of first instance dismissed the plaintiff's suit but on appeal the decree has been set aside and the suit for joint possession decreed.

It was admitted that prior to the institution of the present suit in the Civil Court the defendant No. 1 brought a suit in the

Revenue Court for ejectment of plaintiff Pratab under section 58 of the Agra Tenancy Act claiming that Pratab was his sub-tenant. So far as the record before me goes there is nothing whatsoever to show what ultimately happened in the Revenue Court.

Mr. Sastry on behalf of the defendant wanted to tender before me a certified copy of an order purporting to have been passed by the Revenue Court on the 13th of May 1921 showing that after the dismissal of the civil suit the Revenue Court had decreed the suit. This order obviously was passed as early as the 13th of May 1921. The appeal was not disposed of by the lower appellate Court till the 15th of February 1922, *i.e.*, not till after nine months. The defendant made no attempt whatsoever to tender this additional piece of evidence, which was within his knowledge and power, before the lower appellate Court nor was the attention of that Court directed to this matter. This not having been done, I am of opinion that it is now too late for the defendant to try to tender it in this Court. Under the circumstances, I am quite unable to hold that the decree of the lower appellate Court was wrong, because of a certain order, a copy of which the defendant could have tendered, but which was not tendered before that Court. It is also to be noted that there is no affidavit before me to show that that order of the Revenue Court was in fact the final order of the Revenue Court. For ought one knows, the matter might have been taken to a higher Court or may still be pending in the Revenue Court. I am therefore not disposed to admit these fresh evidence in second appeal. No such prayer was made in the grounds of appeal, nor was any application filed for tendering fresh evidence, with notice given to the defendant so that he may not be taken by surprise at the eleventh hour.

On the record as it stands there is nothing to show that the Revenue Court has passed any final decree in favour of the defendant. All that appears is that a suit was filed in respect of this very holding, and in that suit the present plaintiff clearly denied that there was any relation of landlord and tenant between the parties and pleaded that the Revenue Court had no jurisdiction to try the suit. The plaintiff's plaint as framed is a plaint which cannot be entertained by a Revenue Court at all. It asks for a declaration that the plaintiff is a joint tenant with the defendant and is entitled to joint possession. Such a suit is cognisable exclusively by the Civil Court. *Vide* 8 A.L.J. 1009 and 35 All. 14. I am therefore unable to hold that the Civil Court has no jurisdiction to entertain this claim. Furthermore, as a suit of this kind is not cognisable by a Revenue Court section 10 of the Civil Procedure Code cannot apply, and I cannot hold that the Civil Court should have stayed proceedings in the civil suit.

The learned vakil for the appellant cited before me two cases where it has been held that if previous to the institution of the civil suit a final decree had been obtained from a Revenue Court declaring the status of one party as the tenant of the other that decree cannot be re-opened by the Civil Court. That of course is quite obvious. The Revenue Court is the proper Court for trying the question whether the relation of landlord and tenant exists or not. Once it has been found by that Court, namely that such a relation exists it is not open to the party to come to the Civil Court and establish his proprietary title. That however is not the case here, and so far as it appears no final decree has been passed in favour of the defendant. The rule of law laid down in 8 A.L.J. 695 at 699 applies.

The last point urged on behalf of the appellant was that the finding of the lower appellate Court that the holding was a joint holding of the parties, was incorrect. The question was a pure question of fact. The learned Judge has disbelieved the entire evidence of the defendant. He has believed the evidence for the plaintiff and his witnesses, and there is also the presumption of the Hindu law in favour of the plaintiff. He has also found that the plots were the occupancy lands belonging to the plaintiff's father. This finding cannot be interfered with in second appeal.

The appeal is without force and is hereby dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

* * 1924 Allahabad 233.

MEARS, C.J. AND PIGGOTT, J.

Abdullah and others—Appellants

v.

King-Emperor—Opposite party.

Cr. A. No. 51 of 1923, decided on 30th April, 1923, from the order of Special Sessions Judge, Gorakhpur.

(a) *Criminal Procedure Code (Act V of 1898), S. 239—Sessions Judge must look to the charges themselves to see if they could be jointly tried—Result of trial need not be considered.*

Sessions Court has to look to the case for the prosecution as set forth in the charges themselves and if according to that case the offences are such as could be regarded as parts of the same transaction, the Court would be justified in entering upon the trial of all the accused on the charges as framed. It need not consider what the position would be if it finally comes to the conclusion that no offence had been committed or that the offence committed was one which was excluded from its cognizance by S. 196-A of the Criminal Procedure Code. [P. 236, C. 1.]

(b) *Criminal Procedure Code (Act V of 1898), S. 239—Joint trial for murder committed by members of an unlawful assembly is legal.*

A joint trial of the accused is legal under S. 239 where a large number of persons are tried for the offence of wilful murder committed by the members of an unlawful assembly at a time when each of the persons is alleged to be a member of that assembly. [P. 233, C. 1.]

(c) *Picketting may be an offence where agreement to stop sale of intoxicants in a bazar constituting criminal conspiracy is arrived at.*

Certain national volunteers went to a small village bazar for the purpose of picketting the sale of country liquor, etc. Outside the bazar the shopkeepers and the agents of the Zamindar told them that no interference with the bazar would be tolerated. The volunteers finding themselves too few in numbers retired but their leaders distinctly told the interlocutors that they would return on the following market day. A large meeting of the volunteers was then convened by the leaders at which the persons present entered into an agreement to stop the sale of intoxicants, etc., at the bazar.

Held (1) that the agreement was an agreement to commit the offence of criminal intimidation and amounted to a criminal conspiracy;

(2) that whatever might be said in defence of peaceful picketting when undertaken in the market of a large town by individuals or by small groups of earnest and enthusiastic men or women it had no application to the present case where it was proposed to flood a small village bazar by a body of men whose mere presence there would put a stop to all business which could only be varied on with their consent or indeed with their active assistance. [P. 248, C. 1.]

(d) *Sentence—Murder where accused are ignorant peasants and are misled by misrepresentations and promise of millennium—Sentence of transportation for life is sufficient.*

Where the accused were ignorant peasants and were led to commit offences under S. 49 and 302 of the Penal Code by misrepresentations and preposterous promises of millennium which was to be brought about by courage and resolution on their part and where some of them believed that the person whose orders they believed they were carrying out was a worker of miracles. *Held*, that this was a sufficient reason for passing on the accused the lesser sentence of transportation for life. [P. 251, Cs. 1 and 2.]

(e) *Penal Code (Act XLV of 1860), S. 141 (3)—Common object to obstruct police in discharge of duty comes within 3rd clause.*

Where the immediate object of an assembly when it reached the Police station was to obstruct by threat the police in the discharge of its duty.

Held, that the object in itself and apart from any of the other clauses of S. 141 is sufficient to bring the case within the purview of the 3rd clause of the section. [P. 249, C. 2.]

(f) *Penal Code (Act XLV of 1860), S. 147—Intention to attack police in certain eventualities being clear, on attempt by police to disperse assembly by force, if attack on police and murder follows, every member is liable unless his separation is proved.*

One of the common objects of a crowd was to attack the police in certain circumstances. While it was passing by the Police Station the Police attempted to disperse it by force. Upon this whistles were sounded and the crowd turned round and began to throw kankar at the police and after the police had shot the 1st volley and injured a number of persons it attacked the Police Station and murdered the policemen there:

Held that every one of the accused persons who was proved to have continued as active participant in the riot after the moment when kankar began to be thrown is guilty under S. 302 read with S. 149 unless and until the evidence showed that he had separated himself from the rest before the offence of murder had been committed by anyone of them. [P. 250, C. 1.]

M. M. Malaviya, K. N. Malaviya, Sanyal, D. N. Malaviya, K. C. Shrivastava, A. P. Dube—for Appellants.

The Government Advocate and *R. B. Kadri*—for Crown.

Judgment:—Referring to the admirable way in which Counsel and the lower Court had dealt with the case, their Lordships proceeded:—

We have made the above remarks at the very outset of our judgment, because it was only proper that we should take account of an argument addressed to us on behalf of the accused generally, to the effect that the procedure adopted in placing 225 accused persons jointly on their trial has necessarily hampered each and all of them in the preparation of their defence. In this connection some comment was made regarding the comparatively short interval of time between the commitment order and the commencement of the

trial at sessions. There is no question here of any alleged illegality of procedure. All the persons placed upon their trial were actually accused of the same offence, in so far at any rate as every one of them was charged with, and tried for, the offence of wilful murder committed by members of an unlawful assembly, in prosecution of the common object of that assembly, at a time when each of these persons was alleged to be a member of the said assembly, sections 302-149, Indian Penal Code. The joint trial upon this charge was therefore unquestionably legal under section 239 of the Criminal Procedure Code. It is quite true that the matter was one for the discretion of the trial Court: the accused persons were liable to be charged and tried together, or separately, as the Court might think fit. What has been suggested to us in argument is that the interests of justice would have been better served if the Sessions Court had seen fit to order the trial of the accused in batches, or at any rate, had insisted upon doing so unless the Public Prosecutor were prepared to withdraw the prosecution as against a very considerable number of the men committed for trial. With respect to the former alternative, it is sufficient for us to say that the practical difficulties and inconveniences in the way of duplicating, or triplicating or even further multiplying, this inevitably laborious and protracted trial were such as to make the adoption of this course practically impossible. We do not think it necessary to say more on this point. Every lawyer acquainted with the procedure in an Indian Sessions Court, and indeed any person of intelligence who even glances through the voluminous printed record which lies before us, will be driven to concur in the opinion we have expressed. The question of possible action on the part of the Public Prosecutor in reducing the number of accused, which was suggested to us in argument, is a more complicated one, and is not strictly one for our consideration. We fully appreciate the patent fact that we are dealing with an offence, or series of offences, in which the criminals concerned numbered at least 3,000. We see no reason whatever to doubt the truth of a statement, made to us in the course of argument by Mr. Kadri the very able Counsel employed to conduct the prosecution in the trial Court and to assist the learned Government Advocate at the hearing before us, that the police investigation resulted in the discovery of evidence, more or less, implicating at least 1,000 persons. There was, therefore, a very considerable amount of selection and discrimination exercised before the number of persons placed on their trial in the Sessions Court was reduced as low as 225. It was a case in which the public interest certainly demanded that the interval of time between the commission of the offence and the commencement of the sessions trial should not be prolonged further than was absolutely necessary. Those responsible for the conduct of this prosecution were working, inevitably under the circumstances, against time. The question whether the provisions of Chap. XXXVIII of the Code of Criminal Procedure (sections 492—495 inclusive), regarding the appointment and duties of "officers to be called Public Prosecutors" do not require some revision, and the further question whether the provisions as they stand might not be used so as to call into existence a more effective department for the conduct of public prosecutions in this Province, are no doubt deserving of serious consideration. In the existing state of things we doubt whether the problems presented by the investigation of this extraordinary crime and the prosecution of the criminals could have been more efficiently handled, or with greater consideration for the right of each individual accused to a thorough investigation of the charges against him personally, than has in fact been done.

[Their Lordships paid a glowing tribute to C. E. W. Sands and the Police for the spirit of fairness and moderation shown by them and expressed their appreciation of the services rendered by the Counsel on either side.]

Their Lordships then took up the question of misjoinder of charges and proceeded:—

The charges against all the accused were six in number. There was a seventh charge affecting twenty-six only out of the entire number and an 8th charge affecting the same twenty-six and twelve others in addition. These charges are set forth in detail in the opening pages of the judgment under appeal and we do propose to recapitulate them. They admit however of a certain classification. We have

already spoken of the crowd which attacked the police as an assembly of persons moving in a certain formation and animated by a definite purpose. It is an essential part of the case for the prosecution that the nucleus of this crowd consisted of a body of perhaps 1,000, perhaps 1,500 persons, which set forth from the little village of Dumri Khurd, situated some two miles or rather less from Chaura police station. It is alleged as against all the accused persons that they formed part of this original assembly at the village of Dumri and that, before their departure from that place, they had entered into an agreement amongst themselves to do certain illegal acts of such a nature as to render them liable to punishment under section 120-B of the Indian Penal Code. This has been spoken of in argument as the "conspiracy charge" and we propose to refer to it hereafter under that designation. For the present, the point which we have to note is that it was an intergal part of the case for the prosecution in the Court below that the events which occurred later in the day, in the neighbourhood of Chaura police station, followed upon this alleged criminal conspiracy at Dumri Khurd in such a manner and were so connected therewith, not merely by sequence of time, but by the link of causation as to make the conspiracy at Dumri and the subsequent assault on the policemen at Chaura parts of the same transaction, within the meaning of that expression in section 239 of the Criminal Procedure Code.

The next five charges, Nos. 2, 3, 4, 5 and 6, relate to what took place on the afternoon of the 4th of February, 1922, at Chaura police station and in its immediate neighbourhood. They may be described as different presentations of one and the same charge in lesser or in more aggravated forms. They start with the second charge, which simply alleges as against all the accused persons that they were members of an unlawful assembly, within the meaning of the definition in section 141 of the Indian Penal Code, at the time when force or violence was used by members of the said assembly in prosecution of the common objects thereof. This charge is therefore laid under section 147, Indian Penal Code. It is further the case for the prosecution that the force or violence thus used extended to the murder of twenty-three police and *chaukidars*, the plundering of property belonging to the said officials and to Government, the destruction by fire of the police station buildings and the voluntary causing of hurt to various police and *chaukidars*. We have therefore charges drawn up under sections 302, 395, 436 and 332, I.P.C., read in each case with section 149 of the same Code.

The 7th and 8th charges, which affect some of the accused persons only, may be grouped together. They deal with the damage inflicted on the Railway line and on the telegraph wires and are framed respectively under section 126 of the Railways Act No. IX of 1890 and under section 25 of the Indian Telegraph Act No. XIII of 1885.

There is as a matter of fact one further charge, of such slight importance that it had been almost overlooked. It affects a single one of the accused, the appellant Sikhari, and is framed under section 412, Indian Penal Code. In substance it refers back to the charge of dacoity under section 395-149, I.P.C., in which Sikhari was already involved, and alleges against him, in the alternative, that, if he was not actually concerned in the said dacoity, he was at any rate subsequently found in possession of property which had been stolen in the course of the same. The charge is somewhat loosely worded and does not allege against Sukhari the essential point that he knew that the possession of the property in question had been transferred by the commission of dacoity, but this is not a matter upon which we find it necessary to insist.

Now the case for the appellants is that no offence of criminal conspiracy was committed by any persons at Dumri Khurd on the morning of the 4th of February, 1922; or in the alternative that, if there was such conspiracy, it was not one in respect of which a prosecution could be instituted without an order in writing by the Local Government, in view of the provisions of section 196-A of the Indian Penal Code. To this contention we shall have to revert later. The point immediately before us is that, whatever offence may or may not have been committed at Dumri Khurd on the forenoon of the 4th of February, 1922, it was not one so connected with the offences committed at Chaura later in the same day that it could fairly be regarded as "committed in the same transaction" within the meaning of section 239 of the

Code of Criminal Procedure. Upon this plea the appellants base the further contention that there has been a misjoinder of charges, sufficient to invalidate the entire trial in the Court below. We think we do no injustice to Pandit Madan Mohan Malaviya, the very able Counsel who argued this part of the case on behalf of the appellants, when we say that it is not our impression that he seriously pressed this argument to the logical conclusion that, if we found it correct, we should have no option but to order a retrial of the entire case. He is certainly not to be blamed if he hesitated to face the possible consequences of such a contention, were it to prevail with the Court. Our own view of the question has been already indicated by the expressions we have used in setting forth the charges, but we should perhaps amplify it. When the learned Sessions Judge entered upon the trial of this case, and was faced with the question whether the provisions of section 239, Criminal Procedure Code, did or did not authorise him, not merely to try the 225 accused persons before him at one and the same trial, but to try them on each and all of the charges set forth against them under the order of the committing Magistrate, he could not possibly know what conclusion he would arrive at after hearing the whole of the evidence. He had to look to the case for the prosecution as set forth in the charges themselves. He was, therefore, for the reasons which we have already indicated, warranted by law in entering upon this trial of the 225 accused on the charges as framed. The convictions which he has recorded are warranted by the conclusions at which he arrived on the evidence. As he had to regard merely the "charges," it was not necessary for him to consider what the position would be, if he had eventually come to the conclusion, either that no offence punishable under section 120-B, I. P. C., was committed by any persons at Dumri Khurd on the forenoon of 4th February, 1922, or that if any offence was so committed it was one excluded from his cognizance by section 196-A of the Criminal Procedure Code. In any event, the acquittal of all the accused persons on the conspiracy charge would have removed any possible objection to the validity of the trial. It is possible that in certain events the prosecution may have to suffer the penalty of having attempted to prove too much, by seeing a verdict of acquittal recorded which might otherwise have been avoided.

We do not feel that we are greatly concerned at this state to discuss the form of the various charges, so long as we are satisfied that there has been no such misjoinder of charges as to force upon us the duty of vindicating the law by quashing all the convictions upon this ground alone, and the consequent responsibility of considering the question of the ordering of a new trial upon such charge or charges as we might direct to be framed. On the case for the prosecution, the three groups of charges as we have set them forth were in respect of offences committed in the same transaction within the meaning of section 239, Criminal Procedure Code. The final charge against the accused Sikhari alone, was really in the nature of an alternative to one of the others. There was nothing illegal in the procedure adopted by the trial Court. The conception we have formed of our duty in this matter is that we ought to concentrate our attention upon the one substantial charge in the case. There is not one of the appellants now before us who has been convicted upon any of the other charges, but has been also convicted of the offence of murder committed in the course of a riot and punishable under section 302/149, I.P.C. In respect of any of the appellants against whom this charge is not in our opinion satisfactorily proved, but who is not entitled to a clear verdict of acquittal upon all the charges, the only offence in our opinion established is that of simple rioting punishable under section 147, I. P. C. This offence is set forth in the second of the charges framed. As regards the conspiracy charge there are certain aspects of the case which we shall have to consider further, because of their bearing upon the important and essential question of the common object or objects of the unlawful assembly around Chaura police station referred to in the charge of murder. Otherwise we propose to concentrate our attention on the charge under section 302/149 of the Indian Penal Code and to consider whether this is established against all or any of the appellants. The question of sentence can be completely and adequately dealt with under that single charge. So far as this Court is concerned no lesser sentence than that of transportation for life can lawfully be imposed on any

accused person found guilty upon that charge.

[Their Lordships expressed their appreciation of the careful manner in which the Sessions Judge had dealt with the case and remarked that the accused had not been prejudiced by a large number of persons being jointly tried.]

[Their Lordships at this stage dwelt upon the volunteer movement of Gorakhpur and showed how the tragedy which was the subject-matter of the case in hand had grown out of the activities of the so-called non-co-operation movement.]

The further portion of the judgment ran as follows:—

On the occasion of the Wednesday market—the 1st of February, 1922—a body of volunteers, thirty to forty in number, moved upon Mundera and halted outside the village in the morning, waiting to commence operations as soon as the bazar was fairly under way. The shopkeepers and the agents of the substantial landowner of the village were on the alert. The latter came out and questioned the volunteers and told them bluntly that Babu Sant Bakhsh Singh would not allow them to interfere with his market. Reading a little between the lines of the evidence there can be no doubt that any attempt at actual coercion on the part of the volunteers would have been resisted by force. Moreover, it is clear that word had been sent to the local police station, for Sub-Inspector Gupteshar Singh marched into Mundera with a considerable body of police and *chaukidars*. Before his arrival, however, the volunteers had abandoned their enterprise. In face of the resolute attitude of the agents in charge of the bazar, the volunteers felt themselves too few in number to attempt anything. They scattered and most of them returned to their homes.

Two points however require to be noticed. The leaders of the volunteers, before they went off, distinctly told their interlocutors that they would return on the following market day (Saturday, the 4th of February) in such numbers as to enforce compliance with their demands. There is naturally some room for controversy as to the precise language used; but that it was a threat, and was understood as such, is fully proved, not only by the direct evidence, but by the fact that the landholder sent a trusted agent to Gorakhpur to appeal personally to the District Magistrate for special police protection for his market on the following Saturday. There can be no doubt whatever that such an appeal was made, and that it resulted in the arrival by train at Chauri Chaura railway station, at about 9 a.m., on the 4th of February of a small body of armed police, nine muskets in all.

The other circumstance, trifling in itself but of far reaching consequence, is that a few volunteers did enter the Mundera bazar after the gathering had dispersed. There is no evidence worth speaking of that they actually did anything provocative, and we give accused generally the benefit of our belief that the volunteer enterprise had really been given up for the day and that the individuals who entered the bazar did so on private business of their own. Unfortunately, their mere presence in the bazar proved, under the circumstances, to be provocative. Sub-Inspector Gupteshar Singh reached Mundera under the impression of an emergency calling for action on his part and he found the persons in charge of the bazar excited and alarmed. There is some conflict of evidence as to the details of what followed. Indeed the one witness from whom one would have expected a clear and co-herent account, police constable Siddiq (the one constable who survived the massacre) is confused and self-contradictory. Taking the evidence as a whole, it seems clear to us that the Sub-Inspector was, at some time in the forenoon, at the office of the local landholder, when certain volunteers were brought before him by policemen who had found them in the bazar. There were probably only two of them; there may have been three or four, but one of them was certainly the accused Bhagwan *ahir*, whom we have spoken of as the "drill-instructor." The Sub-Inspector spoke roughly to the volunteers. His wrath was particularly directed against Bhagwan, whom he abused for drawing a pension from Government while taking an active part in an "unlawful association," whose ostensible object was the overthrow (no matter by what means) of the Government whose salt he was eating. There is an allegation that Bhagwan answered insolently; there is also a suggestion that the Sub-Inspector was in some way further inflamed against the man by one of the landholder's agent named Raghubar Dayal. What we are certain of is that the Sub-Inspector thoroughly lost his temper and struck the

man ; we hold it proved that he gave him two cuts with a light cane, and he very probably also struck him with the open hand.

Bhagwan and any volunteer or volunteers with him thereupon decamped and left Mundera altogether. No arrests were considered necessary by the Sub-Inspector and no official report was ever made as to any collision on that date between the police and volunteers. A curious fact is that we have it, not only from the evidence of Siddiq but from a statement made by the accused Bhagwan himself (Ex. 226), that the latter voluntarily presented himself at the police station the following morning (the 2nd of February) and had an explanation with Sub-Inspector Gupteshar Singh. As might be expected the accounts of this explanation differ somewhat; but they agree to this extent, that explanations and apologies were tendered and received and that, as between the principal actors in this episode, the unfortunate incident seemed to have been brought to a conclusion satisfactory to both parties.

There were nevertheless other interested parties who saw in the Sub-Inspector's loss of temper and his unjustifiable action a lever which might be worked with impressive results. For what immediately followed we turn to the evidence of the approver Shikari. We agree with the learned Sessions Judge that this man was endeavouring to earn his pardon by making a clean breast of all facts within his knowledge. We find moreover abundant corroboration of all matters in his evidence which strike us as essential. He tells us that on the evening of the thwarted enterprise at Mundera, that is on Wednesday, the 1st of February, 1922, there was a small gathering at his house. Bhagwan *ahir* was present, and so also were ringleaders such as Nazar Ali, Lal Mohammad, Mahadeo, son of Thag, and Ramrup (*barhai*). What Shikari understood from the conversation which followed was that, not Bagh-wan only, but Mahadeo and Ramrup as well, had been beaten by Sub-Inspector Gupteshar Singh. It was asserted that Babu Sant Bakhsh Singh (the owner of the Mundera bazar) had caused them to be seized and brought to his office at Mundera, where they were beaten by the police. On this it was agreed that letters should be sent out to volunteer associations in neighbouring villages, with a view to their assembling in a body strong enough to warrant them in paying a visit to the Sub-Inspector and "asking him why he had beaten our men." Early on the following morning (Thursday, the 2nd of February, 1922) the same persons came together again at Shikari's house and as the officials and ringleaders were illiterate, a body of eleven, the witness Nakched (P. W. 125), was employed to transcribe five copies of a letter to be sent out as a summons to neighbouring volunteers. There was some discussion as to the actual place to be chosen for the proposed gathering. Someone seems to have observed, shrewdly enough, that if this were fixed in the immediate neighbourhood of Chaura police station, the Sub-Inspector would break up the gathering by arresting the volunteers piecemeal as they arrived. Eventually a threshing floor at Dumri Khurd, in the immediate neighbourhood of Shikari's house, was fixed upon for the meeting place. It was determined that the volunteers should first march to Chaura police station to settle their differences with Sub-Inspector Gupteshar Singh and thence proceed northwards to the Mundera bazar in order to impose their will on the recalcitrant shop-keepers of that place. There would thus be a long day's work before them, which could scarcely be undertaken fasting. Arrangements were therefore made for the collection of supplies in the shape of raw sugar which could be distributed to those attending the meeting. We have independent evidence that this was actually done. The five letters actually issued were to serve as summonses for five hundred to seven hundred and fifty men; but we note with interest that Shikari says they were confident from the outset that more than this number would assemble once the news got abroad. They expected a gathering of between two and three thousand men.

The boy Nakched was perhaps a little confused under the stress of a severe cross-examination ; but in the main he has told a consistent story, and we have no doubt he was trying to tell the truth to the best of his recollection. The account which he gave to the investigating police on the 16th of February, 1922 (*vide* Ex. No. 139) of the contents of the letters he was required to write was given while his memory was still fresh. As a summary of the essentials of the message it is in complete accordance with

the evidence subsequently given by the witness and we are prepared to accept it as an accurate summary. It runs as follows:

"The Sub-Inspector of Chaura seeks out and beats the volunteers; therefore bring all your volunteers to Dumri. We will go and enquire from the Sub-Inspector why he makes a practice of beating the volunteers; if he wants to sent us to jail or to arrest us he may do so with all of us."

The meaning of this last phrase is obvious enough: the volunteers were to assemble in such numbers as to make it palpably preposterous for the Sub-Inspector to attempt to arrest all of them. It was suggested in argument that we ought to see in these words a declaration beforehand, on the part of the leaders of the volunteers, that one and all of them would abide faithfully by their pledge to absolute non-violence submitting meekly to arrest or to any other action which the police might take within the limits of their lawful authority. We are impressed rather with the ironic turn of the phrase and its dangerous implications. The volunteers had only to assemble in sufficient numbers, and to be resolute enough in their determination that nothing should be done to any one of them which was not done to the whole body and they impose their own will; the arresting of even a couple of thousand men was a known impossibility.

In his evidence at the sessions trial Nakched attempts a somewhat fuller statement. As we read his evidence, he purports to give from memory a complete transcript of the letters. In this version we find the provocative statement that the Sub-Inspector is seeking out the volunteers in order to beat them. The closing phrase appears in a confused form, with a reference both to beating and to imprisonment. The essential point remains the same: there was to be no beating of individuals, no arresting of individuals. In this version, however, there is a reference to a further object for the assembly; they were to go on to Mundera and stop the sale of fish and of meat.

We do not think it would help the defence if we were to insist on this fuller account of the contents of the letters as it appears at page 543 of our printed record and we are a little sceptical as to the capacity of this boy of eleven to reproduce the entire contents from memory. We think it safer to stand by the summary of essentials which he gave while his memory was comparatively fresh. The volunteers were summoned to Dumri Khurd on the strength of a preposterously exaggerated account of the assault committed by the Sub-Inspector on the accused Bhagwan; the immediate object of the assembly was that they should march in an organized body to Chaura police station and ask the Sub-Inspector what he meant by it. The meeting was fixed for Saturday morning, the 4th of February, 1922.

In the interval, further action was taken about which Shikari apparently knows little or nothing, but as to which there is plenty of evidence. The accused Lal Muhammad sent in a report to the district headquarters of the Khilafat Committee at Gorakhpur. The evidence on this point consists party of documents seized by the police, when they raided the Khilafat Office on the 5th of February, and partly of the evidence of various members of the Executive Committee of the Khilafat at Gorakhpur, whom the prosecution put into the witness-box one after another, in the hope of getting at the whole truth concerning this important aspect of the case. We do not feel that any very substantial measure of success has been attained. On one matter of detail there is a distinct conflict of testimony. Maulvi Subhanullah (P. W. 134), seems positive that Lal Muhammad either brought his written report to Gorakhpur himself, or at any rate followed it up by a personal visit. The Secretary of the Khilafat Committee, Muhammad Sulaiman Adhami (P. W. 170), does not think that Lal Muhammad came to Gorakhpur in person, and is positive that Maulvi Subhanullah is making a mistake if he says (as he apparently does) that Lal Muhammad was sent from that gentleman's house to the office of the Khilafat Committee with his letter, or written report, in his hand. There is a conflict of evidence also as to whether the paper, Ex. 95, is this report in original; indeed we are in some little doubt as to whether Lal Muhammad or any other volunteer had the capacity to draft such a document. We are beyond all question dealing with the testimony of reluctant witnesses, who were as economical of the truth as they dared to be. Certain facts are, however, fully established. Lal Muhammad did cause to be conveyed to the office of the Khilafat Committee a

letter or report, of which Ex. 95 is at any rate a correct transcript. This report was sent in by hand, so that the information it conveyed could be, and undoubtedly was, supplemented by oral communication with the person or persons who carried it. The communication was one which called for an immediate answer: if any written answer was returned it has disappeared, nor can any trace of it be discovered in the correspondence registers of the Gorakhpur Khilafat Committee. Some sort of answer, oral or written, or both, was unquestionably returned.

The letter, Ex. 95, is to the effect that two volunteers, while peacefully engaged about their own marketing (the name of the bazar is not given), had been seized and severely beaten by the officer-in-charge of the local police station. "We therefore, report this matter to your worships," the letter concludes, "in order that you may come and investigate the matter. It is because of your worships that we (*ham-log*, *i.e.*, the local volunteers) have not committed any offence of any sort, for whatever action we take will be after inquiring from (you) our superiors." A book has been produced (Ex. 92) which purports to be the abstract register of correspondence received at the office of the Khilafat Committee at Gorakhpur: this register the witnesses called from that Committee have (not without some apparent shuffling and hesitation) admitted to be genuine. In this register there is an entry under date the 2nd of February, 1922, of a letter received from Lal Muhammad, Secretary, Chauri Chaura, the recorded summary of which is to the effect that the Sub-Inspector in charge of Chaura police station has severely beaten two volunteers, and the "people of that place" were ready to assault the police in return, "but had been with difficulty restrained." It need scarcely be pointed out that this is not an accurate summary of Ex. 95. There are various points about the appearance of Ex. 92 calculated to suggest a doubt whether this is really the correspondence register, as kept up in the regular course of business. No abstract register of correspondence issued from the Gorakhpur Khilafat Office is forthcoming; and in face of the description of the book Ex. 92 in its own heading we are not prepared to accept the belated assertion of Niaz Ahmad Arif (P. W. 172) that this Exhibit is in fact the only register maintained at that office for correspondence received and correspondence issued.

In considering the inference to be drawn from this peculiar state of the evidence we bear in mind the fact that no official or member of the Executive Committee of the Khilafat at Gorakhpur is now on his trial before us; but we are very definitely called upon to form an opinion as to the objects with which the National Volunteers assembled at Dumri Khurd on the morning of 4th of February and as to the resolutions come to at that gathering before the meeting proceeded to take action in pursuance of the same. Looking at the matter from this point of view, we feel bound to record our opinion that the whole truth has not been disclosed in the evidence produced at this trial as to the communications which passed between the Executive Committee of the Khilafat at Gorakhpur and the local leaders of the National Volunteer associations in the neighbourhood of Chaura in the course of the 2nd and 3rd of February, 1922. In particular, we do not believe that any written answer was ever returned by or on behalf of the said Executive Committee to the communication received from Lal Muhammad. We strongly suspect, to put it no higher, that the register of correspondence issued from that office has disappeared, not because of anything which it did contain but because of what it did not contain; that is to to say, because no entry appeared therein of any written answer to Lal Muhammad's report. It follows that an oral answer was returned, and that it was of such a character that those responsible for it could not venture to reduce it to writing. Our suspicions on this point are strengthened by certain evidence, which will be noticed in due course, as to what took place at the meeting at Dumri Khurd. These considerations warrant us in putting upon Lal Muhammad's letter the sinister interpretation of which it is undoubtedly susceptible. In substance and in effect this accused reported to his "office" at Gorakhpur that the local volunteers had been roused by the outrageous conduct of the Sub-Inspector of Chaura to such a state of indignation that, if the officials would only give the word, they were prepared to teach that officer, and the police generally, a signal lesson: and requested that some one should be sent down to look into the matter.

The reply to this communication was, as we believe and have already said, sent by word of mouth. The positive evidence as to its purport is to be found in the depositions of one or two "Khilafat" witnesses, who say that it was to the effect that the volunteers should be patient. If they were speaking the truth, and a written answer had been returned to this effect, we are confident that either the writing itself would be forthcoming, or reliable secondary evidence as to its purport. We are driven to form our opinion on this point from the evidence as to what actually took place on Saturday, the 4th of February.

From early morning on that day preparations were made at Dumri Khurd for the expected gathering. The place chosen was a threshing floor in front of the house of the accused, Behari (*Pasi*). The local volunteers arranged the ground, sacking being spread to provide seating accommodation for the central group of leaders. Some modest provision was made for refreshments by way of baskets containing raw sugar. Flowers were collected and made into garlands for the adornment of those whom the assembly might particularly desire to honour. From about seven in the morning a steady stream of volunteers began to flow in. There is evidence scattered about the record, in the depositions of witnesses from various villages within a radius of several miles from Dumri, which shows the manner in which these men had been summoned by messages and mustered in little groups of half a dozen or so, before marching for the appointed rendezvous. Harpal, the village watchman of Dumri (P. W. 34), had received instructions beforehand. He watched the proceedings until two or three hundred men were collected, ascertained from the general trend of the conversation that the intention was to march on the Mundera Bazar and then slipped away to report the matter at Chaura police station. He says that volunteers were still streaming in when he left Dumri Khurd. The approver Shikari (P. W. 1), estimates that five or six hundred men had come together by about 8 a.m. and that the numbers had increased to about one thousand when the meeting was brought to a close by the organized body of volunteers setting out for Chaura police station. So far as we have been able to check this estimate by the evidence of other witnesses, it certainly does not appear excessive: we are satisfied that the men who set out from Dumri Khurd for Chaura police station were at least one thousand in number, and may well have been fifteen hundred.

For the proceedings at this meeting, generally spoken of in the evidence and in the judgment as "the Dumri Sabha," we have before us a very considerable body of evidence. In the first place we have the depositions of the two approvers, Shikari and Thakur. Next we find references to this matter in statements made under section 164 of the Criminal Procedure Code, to a Magistrate, before the commencement of the enquiry preliminary to commitment, by a number of accused persons. The most important of these are the statements of Ramrup *Barhai* (Ex. No. 225), Bhagwan *Ahir* (No. 226), Mahabir *Saithwar* (No. 246) and Raghubir *Sunar* (No. 251). In the third place, we find more or less detailed accounts of the affair from three witnesses, Jakat Narain Pande (P. W. 91), Bhawani Prasad Tewari (P. W. 25) and Shankar Dayal Rae (P. W. 102). It is quite beyond question that these three men were present at the occurrences they profess to describe. The first strikes us as the sort of vain and irresponsible busy-body whom one so often finds thrusting himself to the front in connection with some political or social movement. The reception he met with on his first arrival at Dumri is enough to show that the peasantry of the neighbourhood not only respected his caste and were inclined to take him at his own valuation as a professor of religion but looked upon him as a person of some authority in connection with the non-co-operation movement. We see no reason to believe that he was ever accepted as such by the organizers of the Congress or Khilafat movement in Gorakhpur itself; nor on the other hand do we see any real ground for regarding him as a police spy, though he was accused of being one by indignant volunteers before the meeting at Dumri was over. His own account of what took him to Dumri is that he hastened to the place as soon as he heard what was going on because he had formed a low opinion of the character of local volunteers and was persuaded (from what had happened at Mundera on the previous Wednesday) that they were going to get themselves into trouble by acting contrary

to the true precepts of non-violence as laid down by "Mahatmaji" Gandhi. He naturally tries to put his own conduct in the most favourable light, and we are not greatly concerned to inquire how far honest zeal for what he thought right, mingled with mere curiosity and a desire to gratify his self-importance in determining his conduct. He certainly did go to Dumri and he does seem to have exerted himself, to the best of his ability, to prevent mischief. Bhawani Prasad is a land-holder and village headman of Pokharbinda, a hamlet which had sent a contingent of volunteers to Dumri. He was on friendly terms with Sub-Inspector Guptesbar Singh and was sent for to the police station on the Saturday morning. He was relieved to find the small contingent of armed police arriving from Gorakhpur, and he went to Dumri, on the Sub-Inspector's suggestion, to see what was really happening and to warn the volunteers that they had better abandon whatever enterprise they were meditating, whether against Chaura police station or Mundera Bazar, especially in view of this reinforcement which the police had received. Rae Shankar Dayal is a resident of the Ballia district who was making a living in Gorakhpur out of District Board contracts and a contract which he held in connection with the Mundera Bazar. It was his interest in this matter which took him to Dumri to see what the volunteers were really doing. He has played an ambiguous part in this trial and portions of his evidence have been severely commented on by the learned Sessions Judge. We are satisfied that he may be regarded as a witness distinctly friendly to the accused persons.

The effect of this evidence as a whole is tocorroborate the account of the meeting at Dumri given by the approver Shikari, at least in its broad outlines, sufficiently to enable us to feel certain of its straightforwardness and general accuracy. Of the present accused, the men who took the lead were Nazir Ali and Lal Muhammad; also, in a lesser degree, Shyam Sunder and Abdulla *alias* Sukhi; with these must be placed Shikari himself, a man of the name of Indarjit whom the police had not been able to arrest up to the time of the trial in the Court below and an ascetic with a pair of tongs, an article commonly carried by religious mendicants of a certain class. He is frequently referred to in the evidence; and was probably a mischief-maker from a distance. No one seems to know his name. Jagat Narayan Pande and Shankar Dayal were cordially received on their arrival, garlanded and permitted to address the meeting. The latter was apparently mistaken for some emissary from headquarters whom the volunteers were expecting, under the description of "the Ahrauli Babu." Both tried to persuade the gathering to break up and to abandon their expressed intention of proceeding in a body to Chaura police station and Mundera Bazar. Jagat Narayan especially exerted himself in this sense, appealing to the precepts of "Gandhiji" and to the fact that armed police had reached Chaura. He was violently opposed by Nazar Ali, also by Lal Muhammad, Shyam Sundar and Abdulla *alias* Sukhi. He was told that he was no better than a police spy, ridiculed, abused and finally turned out of the meeting with contumely. Eventually Nazar Ali carried the entire meeting with him in a resolution that they were to march in a body, first to Chaura police station, to ask the Sub-Inspector why he had beaten two volunteers, and thence to Mundera Bazar to stop the sale of intoxicants, of meat and of fish. These objects were to be pursued unflinchingly and carried through in the teeth of any opposition that might be encountered. No one was to start on the expedition who was not prepared to venture his life on the hazard. When challenged to do so by Nazar Ali, all those present bound themselves by oaths to persevere to the end. Anyone who turned back after setting forth with the rest was to be considered, if a Hindu, to have eaten cow's flesh, if a Musalman, the flesh of swine. What may be a coarse variant of the oath, but is more likely to be a description of any defaulter, is mentioned by Shikari as particularly applicable to anyone "who should retreat from before the bullets at the Thana." The assembly was a large one and it is easily conceivable that more than one form of oath was used. The coarser one, be it oath or description, was abhorrent in its terms and might well appeal more particularly to those elements in the crowd, drawn from the lowest strata of society, which are abundantly represented in the list of appellants before us.

On all the points hitherto set forth the evidence as to the proceeding at this

Dumri Sabha is clear, consistent and overwhelming. There remains, however, one detail which calls for separate consideration. When Shikari made his first statement before a Magistrate on the 16th of March, 1922, he said, speaking of a late stage of the meeting. "In the meantime two Muhammadans, one of whom was wearing spectacles, came there. I do not know where they lived. They took out a piece of paper and began to read it. Then they began to sing. In this song the names of Muhammad Ali and Shaukat Ali were uttered, again and again, and it was about their imprisonment. After singing the song they went away to the west. *Then* we got up and passing along the raised borders of the fields reached the road." In his evidence at the trial, after speaking of the ejection of Pandit Jagat Narayan from the meeting and the departure of Rae Shankar Dayal—it is curious to note that he ignores Bhawani Prasad altogether—Shikari goes on to state—"Two other men came. one wearing green glasses who was of my stature, but older, about 32, who from his words appeared to be a Musalman; the other was younger than I—I cannot say whether he was a Hindu or a Musalman. The man with glasses began to read from a slip of paper, singing 'we are going for two years each.' We understood going to jail. Then Nazar Ali stood and publicly administered an oath."

On the 13th of March, 1922, the accused Bhagwan *ahir* made a statement before a Magistrate, which contains the following passage:—"Then two Muhammadans wearing spectacles came there. They began to sing a song describing the deeds of Shaukat Ali and Muhammad Ali. On hearing the song all became angry and said, 'Come, we will all go to the thana."

Four days later the accused Mahabir, son of Lalsa *Saitwar*, in a statement similarly recorded, told the Magistrate:—"Two Musalmans came there. One of them was wearing spectacles and the other had a beard. They came there and began to sing. After this all the volunteers, who were about three thousand, got up and started from there crying out, *Mahatma Gandhi ki jai.*"

The accused, Raghubir, son of Jaddu, is a *Sunar* by caste, a man of higher social position than the bulk of the accused. On the 4th of March, 1922, he told a Magistrate as follows:—"Lectures were delivered. There was a Babu who in his lecture said that we should not go either to Mundera Bazar nor to the police station. If we went in a body there would be a riot. But no one listened to him. A *Miyan*, whose name and residence I do not know, delivered a lecture and asked his hearers whether they were ready to die. They replied that they were ready. Then all started from there."

It would be quite possible for us, on the evidence which we have already reviewed, to record our finding as to the nature of the agreement come to by the volunteers assembled at Durmi Khurd and whether that agreement did or did not amount to a criminal conspiracy. We think it better, however, to proceed with the narrative of events. The evidence as to what the volunteers agreed amongst themselves to do cannot be altogether dissociated from the evidence of what they actually did. We shall have to consider, in connection with certain statements made by the approvers Shikari and Thakur, if their testimony is or is not borne out by the subsequent conduct of the volunteers.

Up to a certain point there is no room for controversy as to the course of events. When the volunteers left the threshing-floor at Dumri, they made their way along the field boundaries to the broad, unmetalled road which runs from Gorakhpur to Deoria, by going eastward along which they would come to the Chaura police station, rather less than two miles distant. On this road the men were got into some sort of rough formation. The services of drill-instructor Bhagwan were requisitioned for this purpose. Flags which had been prepared beforehand were sent to the front and the crowd began to move under the guidance of their "officers," who halted them and moved them on again by the sound of whistles. They were in an excited mood, continually raising triumphant cries and acclamations. At a point roughly about half way to Chaura they came to Bhopa Bazar, where a road branches off to the left, that is to say in a northerly direction, towards a railway crossing, beyond which it leads directly to Mundera Bazar. This was the route which the crowd would have followed if they had not resolved to visit Chaura police station before going to Mundera. At this point they were met by the witness Awadhu Tewari, a servant of Babu Sant Bakhsh

Singh, the proprietor of the Mundera Bazar. The evidence of this witness as to what he saw at Bhopa corroborates Shikari. The approver says that by that time the crowd had swollen to a total of 2,500 or 3,000 men. Awadhu puts the number considerably higher, but is probably exaggerating. He says the crowd came towards him carrying flags and raising triumphant cries. The leaders appeared to him to be the accused Nazar Ali and Shyam Sunder and the approver Shikari. He gives an interesting and obviously genuine account of his conversation with them, when he endeavoured to persuade them to turn back or to disperse. Nazar Ali spoke with great insolence and remarked in an ironical tone that he was going on to the police station to get a beating. He raised his flag and the crowd moved on, still crying out "Victory". The witness hurried to the police station and told the Sub-Inspector what he had seen. In the meantime the crowd moved on as far as a building often referred to in the evidence as the factory of Lala Halwai. This brought them close to the police station enclosure which lies in an angle, where a short length of metalled road turns northward from the highway between Gorakhpur and Deoria and leads to a railway crossing and the bazar of Chaura, beyond which it proceeds to Mundera Bazar. The police station enclosure extends practically from the Gorakhpur Deoria highway on the south to the railway crossing and the line of the railway on the north side. The entrance to the police station is on the east, that is to say opening on to the short length of metalled road leading northwards from the highway to the level crossing. Opposite this entrance, and across the metalled road, were a few buildings, including the private quarters of the Sub-Inspector in charge of the police station. According to Shikari the crowd was continuously increasing in numbers as they moved from Bhupa Bazar towards Chaura. We unhesitatingly accept his evidence as proving that when the crowd came to a halt beyond Lala Halwai's factory it was over 3,000 strong. Shikari says "they were in ranks overflowing the road on either side". He adds:—'When we came to the factory we knew there was danger and that there was a guard with guns at the thana (police station). We were ready to sacrifice our lives. We saw that the *darogha* (the Sub-Inspector in charge of the police station, *i.e.*, Gupteshar Singh) was standing with police and *chaukidars*. We supposed he was standing there to beat us. We went on because we considered ourselves to be in overwhelming numbers; and what could he do to us." We ought perhaps to explain that the vernacular word used by the witness, which had been translated "to beat", is a word of wide significance, meaning also "to strike" and even "to kill:" it would undoubtedly include striking with bullets or other missiles as well as the infliction of blows in hand-to-hand combat.

To resume our narrative: at this point the witness Sardar Harcharan Singh came forward from the direction of the police station to meet the crowd. A conference took place between him and their leaders. He estimates the number of the crowd at three to four thousand. Their leaders appeared to him to be Nazar Ali, Shyam Sunder, Shikari and the unknown ascetic carrying a pair of tongs who has been referred to elsewhere. He found the crowd in a singular state of fierce excitement. He says their leaders addressed him in a tone which was anything but respectful. They told him plainly that they were resolved at all costs to go to the Chaura police station and thence through the Chaura Bazar, through the village of Bale, to Mundera Bazar. The witness persuaded them to wait while he went to speak with the Sub-Inspector. It must be remembered that the police occupied at this moment a position which was strategically sound. They were drawn up across the highway, the breadth of which would presumably be commanded by the muskets of the armed police. These were the men on whom Sub-Inspector Gupteshar Singh would have to rely in the event of an encounter. The four or five men of the civil police whom he seems to have kept about him would scarcely count for anything as a fighting force. He had with him also, so far as we can gather, 40 or 50 *chaukidars* or village watchmen, being in part men whom he may have called in to the police station that morning in anticipation of trouble, and in part men whose turn it was to go to the police station on that day to draw their pay. These men were efficiently enough armed for an encounter at close quarters with the brass-bound lathis of stout bamboo which formed part of their official

equipment. They were, however, a mere collection of village watchmen, wholly unused to acting together in numbers. The records of dacoity cases in this Court afford abundant evidence of the slight reliance which can be placed upon an assemblage of village watchmen as a fighting force. On the other hand no one who examines this record can fail to realise something of the impression produced on the minds of those who saw the crowd at close quarters, not merely by their numbers but by the spirit which animated them. Bhawani Prasad after seeing them at Dumri advised the Sub-Inspector to bow his head to the storm and let the day go by. He evidently believed that successful opposition to the march of the volunteers was out of the question; that it would be better to let them work their will, for that one day, in Mundera Bazar and to see what could be done subsequently in the way of re-establishing order. Sardar Harcharan Singh was deeply perturbed. We do not think that anything in his conduct bears out the imputations of treachery and double-dealing which have been cast upon him. He returned to the Sub-Inspector, after his interview with the leaders of the volunteers, with the conviction plainly on his mind that there was no stopping these men if they moved forward, as they were evidently determined to do. We take it that there was perceptible in the spirit of this crowd that sort of magnetic force which the ancient Greeks ascribed to supernatural influences, and which has often been noted as emanating from an army destined to be victorious in an impending encounter. Psychologically it has its basis in the recognition on the part of each member of the force that those around him are animated by the same resolution which he feels in himself: he knows that if he elects to go forward, he will not go forward alone. Sardar Harcharan Singh believed that he could exercise sufficient influence over the crowd and its leaders to ensure their marching, peacefully and without disorder, past the police station, if they were allowed to proceed in this way towards their destination at Mundera Bazar. He apparently received some assurance to this effect from the leaders. He says that, in communicating his views to the Sub-Inspector, he suggested that it would be easier "to deal with the crowd" after they had passed the police station.

If Sub-Inspector Gupteshar Singh had followed resolutely the plain dictates of duty, if he had continued to bar the road against the advance of the crowd and had offered them a reasonable time in which to disperse, under threat of opening fire in the event of their refusal, his chances would have depended on the possible intimidating effect of two or three volleys delivered at close quarters into the crowd massed along highway and "over-flowing," as Shikari says, "the road on either side." If the crowd broke in panic, the miscellaneous force of *chaukidars* might have been useful enough in completing their dispersal, and possibly in arresting their leaders. If the resolution of the crowd held firm, we very much doubt whether, with the force and with the weapons at his disposal, Sub-Inspector Gupteshar Singh could have prevented the dispersal of his force by sheer weight of numbers, their isolation and subsequent massacre.

The matter was not put to the test. The unfortunate Sub-Inspector is not to be blamed, or at any rate to be severely blamed, if his resolution gave away. He had to consider, not only the chances of an actual conflict, but the subsequent justification of his own action against the flood of adverse criticism which would undoubtedly have been let loose upon him. He accepted the advice of Sardar Harcharan Singh, withdrew his force from across the highway and fell back within the police enclosure. From that moment he and those with him were doomed. The crowd so far kept their express or implied compact with Sardar Harcharan Singh, that they moved in more or less orderly formation along the highway to the south of the police station and, turning to their left, began to file past the thana gate towards the railway crossing, and on beyond into the Chaura Bazar. From this point we have to deal with evidence about which there has been some controversy. We think it useless to enter upon a detailed analysis of all the items of evidence upon which our conclusions are founded. Certain matters of detail must remain in doubt; but as to the main course of events we believe it possible to formulate conclusions quite sufficient for the determination of all the issues set before us.

It must be remembered that, when Nazar Ali and Lal Muhammad called the volunteers together, they had not done so

merely in order to carry out their previous threats against the vendors of intoxicants, of meat and of fish in the Mundera Bazar. They had got together their men on the understanding that they were to go to Chaura police station and have it out with the Sub-Inspector about the matter of the beating of the volunteers. We know that highly exaggerated statements had been put about on this subject. Accordingly, while numbers of the crowd were continuing on their way towards the railway crossing and Mundera Bazar, some of their leaders, with a considerable body of followers, came to a halt in front of the open gate of the police station and demanded to see the Sub-Inspector. Matters about which there has been considerable controversy are the numbers of the men who thus came to a halt and the question whether, as the movement of the crowd continued, there was ever at any moment a perceptible interval of space between the group which was halted in front of the police station and the rest of the crowd. It cannot appear surprising to any one who endeavours to form a mental picture of the scene that the available evidence on question of this sort should be conflicting. We are prepared to believe that the number of those who definitely halted in front of the *thana* gate, to have it out with the Sub-Inspector, did not exceed three hundred. Events moved rapidly: a crowd of three to four thousand men cannot get along very fast by a narrow street and over a railway crossing; we very much doubt whether there was at any moment a clear interval of space between those who were still moving on northwards and those, who, whether of set purpose or out of mere curiosity, lingered about the eastern front of the police station. The evidence satisfies us that the demand for an explanation in the matter of the beating of a volunteer, or of volunteers, was made in insolent and over-bearing tones and that Sub-Inspector Gupteshar Singh adhered to the policy which he had adopted by speaking the crowd fair. He told them that the man whom he had beaten (the accused Bhagwan) was not a brother of theirs; that he was a Government pensioner and might therefore fairly be regarded as subject to his (the Sub-Inspector's) authority. There are statements here and there on the record which attribute to the Sub-Inspector words and expressions of more object apology. Whatever he said, his remarks were received by the crowd, not merely with satisfaction, but with insolent and mocking triumph. Numbers of witnesses depose to a coarse jest which passed from mouth to mouth in the crowd, no doubt with slight variations of form, ascribing abject terror to the Sub-Inspector personally, to the police generally and even to that abstract entity referred to as "the Government." Along with this came a derisive clapping of hands, similar to that which had driven Pandit Jagat Narayan from the assembly at Dumri. Some of the crowd which had halted by the police station gate began to move northwards, but we are quite satisfied that the gateway was still beset by numbers of the crowd when the patience of the much tried Sub-Inspector gave way. The man is dead, and we shall never know with certainty what was passing in his mind. We can well believe that he was roused to anger by the taunts of the crowd, their coarse jets and their derisive hand-clapping. It is quite conceivable, however, that it was precisely these taunts which brought home to him the disadvantages of the position into which he had allowed himself to drift. After all, the armed guard had been sent out, not to defend him personally, but in order that he might use it to protect the licensed vendors and other shop-keepers of the Mundera Bazar against terrorism and mob violence. The organised crowd of volunteers was now moving steadily on towards Mundera, while the Sub-Inspector himself was practically blockaded inside his own police station by the crowd which still hung about the gate way. If the volunteers achieved their threatened purpose in Mundera that day, and still more in the not improbable event of the baser elements of the crowd getting out of hand there and plundering shops or the like, he would have to answer to his superiors for the remissness by which he had allowed these things to happen. He may well have felt, and we think that in all human probability he did feel, that the first and most urgent duty incumbent upon him at that moment was to recover his own freedom of action by clearing the road immediately in front of the police station. He ordered a number of *chaukidars* forward for this purpose. As might be expected, the evidence regarding the brief and

confused scene which followed is somewhat conflicting. The crowd undoubtedly scattered before the advance of the *chaukidars*; there are witnesses who speak of them as running in different directions. In the main, however, the natural tendency of the crowd would be to press northward towards the railway crossing, that is in the direction of their own reinforcements. Hence we have some of the witnesses who speak of the *chaukidars* as driving the crowd towards the railway crossing, which would in itself be a futile thing for the police to have done. What precise degree of violence was used by the *chaukidars* it is impossible to determine. Sardar Harcharan Singh, who was in as good a position to observe what happened as any other witness, will not admit that the *chaukidars* actually struck any one: he describes them as thumping the ends of their *lathis* on the ground, which is a well known and frequently adopted method of breaking up, or moving on, a crowd by threatening them with painful, but not serious, injury to their feet. There is no doubt a good deal of evidence to the effect that some of the *chaukidars* "beat" some of the volunteers, and we are prepared to take it that blows were struck. What seems to us the one crucial fact which stands out in plain relief from the evidence is that the crowd generally, and more particularly the volunteers who constituted the back-bone of the crowd and the leaders of those volunteers, were prepared beforehand for just such a contingency. As the cry was passed along that the *chaukidars* were beating the volunteers, whistles were sounded and, upon this preconcerted signal, the whole crowd swung back upon the police station. The men spread themselves out along the railway line, arming themselves with *kankur* and brick-bats from the ballast, which missiles were also carried down towards the eastern front of the police station. A steady hail of missiles began to overwhelm the scanty police force, already disorganised and manœuvred into an untenable position. The firing of the first volley in the air was met by a cry that "*Mahatmaji Gandhi*" was working miraculously in favour of the volunteers and was turning the bullets to water. We have plenty of evidence on this record as to the wide-spread belief in this gentleman's miraculous powers. We have no doubt that such a cry was raised and that it put the finishing touch to the resolution of the mob. When the police began to fire in earnest, and two of the rioters had been shot down and others wounded, the only result was to inflame this resolution into fury. What followed has been already told.

In the light of these events we must now go back to the question, what was it that the volunteers assembled at Dumri agreed to do? The case laid before us by the defence may be fairly summed up as follows. The agreement undoubtedly was that the volunteers should go first to Chaura police station and thence to the Mundera Bazar. At the former place they were to submit to Sub-Inspector Gupteshar Singh a sober and dignified remonstrance against his illegal conduct in assaulting individual volunteers. They were to offer themselves to him for arrest in a body, if he was prepared to act upon the view that under the order of Government every enrolled volunteer was *ipso facto* liable to arrest and prosecution. When this piece of business was satisfactorily settled, they were to move on to Mundera Bazar and there, by peaceful persuasion exercised towards the licensed vendors of intoxicating liquor and drugs, and towards any persons whom they might find attempting to purchase the same, put a stop to the public sale of these harmful intoxicants. They were at the same time to stop the sale of meat and of fish, either absolutely or unless the vendors submitted to the sweeping reduction in price of which we have already spoken. As a matter of fact this latter alternative cannot be seriously considered. Everyone must have known that meat and fish would not be sold at the price suggested by the volunteers and the idea of obtaining meat and fish at reduced prices had by this time been wholly superseded by the idea of punishing the vendors of these commodities in Mundera Bazar for their contumacy by closing their shops altogether. All the evidence on the point is simply and plainly to the effect that the volunteers were to stop the sale of meat and of fish.

On this the first comment we have to make is, that the very idea of a body of 3,000 men or more controlling the shops in the Mundera Bazar by means of peaceful persuasion is on the face of it almost grotesque. Whatever may be said in defence of peaceful picketting, when

undertaken in the market of a large town by individuals, or by small groups of earnest and enthusiastic men or women, has no application whatever to the proposed flooding of a small bazar like Mundera by a body of a men whose mere presence there would put a stop to all business which could only be carried on with their consent, and indeed with their active assistance. Secondly we cannot deal with the question of the object of the volunteers in moving on Mundera Bazar without taking into consideration the events of the previous Wednesday. The expedition of Saturday, February 4th, was in plain fulfillment of the threats which had been used by Nazar Ali and other leaders of the volunteers on the previous market day. So far as this part of the case is concerned, we have no doubt that the agreement come to at Dumri to stop the sale of intoxicants, of meat and of fish in the Mundera Bazar was, under the circumstances, an agreement to commit an offence punishable with rigorous imprisonment for 2 years at least, namely, the offence of criminal intimidation under section 506, I.P.C.

As regards the visit to Chaura police station, it may perhaps be necessary to distinguish between the intention of those who organised the movement and the purpose of the great mass of the crowd who gave their adhesion to the same. Lal Muhammad, Nazar Ali and those who were with them had used very exaggerated versions of the Sub-Inspector's violence towards the volunteers in order to get together the largest possible gathering of their supporters. They were taking them to Chaura for the avowed purpose of asking the Sub-Inspector why he beat volunteers. To the minds of the great majority of the crowd this expression, we have no doubt, carried very much the same significance as that conveyed by the corresponding English phrase in the historic rhyme, which tells how the Cornish men proposed "to know the reason why" Bishop Trelawny was being persecuted by King James II. At the same time the purpose actually uppermost in the minds of those who organised this demonstration was to overawe the police at Chaura into quiescence, before the crowd moved on the Mundera Bazar, in order that they might be certain of being able to work their will there without interference.

From every point of view the agreement come to amounted to criminal conspiracy. There has been much criticism before us, directed against the drafting of the conspiracy charge, and that criticism is not altogether without foundation. As we read the charge, the illegal acts which the accused are alleged to have agreed amongst themselves to do fall under two distinct heads :—

(*a*) to overawe the police by force or show of force,

(*b*) to beat the police, in consequence of what the Sub-Inspector and his subordinates had previously done at Mundera on the 1st of February.

The second part of the charge, as thus stated, is not sustainable, if only for the reason that when Sub-Inspector Gupteshar Singh caned the accused, Bhagwan Ahir, he was not acting in the discharge of his duty. The first part of the charge is in our opinion borne out by the evidence. We have also expressed our opinion that the agreement come to as to what was to be done by the crowd when they reached Mundera amounted to criminal conspiracy, although that is not expressly set forth in the charge. As a matter of fact, although we are prepared technically to affirm the convictions recorded under section 120-B, I.P.C., except where we have arrived at the conclusion that in the case of a particular appellant the evidence is insufficient to support any of the charges, the question is to our minds one of little more than academic importance. What we really have to determine is whether Sub-Inspector Gupteshar Singh was warranted by law in the action which he took that afternoon at Chaura police station, and what was the common object of the crowd there assembled, at least from the moment when they began to discharge volleys of missiles against the police.

On the first point we have in substance already expressed our opinion. A statement has been made in evidence that, before calling upon the *chaukidars* to disperse the assembly in front of the thana gate, Sub-Inspector Gupteshar Singh made some attempt to issue a formal command directing the assembly to disperse. It is likely enough that the unfortunate Sub-Inspector did try to strengthen his own position by formal compliance with the provisions of section 127, Criminal Procedure Code. It would have been no more than a formal

compliance at most, and the evidence on point is not particularly convincing. We are, however, abundantly satisfied that, from the moment the crowd of volunteers left Dumri Khurd, right up to the time when they began to file past the gate of Chaura police station, they not merely constituted an unlawful assembly, but were conducting themselves throughout in such a manner as to show the firmest possible determination not to disperse if called upon to do so. The Sub-Inspector was, therefore, abundantly justified, under section 128, Criminal Procedure Code, in attempting the dispersal of the crowd at the moment when he did so. If he failed in his duty at all, it was in not having done so some time before. Arguments which have been addressed to us at the hearing of this appeal only serve to suggest the storm of criticism which the Sub-Inspector would have provoked if he had resolutely done his duty, as we conceive it, by barring the further advance of the crowd before they reached the southern boundary of the police station. In this connection we are bound to note the great stress laid in argument before us on the fact that the volunteers set forth on this expedition were, generally speaking, unarmed. We agree that the evidence justifies the conclusion that they did so, though we are not prepared to say that numbers of those who joined the crowd on the march were similarly unarmed. It may be matter for consideration also how far the flags mounted on staffs, carried in front of the crowd, were capable at need of being used as weapons. We do think, however, that those responsible for organising this movement did intend that the volunteers should advance on the police station without weapons and that, in the main, they succeeded in carrying out this purpose. This finding in no way conflicts with the findings we have recorded as to the unlawful character of the assembly. The crowd was formidable enough, without carrying weapons, to have overwhelmed any resistance offered by the small police force, provided only they showed sufficient courage and resolution. If their resolution had failed them and they had scattered, after suffering a number of casualties from the muskets of the police, the fact that they carried no weapons would no doubt have been used to support a story of the wanton massacre of peaceful demonstrators by the agents of a ruthless Government.

The immediate object of the assembly as it reached the police station was to threaten and to obstruct Sub-Inspector Gupteshar Singh and the policemen with him in the discharge of their duty, an offence punishable under section 152, I.P.C., an object sufficient in itself, and apart from any of the other clauses of section 141 of the same Code, to bring the matter within the purview of the third clause of the said section. We have, however, already indicated our opinion that a further and more dangerous purpose lurked behind. Shikari stated in his evidence that the resolution come to at Dumri was that, after asking the Sub-Inspector why he had beaten volunteers, they should beat him if his answer was unsatisfactory. The approver Thukur stated that the agreement they had come to was that if he (the Sub-Inspector) "beat us we should beat him." We are asked to disbelieve these statements on the strength of various arguments based, in part, upon a comparison of the evidence given by the approvers at the sessions trial with previous statements which they had made in the Magistrate's Court, or elsewhere. This evidence, however, and particularly Thakur's version of the scheme as it presented itself to the minds of the volunteers, fits in too well with what actually occurred at Chaura for us to feel any doubt that these controverted statements are substantially true. The instructions which had come down to the volunteers from their superiors, by what channel we do not know, were that they were not to be the first to use violence; but that, if the police used force, they were to be at liberty to retaliate in such manner as they might consider best and most effective. The evidence as a whole leaves no doubt whatever in our minds on this point. We know also that the objects which the volunteers had set before them for accomplishment, at Chaura first, and afterwards at Mundera, were such as must sooner or later provoke the most long suffering of police officers to the forcible use of his lawful authority against the lawless crowd.

An intention to assault the police in certain eventualities was therefore part of the common object of the whole assembly of volunteers from the time they left Dumri. From the moment the whistles

sounded and the crowd turned back and commenced their organised, and, to the extent which we have indicated, their premeditated, attack on the police station, the object of every member of the crowd was unquestionably to cause the utmost hurt in his power to any policeman on whom he could succeed in laying hands. After the first effective volley had been fired, and when the crowd continued their attack and pressed it home in face of the casualties they had suffered, their object was, beyond possibility of doubt or contradiction, to do simply what they did, namely, to take life, in revenge for life. The crowd which stormed the police station and massacred the policemen and *chaukidars* was the same crowd which had commenced the attack with volleys of missiles. The charge drawn up under sections 302-149, I.P.C., is fully established as against any one of the accused persons who is proved by evidence to have continued an active participant in the riot after the moment when *kankar* began to be thrown, unless and until it can be inferred from credible evidence that he separated himself from the rest before the offence of murder had been committed by any one of them.

Passing on to consider the cases of individual appellants, we find it convenient to depart from the alphabetical order followed by the learned Sessions Judge. Up to certain point at any rate, it appears to us that we are able to obtain a clearer and more logical view of the effect of the evidence as a whole by grouping the accused persons together, as far as possible, under the head of the villages in which they reside. The prosecution believed that they had evidence in their possession to support the conclusion that contingents of volunteers from no less than sixty villages, situated within a radius of fifteen miles or so from Chaura police station, took part in the final encounter with the Police. The list of appellants now before us contains representatives from a large proportion of these villages; but considerable groups come from each of five or six particular localities which have consequently assumed a special importance in the history of the case. We propose to take up these groups first.

We begin with the villages of Dumri Khurd, which was the rendezvous of the volunteers and from which the nucleus of 1,000 to 1,500 men set forth on their expedition to Chaura police station and Mundera Bazar. The learned Sessions Judge had before him no fewer than 31 accused persons from this village. He found the evidence against six of them insufficient to warrant a conviction—a fact which in itself suggests to our minds that the prosecution net had been spread a little too widely, so far as this village is concerned. One feature common to practically all the accused from this village is that they are implicated in the evidence given by the approver Shikari. The circumstances under which this man made his appearance in the witness-box are sufficiently set forth in the judgment under appeal. He proved himself an intelligent and even plausible witness. His statement, as we have been taken through it, reads convincingly. We have no hesitation in agreeing with the learned Sessions Judge that Shikari did take that part in the events referred to in his evidence which he ascribed to himself, possibly even a somewhat more prominent part. In the main, as we have already stated, we are satisfied that the witness had made up his mind to earn his pardon honestly, by making a clean breast of the facts so far as known to him. At the same time we are entirely in agreement with the principle which the learned Sessions Judge has himself laid down, that this is not a case in which the Court would think of departing from the general rule of practice which requires some reliable corroboration of the evidence of an accomplice, before it will accept that evidence as sufficient proof of the guilt of a particular accused. In certain instances the learned Sessions Judge has himself found reason to suspect that Shikari may have stretched a point against particular neighbours of his, for the sake of gratifying an antecedent grudge. Apart from this, the man was obviously under a considerable temptation to introduce into his story the names of any of his own fellow villagers against whom he believed that the investigating police officers were entertaining serious suspicions. His failure to do so might, according to the mentality of a person of his class, endanger his own pardon by creating a suspicion in the minds of the police that he was endeavouring to shield neighbours of his own, about whose doings he could not well,

profess ignorance. We have made these general remarks because, upon a review of the entire evidence against the Dumri men and a further sifting of that evidence, we have come to the conclusion that the doubts entertained by the learned Sessions Judge regarding the adequacy of the corroboration forthcoming against six of these men should have been extended to a considerably larger number.

We have now to consider the appropriate sentence to pass on each of those appellants in respect of whom we have affirmed the conviction on the capital charge, namely, that under section 302/149 of the Indian Penal Code. The law allows us a certain discretion. We are empowered to confirm the sentence of death in each case which has been passed by the trial Court; or we can set aside that sentence and substitute for it one of transportation for life. The exercise of this discretion is subject to the same condition by which the learned Sessions Judge felt himself to be bound. In every case of a conviction on a charge of murder the law regards sentence of death as the normal and appropriate punishment. Where the Court sees fit to pass the lesser sentence of transportation for life it must record its reasons for so doing.

We do not, however, agree with the learned Sessions Judge that it is impossible to formulate such reasons in respect of any of the appellants in this case whose conviction on the capital charge we have affirmed. We do not think it expedient to say too much on this point, for we in no way desire to extenuate the savage nature of the crime or to come forward as apologists for the lawlessness of the crowd. We take account nevertheless of the fact that this crime grew out of a political agitation. The appellants are in the main ignorant peasants; the great majority of them were drawn into the business by misrepresentations of fact and preposterous promises concerning the millennium of "Swaraj," the arrival of which was to be forwarded by courage and resolution on their part. Some indeed were apparently influenced by the belief that Mr. Gandhi was a worker of miracles. We cannot take leave of the case without an uneasy feeling that there are individuals at large at this moment, men who have not even been put on their trial in connection with this affair, whose moral responsibility for what took place at Chaura police station on the afternoon of February 4th, 1922, is at least equal to that which rests upon such men as Nazur Ali and Lal Muhammad, who acted as leaders openly, in the light of day, and at least placed their own lives on the hazard along with the rest.

These are sufficient reasons, in our opinion, to warrant the course we propose to take. We reserve the supreme penalty of the law for the ringleaders and for those against whom we find specific acts proved by the evidence such as would have bound us to convict them on a charge of murder, apart from the special provisions of section 149 of the Indian Penal Code. As to these we find nothing which can in our view warrant any other sentence than that of death. Against the remainder we pass the only other sentence permissible to us by law, that of transportation for life.

We propose to go a step further than this. In respect of a considerable number of the men whom we are sentencing to transportation for life we have formed the opinion that their cases are fit to be considered with a view to the exercise of the clemency of the Crown.

Their Lordships concluded their judgment by confirming the lower Court's sentence in the case of nineteen accused and varying it in that of others of whom 38 were released.

---

* 1924 Allahabad 251.

LINDSAY AND SULAIMAN, JJ.

Zamani Begam—Defendant-Appellant

v.

Khan Muhammad Khan — Plaintiff-Respondent.

F. A. F. O. No. 116 of 1923, decided on the 21st November, 1923, from an order of the District Judge, Farrukhabad, dated 10th April, 1923.

(a) *Mahomedan Law — Pre-emption — Second demand to vendor is sufficient where possession has not passed to vendee.*

Where possession of the property had not passed to the vendee, *held*: that the second demand made to the vendor was quite sufficient. [P. 252, C. 1.]

(b) *Mahomedan Law — Pre-emption — Right arises even on complete irrevocable contract of sale.*

A right of pre-emption arises not only when an out-and-out sale has been completed but also when a complete contract of sale (without any option in the vendor) has been made. [P. 253, C. 1.]

A. P. Dube—for Appellant.

S. Raza Ali—for Respondent.

Sulaiman, J.:—This is a defendant's appeal arising out of a suit for pre-emption. The right of pre-emption was originally based both on an alleged custom and on the Muhammedan Law. Both the Courts below have found that the existence of custom has not been established in this case. That finding is in no way challenged in appeal and must therefore be accepted as final.

On the question of the applicability of the Muhammedan Law the Court of first instance was of opinion that the demands required by that law were not fully complied with. It accordingly dismissed the suit. On appeal, the learned District Judge has come to a contrary conclusion and has held that there has been no flaw in the performance of the necessary conditions.

In appeal four points have been urged as showing that the demands were not in accordance with the requirements of the Muhammedan Law.

The *first* is that the demands were made before the actual registration of the sale-deed in question.

The *second* is that there was no demand made to the vendee.

The *third* is that there was no reference to the first and second demands. And the last point is that the invocation of the witnesses was not made in the proper way.

It would be convenient to dispose of the last three points first. It is not suggested that possession of the property had passed to the vendees. It is therefore, obvious that the second demand made to the vendor was quite sufficient. We have had the statements of the witnesses read to us and we are satisfied that there was in the second demand both a reference to the first demand and there was also an invocation of the witnesses. None of these three points therefore haveany force.

With regard to thefirst point it has been strongly contended on behalf of the defendant that inasmuch as under the present law no sale of immoveable property of the value of over Rs. 100 can be completely effected except under a registered deed, the demands were premature as they were made before the sale was perfected by registration.

This contention, however, in view of the pronouncement of the Full Bench in the case of *Begam* v. *Muhammad Yakub* (1) is without any force.

In an earlier Full Bench case reported in *Janki* v. *Girjadat* (2) it had been held that a right of pre-emption may in certain circumstances arise even in the absence of a registered sale-deed.

In the Full Bench case in 16 All., 344, the learned Chief Justice who delivered the leading judgment in the case at page 347 after pointing out the various conditions required in order to give rise to a right of pre-emption, remarked :—

> "This leads me to the conclusion that what was considered in Muhammedan Law to be a sale upon which a right of pre-emption would arise included an offer unconditional on the part of the vendor and made by him to the purchaser, or intending purchaser, to sell, and accepted by the intending purchaser, although the offer and acceptance were subject to the exercise of an option by the intending purchaser, the exercise of which option was not a necessary condition to the right of pre-emption arising. What apparently was considered as giving a right of pre-emption was either an absolute out-and-out sale, as English lawyers understand the term, or a contract of sale subject to a right of option in the intending purchaser which deprived the intending vendor of any right to refuse to complete the sale, should the intending vendee exercise his option to purchase."

This exposition of the law was accepted by all the other Judges except Banerji, J., who delivered a dissenting judgment. This case, therefore so far as this Court is concerned, is conclusive authority for holding that a right of pre-emption arises not only when an out-and-out sale has been completed but also when a complete contract of sale (without any option in the vendor) has been made.

The learned Advocate for the defendant wanted to invite our attention to rulings of the Calcutta High Court which laid down a contrary proposition of law. On the other hand it was pointed out by the learned Vakil for the respondents that the Bombay High Court has taken not quite the same view. In view of a clear pronouncement by a Full Bench of this Court, which has been followed for so many years, it is unnecessary for us to consider the cases of the other High Courts. That Full Bench case is binding on us.

In view of this interpretation of law it is quite clear that the demands which were

(1) (1894) 16 All. 344=(1894) A.W.N. 101 (F.B.).
(2) (1885) 7 All. 482=(1885) A.W.N. 97 (F.B.).

made soon after the execution of the sale-deed though before its actual registration were by no means premature and defective.

The result therefore is that the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

---

* 1924 Allahabad 253.

FULL BENCH.

MEARS, C.J., WALSH AND SULAIMAN, JJ.

In the matter of Babu Dwarka Prasad Mithal, Vakil, Muzaffarnagar.

Civ. Mis. No. 366 of 1923, dated 12th November, 1923.

Legal practitioner—Making serious allegations against Court is liable to be punished.

No practitioner can possibly suggest that because an application that a case should be transferred to the District Judge, had been judicially rejected, there is the slightest ground, in decency or honour, for suggesting that any suspicion has thereby been aroused against the impartiality of the Magistrate. Members of the legal profession are under no duty to their clients to make grave and scandalous charges either against Judges or the opposite parties on the mere wish of their clients. They are agents, not of the man who pays them, but are acting in the administration of justice, and in matters of making applications to Court they are bound to exercise an independent judgment, and to conduct themselves with a sense of personal responsibility. If they fail to act with reasonable care and caution, they are unfit to enjoy the privileges conferred upon them by law, and serious breaches must be visited with punishment. [P. 254, C. 1].

Nehal Chand—for the Vakil.

The Government Advocate—for the Crown.

Mears, C. J.:—In this case Dwarka Prasad Mithal, an LL.B. and a duly qualified member of the legal profession, practising as a pleader in the district of Muzaffarnagar, appears before us to answer to a notice which was issued by a member of this Court, in consequence of a complaint made by the District Magistrate of certain conduct which took place before him. It appears from the admission made by Dwarka Prasad himself before us that he was employed, together with two leaders, Mr. Moore, a Barrister, who was a visitor from Meerut, and Mr. Ramji Lal, a local practitioner of Muzaffarnagar, to represent certain accused in a charge before Mr. Darling, the District Magistrate, in whom Dwarka Prasad has assured us he had complete confidence. Curiously enough, on the first day of the proceedings in the presence of, and with the assent silently given of, Dwarka Prasad, Mr. Moore went out of his way publicly to assure Mr. Darling of the confidence which they all had in him as a tribunal, and assured him there was no reason for desiring to transfer the case. Dwarka Prasad has told us to-day that he has never lost, or had occasion to lose, the confidence which was then publicly expressed upon his behalf. The case proceeded for eight days. The evidence for the prosecution was closed. The statements of the accused had been taken, and his leaders no longer appearing to take part in the case, Dwarka Prasad on the 13th of June made an application to the Magistrate that the case should be committed to Sessions. The merits of that application do not concern us. It was rejected. The result was that the case remained before Mr. Darling for decision.

Dwarka Prasad has told us to-day that because the Magistrate had dismissed that application, he then felt himself entitled to make the disgraceful charge of unfairness against the Magistrate. Whether he did it solely upon his own responsibility, or because he was asked and paid to do it by his clients, appears from his statements to be somewhat difficult to decide satisfactorily. But he has told us that he himself did not consider it, a reasonable application to be made, and no man in his senses could possibly suggest that because an application that the case should be transferred to the District Judge, had been judicially rejected there was the slightest ground, in decency or honour, for suggesting that any suspicion had thereby been aroused against the impartiality of the Magistrate. Nonetheless on the 14th of June, in consequence of the rejection of that application, Dwarka Prasad, reckless apparently of the responsibilities which rest upon legal practitioners representing their clients, put forward an application for an adjournment of the case to enable an application to be made to the High Court for the transfer of the case on the ground that a reasonable suspicion existed against the impartiality of the trying Magistrate. We are satisfied that Dwarka Prasad himself entertained no such view. He had no reasonable suspicion of the impartiality of the Magistrate. He has admitted before us that nothing has occurred to cause him to doubt the confidence which he entertained and which had been expressed on his behalf, in the integrity and impartiality of the Magistrate.

We have invited him and he has confessed himself unable to point to any single fact which justified him in alleging that Mr. Darling was or would be unfair. Having secured an adjournment he took no steps to apply for the transfer. After a delay which has not been explained, and after being soundly advised by a Barrister of this Court that no reasonable application could made to the High Court for transfer, he became a party to a totally different application and abandoned his intention of applying for a transfer. It was not too late then to go to the Magistrate and admit that he had acted improperly, and that no grounds for the application really existed. If he had had a shred of honour or sense of responsibility, it would have been the first thing which he would have done. He was either unwilling, or as he suggested to us, ashamed to do it. The result was that an adjournment having been obtained for the purpose of a transfer, it was deliberately utilised for a totally different purpose. In a half-hearted way Dwarka Prasad, in the course of his answers to the question put by the Court, endeavoured to shift responsibility on to his clients, though he was even unable to remember the particular individual who for this purpose instructed him. This attitude and the painful frequency with which discreditable means are used in the Courts below to obstruct and delay the true course of justice by obtaining adjournments and making futile and childish applications, sometimes offensive applications, to this Court for transfer, renders it necessary that we should make an example of Dwarka Prasad, and that we should issue a serious warning to the members of the profession with the hope that this kind of proceeding will cease. Members of the legal profession are under no duty to their clients to make grave and scandalous charges either against Judges or the opposite parties on the mere wish of their clients. They are not puppets compelled to obey the dictates of their clients where matters of good faith and honourable conduct are concerned. They are responsible to the Court for the fair and honest conduct of a case. They are agents, not of the man who pays them, but are acting in the administration of justice, and in matters of this kind they are bound to exercise an independent judgment, and to conduct themselves with a sense of personal responsibility. If they fail to act with reasonable care and caution they are unfit to enjoy the privileges conferred upon them by law, and serious breaches must be visited with punishment.

We have unfortunately noticed for some time that there is a growing practice in these Provinces to make, if not sometimes statements deliberately untrue to the knowledge of the person making them, at any rate reckless and disgraceful charges of impropriety and partiality against the tribunal when the real ground merely is that the advocate considers himself in danger of losing his case. It is necessary, as a deterrent, to make an example, and to show members of the profession, (be it observed that there are many, indeed the great majority of this profession who will not, and do not, stoop to such practices) that these applications for transfer so made are attended with danger to the persons who make them, when they are proved to be made as recklessly and with such total absence of foundation as the one in this case.

The decision of the Court is that Dwarka Prasad, Pleader of Muzaffarnagar, be suspended from practice for six months from this date.

Pleader suspended for six months.

---

* 1924 Allahabad 254.

MEARS, C.J., AND PIGGOTT, J.

L. N. Gadodia & Co.—Plaintiffs

v.

G. I. P. Ry. Co., Ltd.—Defendants.

F. A. No. 277 of 1920, dated 21st November, 1923, from the decree of the Subordinate Judge of Cawnpore, dated the 24th July, 1920.

Railways Act, S. 72—Consignment at ordinary rate—Railway liable for damage to goods.

Plaintiff tendered to the defendant company 5 bales of cotton tussore to be carried from Sholapore to Cawnpore. The company had an established owner's risk rate from Sholapore to Itarsi, but they had published no such rate between Itarsi and Cawnpore and no consignors of goods between these two latter stations could require the company to carry them at owner's risk. While the goods were proceeding on their journey between Itarsi and Cawnpore, smoke was seen to be issuing from a waggon near the engine and in the result the consignor sustained a pecuniary loss by destruction of and damage to his goods. *Held*, that the fact that he paid the ordinary rate on the Itarsi-Cawnpore section of the journey entitled him to

regard the railway company during this portion of the journey as a bailee. The company was, therefore, bound to show that they took the same degree of care in relation to those goods as a reasonably prudent man would act in relation to his own.

Dr. Katju—for the Appellant.

Zutshi—for the Respondents.

Mears, C. J.:—On the 30th of April, 1919, the plaintiff through his agent tendered to the defendant company 5 bales of cotton tussore to be carried from Sholapore to Cawnpore.

Over some portions of their railway the defendant company carry goods at a reduced or "owners risk" rate. It appears quite clearly that whilst the company had an established owners risk rate from Sholapore to Itarsi, they had published no such rate between Itarsi and Cawnpore and no consignors of goods between these two latter stations could require the company to carry them at owner's risk. The goods would go *via* Itarsi to Cawnpore. The consignor signed an owner's risk note by which he agreed to hold the company free from responsibility in a number of contingencies. The Subordinate Judge has found that in fact the consignor paid a total sum made up of the reduced rate from Sholapore to Itarsi and of the ordinary rate from Itarsi to Cawnpore. The figures are not mathematically exact but are so near as to justify the conclusion of the learned Subordinate Judge. When on the 13th of May 1919 the goods were proceeding on their journey between Itarsi and Cawnpore smoke was seen to be issuing from a waggon near the engine. The train was brought to a stand still at station Sanchi and an endeavour made to put out the fire. It was burning fiercely inside the waggon and in the result the consignor sustained a pecuniary loss by destruction of and damage to his goods to the extent of Rs. 5,436-5-6. He made a claim on the company who repudiated it on the ground that they were covered by the owner's risk note signed by his agent which purported to cover the entire journey.

To this the consignor replied that whatever might be the form of the note, the fact was that he paid the ordinary rate on the Itarsi-Cawnpore section of the journey and was therefore entitled to regard the railway company during this portion of the journey as a bailee. We think the plaintiff's contention is clearly right in the admitted absence of an owner's risk rate from Itarsi to Cawnpore.

This is the final result of the arguments in this Court but in the Court below the matter was greatly obscured and the trial lengthened by defective pleadings on both sides and by an inability on the part of the counsel on both sides to forecast the possibility of the company being found to be bailees. Thus it happened that the Counsel for the Railway Company failed to provide himself with the necessary evidence to prove the taking of proper care.

The circumstances under which the fire originated are unknown. The waggon was of iron and was a covered one. It was apparently of proper construction, clean and fit for the accommodation of the goods of the plaintiff. The van contained the plaintiff's goods, also some cases of military stores, some bags of cocoanuts and 12 other boxes. All the goods except those of the plaintiff had come from the Madras and South Mahratta Railway. It is conceded in this case that if the defendants are entitled to rely on the owners risk note as governing the Itarsi-Cawnpore journey, they must succeed in the action as the plaintiff has failed to give any such proof as would overset the wide protection given to the Company by that document. If however the defendants were carrying the goods between Itarsi and Cawnpore at the ordinary rate then the defendants were bound to put before the Court all materials necessary affirmatively to prove that in the carriage of the plaintiff's goods they had acted with the same degree of care in relation to those goods as a reasonably prudent man would act in relation to his own. The burden of proof if the goods were carried at owner's risk lay on the plaintiff. If the company were bailees the onus shifted to them.

Their proper defence should have been first that they were under no liability because of the consignment note. Alternatively if it were held that that note was not applicable that they took of the goods the degree of care described above. That position was however as we have said never clear in the minds of the legal advisers of the railway company in the lower Court and in fact they actually resisted an application made by the plaintiffs on the 14th of July, 1920, which if assented to by

them and proper particulars obtained would in our view in all probability have made their position as bailees safe and supplied the gap in their evidence which still exists. On the 14th July, 1920, the plaintiffs were casting about for any evidence which might help them to overcome the provisions of the owner's risk note. On the previous day Pandhari Nath Balwant a witness for the defendants had mentioned the presence of "12 other boxes" in the waggon and had said that he did not know what they contained. No one to this day knows what they contained. It was the plain duty of the railway company, for their own protection, on learning of the fire to have communicated in May, 1919, with the Madras and Southern Mahratta Railway company and to have made enquiries as to the description, contents, etc., of these boxes if they had not already, as they may have had, these very materials in their possession. These boxes were part of the contents of a waggon in which a fire had mysteriously broken out on their line and the Company ought to have taken every step to ascertain if they could the nature of the goods entrusted to them. They did not make enquiries at the time. At all events if they did, the result was not communicated to the Court and as we have said they resisted an application which sought to obtain that information from them. Even if immediately after the outbreak of the fire the Company had omitted to enquire from the Madras and Southern Mahratta Railway as to the nature of the articles in the 12 boxes, it was the plain duty of their legal advisers, when the Company became defendants in an action, a few months later, to tell them that they would, if unprotected by the risk note, be bound to give an explanation as to the contents of the other articles in the waggon, and then diligently to pursue that enquiry.

Further, they had in their possession at this time, when the action was commenced, some documents which they had received relative to the boxes from the Madras and Southern Maharatta Railway. Although they were highly relevant to the action, the defendants say that they destroyed them in the ordinary course of business.

The Railway Company therefore produced no evidence as to the general nature of the contents of the boxes. It would in our opinion have been sufficient if they had merely proved the consignment or delivery notes of the Madras and Southern Mahratta Railway, which we are told as a matter of practice pass from one line to another on receipt of goods-provided of course that the details on those notes contained nothing to arouse any suspicion that the goods were likely to be dangerous to carry.

They could then have said that they accepted the boxes in accordance with the usual practice, and that there was nothing on the consignment notes, or in the appearance of the boxes, which would cause any one to hesitate to carry them in the ordinary way, or to place them in proximity to other goods. That evidence would have satisfactorily discharged the onus which lay upon them, as soon as their position was decided to be that of bailees, and would have entitled them to succeed in the action. There being this gap in the evidence as to the 12 boxes we are obliged to hold that the defendants did not produce that quality or amount of evidence which they were bound by law to do in order to prove affirmatively the taking of all due care. Inasmuch however as the plaintiff did not plead his causes of action with precision, and in that he alleged negligence on the part of the Railway Company without giving any particulars of such negligence, and also failed in his pleading and at the trial to bring out the alternative position of Railway Company as bailees, on which point the appeal has succeeded, we whilst reversing the judgment of the lower Court and decreeing the plaintiff's claim, deprive the plaintiff of all costs in the lower Court. The plaintiff will have in this Court the costs of the appeal with fees on the higher scale.

Appeal allowed.

1924 Allahabad 256.

MEARS, C. J., AND PIGGOTT, J.

Shambhu Dayal—Plaintiff-Appellant.

v.

Lallu Mal—Defendant-Respondent.

F. A. No. 25 of 1921, decided on the 25th June, 1923, from the decree of the Sub-Judge, Meerut.

Negotiable Instruments Act (XXVI of 1881), S. 118—Recital of cash payment—Plaintiff attempting to prove that part of consideration consisted of reduction of defendant's liability but failing to prove it cannot get a decree on the recital.

In a suit on promissory note which contained a recital that the consideration was paid in cash, the

plaintiff abandoned the recital and undertook to prove that the consideration consisted partly of cash and partly of reduction of defendant's liability to a certain firm which was in turn indebted to the plaintiff. He failed to prove the latter part of the case. *Held* that in respect of the latter part a decree could not be passed in plaintiff's favour merely on the strength of the defendant's signature. [P. 259, C. 2]

Obiter : He could have got a decree for the whole amount if he had offered no evidence at all but relied on the recital.

(b) *Evidence Act, S. 68—Transfer of Property Act, S. 59—Note by attestor, meaning.*

An attesting witness noted near his signature that he attested the deed at the request of the executant. *Held* that the ordinary meaning of such a note by an attesting witness would certainly be that he had not seen the executant with his own eyes execute the receipt, but had attested it at his request upon an admission by the latter of the genuineness of his signature.

S. N. Sen and *K. C. Mittal*—for Appellant.

Nithal Chand and *S. N. Gupta*—for Respondent.

Judgment :—On the 25th of February, 1920, the defendant Lallu Mal executed in favour of the plaintiff Shambhu Dayal a promissory note for Rs. 8,000. The document begins with the following recital, "I have to-day taken a sum of Rs. 8,000 in cash for payment to Ram Chander Kedar Nath, commission agents of Meerut." On the same date Lallu Mal executed a receipt for the sum of Rs. 8,000, beginning with the words, "I have received to the last farthing the sum of Rs. 8,000 in respect of the note of hand executed by me in favour of Shambhu Dayal. Nothing now remains unpaid out of the amount of the said note of hand." This receipt was attested by two witnesses, Piarey Lal and Timmal Singh, and as it happens each witness has appended to this signature a certain note. Piarey Lal notes that he attested the receipt at the request of Lallu Mal. The ordinary meaning of such a note by an attesting witness would certainly be that he had not seen Lallu Mal with his own eyes execute the receipt, but had attested it at Lallu Mal's request upon an admission by the latter of the genuineness of his signature. Timmal Singh's note is to the effect that Rs. 8,000 were paid over in cash in his presence. The suit when first instituted was dealt with *ex parte* on the failure of the defendant to enter an appearance. Timmal Singh was examined on the 12th of August, 1920, in the *ex parte* proceedings as a witness for the plaintiff. He swore to the execution of the promissory note and receipt and stated, "the money was paid in cash in my presence." The defendant subsequently entered an appearance and satisfied the trial Court that he could show sufficient grounds for having the *ex parte* decree set aside. His next step was to challenge the plaintiff to produce his account books and to take time to inspect the same. In his written statement he finally took the line that, while the promissory note and the receipt had undoubtedly been executed by him, and were in fact entirely in his handwriting, no consideration whatsoever had passed. He explained the matter in this way. He had been gambling in grain with the firm of Ram Chander Kedar Nath, whose names appear in the promissory note. In the month of February 1920, he was anxious to enter into a further transaction with them in respect of 40 grain pits, deliverable three months later. The firm refused to allow him any further opportunity of speculating in grain, unless he was prepared to give some advance payment or security. Having no cash in hand, and being in fact considerably indebted to the firm of Kedar Nath he offered to give them a promissory note. They thought it would not be convenient to take the promissory note either in their own names, or in the names of any member of the firm, and suggested that it might be made out in the name of the plaintiff Shambhu Dayal, who is some sort of a distant relation of Kedar Nath's. On this basis the transaction was entered into, and the two documents in suit were executed. On the case going to trial upon these pleadings, the Court very properly laid the burden of proof on the defendant and Lallu Mal himself gave evidence and was supported by two witnesses, Raghubar Saran and Bharat Singh. Lallu Mal's evidence certainly does not sound straightforward or satisfactory. In particular, when he was examined about certain *hundis* which he had executed in favour of the firm of Ram Chander Kedar Nath, he was obviously fencing with the Court and keeping back as much of the truth as he could. The important point to be noticed, however, is that he admitted the genuineness of the two hundis executed by him in favour of the firm of Ram Chandar Kedar Nath, which the plaintiff produced as part of his

evidence. The witnesses Raghubar Saran and Bharat Singh have been adversely criticised by the trial Court, and, on examining the record of their evidence for ourselves, we can see no reason to reconsider the adverse verdict the trial Court has pronounced upon them. Certainly, if Raghubar Saran is telling the truth, he would have been asked to attest the receipt. If the plaintiff had rested on the case as it stood at the close of the defendant's evidence, it seems impossible to doubt that the trial Court would have decreed the claim on the basis of the double acknowledgment contained in the negotiable instrument itself, which is the basis of the suit, and in the receipt executed on the same date. The plaintiff, however, elected to produce evidence and there is certainly room for controversy about the evidence which he produced. At the outset, the plaintiff departed from the position which he had taken up at the *ex parte* hearing. Timmal Singh himself had to admit that it was not literally true that Rs. 8,000 in cash had passed from the plaintiff to the defendant on the 26th of February, 1922. The account which he now gives of the transaction may fairly be summarised thus. The plaintiff Shambhu Dayal had been engaged in speculation with the firm Ram Chander Kedar Nath and had been more fortunate than Lallu Mal. There was money due to him on a balance of account from the same firm and it seems that there was also a sum of money due to him on a loan which had been taken from him some years before by Khedar Nath. The total liability of the firm of Ram Chander Kedar Nath to the plaintiff Shambhu Dayal worked out at exactly Rs. 5,000. Now Gopal Chander, son of the plaintiff Shambhu Dayal, who seems to have carried this transaction through on behalf of his father and who was very properly produced as a witness in his father's place, deposes that he came into Meerut with Rs. 3,000 in cash, which he was prepared to advance to Lallu Mal. This advance he did make, and for the remaining Rs. 5,000, necessary to make up total of Rs. 8,000, he turned to the witness Timmal Singh, who is himself a partner in the firm of Ram Chander and Kedar Nath, and said in effect, "now let me have the Rs. 5,000 which the firm owes me and I will hand it over to Lallu Mal to make up the total of Rs. 8,000 for which he has given me a promissory note." According to Gopal Chander it was Lallu Mal himself who replied that this would not be necessary as the firm of Ram Chander Kedar Nath would give him (Lallu Mal) credit for this sum of Rs. 5,000 in reduction of the debt which he owed them. In substance, therefore, the plaintiff's case was this. He advanced Rs. 3,000 in cash and for the rest he took over Lallu Mal as his debtor in a sum of Rs. 5,000, in substitution for the firm of Ram Chander Kedar Nath who had previously owed him the money. The plaintiff supported his story by the production of his account books. These have been adversely criticised by the learned Subordinate Judge upon grounds which seem to us somewhat captious and unreasonable. The entries in these books of account, according to the Christian era, are correct, the day of the week being correctly given in accordance with the corresponding English date. There is a persistent error, extending throughout all the accounts which have been submitted for inspection and covering a period of at least two years, in the correspondence between the Hindi date given according to the Sambat year and the English date. This circumstance, although not particularly creditable to the plaintiff, is not really a valid reason for discrediting the genuiness of the accounts themselves. A very probable explanation of the manner in which such a discrepancy between the Hindi and English dates could come into existence, and continue aggregating itself over a series of years, was suggested to us in argument and seems to us reasonable enough. When we come to the entries for the important date, the 26th of February, 1920, we find that the account purports to show a cash payment of Rs. 8,000, to Lallu Mal on the security of a promissory note partly covered by cash receipts aggregating precisely Rs. 5,000 from the firm Ram Chander Kedar Nath on account of money previously due from the said firm. In substance, the entries agree well enough with the story told by Gopal Chander in the witness-box. They certainly cannot be said to contradict his story.

As for the other point taken by the learned Subordinate Judge, namely, that it is open to argument whether the plaintiff had Rs. 3,000 in cash in hand on the 26th of February, 1920, it does not seem to us that there is anything in it. He

started the day with a cash balance of Rs. 2,133-14-6, and by the end of the day he had depleted his cash balance to such an extent that he had only Rs. 207-14-9 in hand. There had been other receipts during the day besides the nominal receipt of Rs. 5,000 from the firm Ram Chander Kedar Nath. Here again there seems no valid basis for the contention that the evidence given by Gopal Chander is contradicted by his accounts. As regards the cash payment of Rs. 3,000 the evidence given is that of Timmal Singh and Piarey Lal. Of course Timmal Singh's evidence is no doubt discounted by the fact that he had taken it upon himself at the *ex parte* hearing to depose that the entire sum of Rs. 8,000 was paid in cash. At the same time it is reasonable to make some allowance for the manner in which evidence is taken at *ex parte* proceeding. On the story told by Gopal Chander, if it be assumed even for the sake of argument that that story is in the main true, there was a kind of payment of Rs. 5,000 involved in the transfer of Rs. 5,000 from Ram Chander Kedar Nath to Gopal Chander and back again to Ram Chander Kedar Nath in part satisfaction of the money which Lallu Mal owed. The evidence of Timmal Singh cannot be wholly discredited on the basis of the loose and summary statement made by him in the *ex parte* proceeding. Moreover, as it seems to us, the trial Court has wholly overlooked the extent to which any evidence produced by the plaintiff regarding the payment of consideration is corroborated by the defendant's signature on the two documents which are the basis of the suit. We are prepared to accept the plaintiff's evidence as proving a cash payment of Rs. 3,000 made to Lallu Mal in connection with the execution of the promissory note. Now as regards the balance of Rs. 5,000 there is some documentary evidence in favour of the plaintiff still to be noticed. On the said date, namely, on the 26th of February, 1920, Ram Chander Kedar Nath executed in favour of Shambhu Dayal and his son Gopal Chander a formal receipt for Rs. 5,000 as received on account of money due from the defendant Lallu Mal. They divided this into two heads, Rs. 2,700 received on account of two hundis executed by Lallu Mal, and Rs. 2,300 credited to Lallu Mal. The hundis Lallu Mal himself admitted were handed over to Gopal Chander in order that he might keep them as evidence of the payment by him and his father of this part of the consideration for the promissory note. Undoubtedly this item of Rs. 2,700 is proved up to the hilt. Our real difficulty is about the item of Rs. 2,300 in any shape or form. The accounts of the firm Ram Chander Kedar Nath were not produced. We may take it as admitted that Lallu Mal was indebted to them on the 26th of February, 1920, to an amount considerably in excess of Rs. 2,300. But what is not proved is that they gave him credit in current account, in reduction of his liability, for this sum of Rs. 2,300. We are bound to hold that this is not proved. The only question then is whether this sum of Rs. 2,300 can be decreed in favour of the plaintiff on the strength of the defendant's signature to the pro-note and the receipts. We have already indicated our opinion that this could have been done if the plaintiff had offered no evidence at all. As the case now stands the plaintiff himself has gone back on the recital in the promissory note to the effect that Rs. 8,000 were paid over in cash. Abandoning that recital, he has undertaken to prove that Lallu Mal got the benefit of Rs. 8,000 partly in cash and partly by reduction of his liabilities towards the firm of Ram Chander Kedar Nath. In our opinion the plaintiff has failed the prove the latter part of his case to the extent of this item of Rs. 2,300, and we must give effect to this finding.

In the result, therefore, we set aside the decree of the trial Court and in lieu thereof we give the plaintiff a decree for Rs. 5,700 with proportionate interest. The parties will pay and receive costs in proportion to failure and success in both Courts. Costs in this Court to include fees on the higher scale. Under the circumstances we decline to allow the plaintiff interest *pendente lite* or future interest.

Appeal allowed in part.

*1924 Allahabad 260.

RYVES, J.

Gajraj Singh—Defendant-Appellant

v.

Thakurji Maharaj Radha Ramji—Plaintiff-Respondent.

S. A. No. 320 of 1922, decided on 25th June, 1923, against the decree of the Sessions Judge, Mainpuri, dated 3rd February, 1923.

Civ. Pro. Code, S. 11 and O. 23, r. 1—Appellate Court can pass order under O. 23, r. 1—Fresh suit between the same parties not barred.

Buddhu brought a suit in the Court of the Munsif of Phaphund against the present appellant in which he stated that the property in suit belonged to an idol Sri Thakurji Maharaj Radha Ramji and he was manager on behalf of the said Thakurji and he sued for possession. The suit was dismissed with costs and the plaintiff appealed to the District Judge and along with the appeal presented an application to withdraw the suit and bring a fresh suit. The order of the District Judge on the appeal runs as follows: Ordered that the appeal be allowed and the decree of the Court below be set aside and plaintiff be permitted to withdraw the suit; permission to file a fresh suit.

Held, that an appellate Court has power to pass orders under O. 23, r. 1 (37 A. 326, F B., *Foll.*) and that the order of the District Judge having set aside the decision of the Munsif that cannot operate as *res judicata*, (1885 A.W.N. 151 and 9 A.L.J. 378, *Ref.*) [P. 261, C. 1.]

M. L. Sandal—for the Appellant.

J. M. Bengali—for the Respondent.

Judgment:—This appeal raises a somewhat interesting point of law. In 1919, Buddhu brought a suit in the Court of the Munsif of Phaphund in the Mainpuri district against the present appellant in which he stated that the property in suit belonged to an idol Sri Thakurji Maharaj Radha Ramji and he was manager on behalf of the said Thakurji and he sued for possession. Various defences were raised to that suit and it was dismissed by the Munsif in a very short judgment. He held that as the property belonged to the idol the plaintiff could not maintain the suit. Then on the third issue namely whether a *Sehdare* in dispute belongs to the temple or to the defendant he found as follows:—'The allegation that the *Sehdare* in dispute belongs to the temple is unsubstantiated. The plaintiff could produce one witness and himself and he refrained from giving any evidence at all. The issue is decided in the negative and the order was that the suit be dismissed with costs." The plaintiff appealed to the District Judge of Mainpuri and along with the appeal presented an application praying that for reason of the formal defect in the pleadings the plaintiff be allowed to withdraw the suit and bring a fresh suit. The order of the District Judge on the appeal runs as follows:—'Ordered that the appeal be allowed and the decree of the Court below be set aside and plaintiff be permitted to withdraw the suit; permission to file a fresh suit.' Thereafter the present suit was filed. Sri Thakurji Maharaj Radha Ramji was described as the plaintiff suing through Buddhu Singh, Manager. The suit was against the same defendant and for the very same reliefs as had been sought in the previous suit. Both Courts have decreed the suit. In second appeal it is urged that the District Judge of Mainpuri had no jurisdiction at all in appeal to pass orders under Order 23, rule 1 of the Code of Civil Procedure or alternatively that he had no jurisdiction under the circumstances to pass the order which he did and therefore his order can be treated as a nullity and disregarded and the original decision of the Munsif in the former case operates as *res judicata* in this case. That an appellate Court has power to pass orders under Order 23, rule 1, has been decided by a Bench of this Court which is binding on me, in *Afzal Begam* v. *Akbar Khanam* (1). Two cases have been cited by the learned Counsel for the appellant to the effect that an order of withdrawal unless it complies strictly with the provisions of Order 23, rule 1 is void and can be treated as a nullity. They are *Rama Singh* v. *Janak Singh* (2) and *Kali Prasanna Sil* v. *Panchanan Nandi* (3). These two cases are exactly similar but they need not be further considered because the former case, which was a Patna case, was expressly overruled in *Raj Kumar Mahton* v. *Ram Khelawan Singh* (4) and the latter in

(1) (1915) 37 All. 326=13 A.L.J. 444=28 I.C. 857

(2) (1920) 1 P.L.T. 200=C.W.N. (1920) Pat. 232 =56 I. C. 697.

(3) (1917) 44 Cal 367=23 C.L.J. 469=20 C.W.N. 1000=33 I.C. 670.

(4) 1922 Pat 44=1 Pat. 90=C.W.N. (1922) Pat. 17 =3 P.L.T. 80=64 I.C 337 (F.B.),

Hridoy Nath Roy v. *Ram Chandra Barna Sarma* (5). It seems to me that in this case the Judge had jurisdiction to pass the order which he did which was one allowing the appeal. The order allowing the appeal rendered the order of the Munsif dismissing the suit as wholly inoperative and therefore that decision cannot be considered for any purpose. It is dead and gone. The plaintiff had been given leave to bring a fresh suit. This is not perhaps quite accurate because the suit is the same. The only difference is that the mistake made in the former suit, if it was a mistake, was that Buddhu called himself the plaintiff and sued on behalf of the idol claiming though not for himself but for the idol, was corrected and the suit was brought strictly in conformity with the law as laid down by this Court, namely that a suit shall be brought in the name of the idol through its manager. In my opinion the order of the District Judge having set aside the decision of the Munsif, cannot operate as *res judicata*. I think the cases of *Abdul Rahman* v. *Lal Behari* (6) and *Chhajju* v. *Khyali Ram* (7) are in point. I therefore dismiss this appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(5) (1921) 48 Cal. 138=31 C.L.J. 483=24 C. W.N. 798=58 I.C. 806.
(6) (1885) A.W.N. 151.
(7) (1912) 9 A.L.J. 878=14 I.C. 175.

1924 Allahabad 261.

SULAIMAN, J.

Satdhar—Appellant

v.

Ram Chandra and another—Respondents.

Civ. Rev. No. 71 of 1923, decided on 30th October, 1923, from the order of Judge of Small Cause Court, Allahabad, dated 23rd December, 1921.

Execution sale—Sale of property not saleable under special law, is void.

It is the duty of the execution Court to see whether it has jurisdiction to sell a certain property and therefore where a sale is prohibited by law, *e.g.*, in this case by the Bundelkhand Land Alienation Act (II of 1903), the execution Court cannot proceed with the sale even though there is a decree for its sale. In such a case no question of estoppel against the defendant really arises. If, therefore, a sale did take place under such a decree it was a mere nullity and could in no sense pass title to the purchasers. (18 A.L.J. 59, *Foll.*). [P. 262, C. 1, and P. 263, C. 1.]

B. N. Vyas—for Appellant.

J. B. Lal and *S. P. Sinha*—for Respondents.

Judgment:—The decree-holders respondents obtained a decree from the Court of Small Causes on the 20th of November, 1918, against the applicant Satdhar. In execution of that decree they attached a grove situated in Bundelkhand. One Md. Yasin on the strength of a sale-deed from the judgment-debtor raised certain objections that the property did not belong to the judgment-debtor. His objections were allowed. The decree-holders then instituted a regular suit for a declaration that the sale-deed in favour of Md. Yasin was fictitious and that the property belonged to their judgment-debtor and was liable to attachment and sale in execution of their decree. In this suit Satdhar was also impleaded but apparently did not put in an appearance. This suit was decreed on the 16th February, 1920, and an appeal from that decree was also ultimately dismissed. The decree-holders had a declaration against Md. Yasin and Satdhar that the property belonged to Satdhar and was liable to attachment and sale in execution of their decree.

After Md. Yasin had been got rid of, Satdhar put in a new set of objections on the 4th of November, 1920, urging that the property was governed by the Bundelkhand Land Alienation Act (II of 1903). On the date fixed for hearing Satdhar did not appear and his objections were dismissed for default on the 4th November, 1920. On the 22nd January, 1921, he put in an application for restoration of his objections but that application was dismissed on the same date. After this on the 27th of January, 1921, the grove was sold and purchased by the decree-holders themselves and on the 1st of March, 1921, this sale was actually confirmed. It does not appear that Satdhar put in any formal application for setting aside the sale dated the 22nd of January 1921. He, however, on the 9th of March, 1921, appealed from the order dismissing his application for restoration. His appeal was allowed on the 29th March, 1921, and the case was remanded. The result of all these proceedings was that the objections which Satdhar

had filed on the 4th September, 1920, were revived and had to be disposed of on the merits.

On the 5th July, 1921, the Court of first instance allowed his objections and, holding that the property being covered by the Bundelkhand Land Alienation Act was not liable to be sold, set aside the sale. The decree-holders appealed from this order and the lower appellate Court by an order dated the 23rd December, 1921, agreed with the finding of the first Court that the grove was not saleable in execution of the decree. The learned Judge thought that that part of the Munsiff's order which had directed the setting aside of the sale was "unnecessary."

The judgment-debtor has come up in revision and wants to have the modification made by the lower appellate Court corrected.

On the findings of the Court below there can be no doubt whatsoever that the land in question is one which comes within Act II of 1903. The finding of the lower appellate Court is that the spaces lying between the trees growing on this land are used as pasture land and are sometimes actually cultivated for raising crops or fodder. The land is not occupied by any building and is used for purposes subservient to agriculture. It is admittedly situated in Bundelkhand. It is clear, therefore, that it falls within the meaning of the definition of land as given in section 2 (2) of Act II of 1903. This finding of the lower appellate Court has not in any way been challenged on behalf of the respondents.

I have to consider two main points in this revision.

1. The effect of the declaratory decree, dated the 16th February, 1920.

2. The effect of the order confirming the sale, dated the 1st March, 1921.

On behalf of the respondents it is strongly contended that in face of the declaratory decree obtained against Satdhar it is no longer open to Satdhar to say that the land is such as is not liable to be sold. It is contended that the former decree declaring that the land is liable to be sold in execution of the decree in question is final and estops the judgment-debtor from raising any objection to the same. This contention, however, has no force. The point has been the subject of previous decisions and is covered by clear authorities. In the case of *Hanuman Prasad Narain Singh* v. *Harak* (1) a Division Bench of this Court laid down that even where a mortgage decree for the sale of land situated in Bundelkhand had been obtained, it was open to the judgment-debtor to raise the objection that the land being not saleable could not be sold. The *ratio decidendi* of that case was that it is the duty of the execution Court to see whether it has jurisdiction to sell it and that therefore where a sale is prohibited by law the execution Court cannot proceed with the sale even though there is a decree for its sale. It was held that in such a case no question of estoppel against the defendant really arises. There is also the Full Bench case, *viz.*, that of *Katwari* v. *Sita Ram Tewar* (2) which is analogous. A mortgage decree for sale of occupancy holding had been obtained against the tenant, and yet the Full Bench allowed the judgment-debtor to raise the plea in the Execution Department that the property was not saleable in view of the provisions of section 20 of the Agra Tenancy Act (No. II of 1901).

The Full Bench has clearly laid down the rule that where the Court has no jurisdiction to sell some property it is immaterial whether a decree for sale of that land has been previously obtained and is in execution. I am therefore, of opinion that the decree-holders cannot take advantage of the effect of the declaratory decree of the 16th February, 1920. I may further point out that that decree was in substance a decree against Md. Yasin, and Satdhar was a mere *pro forma* defendant. Apart from that the decree-holders themselves did not raise this plea in the Courts below as there is no reference to any such plea in either of the judgments.

The next point is whether the subsequent confirmation of the sale of the 1st March, 1921, has any effect on these objections. I am of opinion that that confirmation cannot have any adverse effect. In the first place the effect of the remand by the lower appellate Court was to revive the objections of the 4th of September, 1920. The judgment-debtor is entitled to have his objections heard on the merits as they stood on that date. No sale had

(1) (1920) 42 All. 142=18 A.L.J. 59=14 U.P.L.R. (All.) 192=58 I.C. 551.
(2) (1921) 43 All. 547=19 A.L.J. 473=63 I.C. 264.

taken place till then. It is clear therefore, that in view of the findings of the Courts below that the land was not saleable, the execution Court had no jurisdiction whatsoever to sell it. The objections of Satdhar to that effect were well founded and should have been allowed. I therefore, accept the finding of the lower appellate Court that the grove in question was not at all saleable in execution of the respondent's decree, and that the execution Court had no jurisdiction whatsoever to sell it. If, therefore, any sale did take place it was a mere nullity and could in no sense pass title to the decree-holders as purchasers.

On behalf of the respondents it is contended that this Court should not express any opinion as to whether the sale of the 27th January, 1921, is liable to be set aside or not. I do not propose to leave things in any confusion. I have already held that the Court had no jurisdiction to sell the property and that the sale was a nullity. When the sale itself is void, and not voidable, no question of its being liable to be set aside really arises. In the case of *Khiali Ram* v. *Zahur Ali Khan* (3), the interest of *Z* was attached in execution of a decree and *Z* objected to the sale on the ground that it was his ex-proprietary tenancy. His objection was overruled and the property was sold and purchased by another person. In the meantime *Z* preferred an appeal which was decreed and the land was declared to be his ex-proprietary tenancy. It was held that the land not having been liable to sale, the sale was a nullity and the purchaser took nothing by his purchase. I may also point out that in the case of *Hanuman Prasad Narain Singh* v. *Harakh Narain* (1) the lower appellate Court had actually in reversing the decree of the first Court set aside the sale and that order was upheld by the High Court. I adopt the form which the final order on appeal in this Court took in that case and I hold that the objection raised with regard to the property not being saleable was a valid objection and the property was not liable to sale in execution of the decree. As the order for sale was an invalid and an illegal order, the sale which has taken place in pursuance of that order must fall to the ground and must be deemed to be a nullity. The judgment-debtor absented himself and allowed his objection to be dismissed for default, and then did not put in any formal application requesting the Court not to confirm the sale when he ultimately appealed to the Judge after the confirmation. But for these omissions the case might not possibly have been protracted. For the above reasons I direct that the parties should bear their costs of this application. Holding that the subsequent sale is a nullity I uphold the order directing the release of the attachment.

Application dismissed.

(8) (1905) 2 A.L.J. 358 = 1905 A.W.N. 153.

1924 Allahabad 263.

KANHAIYA LAL, J.

Surajman Chaube—Decree-holder—Petitioner-Applicant

v.

Anjore Shukal — Objector— Opposite Party.

Civ. Rev. No. 120 of 1923, decided on 31st July, 1923, from the order of the Sessions Judge, Jaunpoor, dated 23rd December, 1922.

(a) *Civ. Pro. Code, S. 102—No second appeal in Small Cause Suit of less than Rs. 500.*

Where the suit is one of a Small Cause Court nature below Rs. 500 in value, no second appeal lies against an order in execution of a decree in such a suit. (12 All. 579 and 30 Bom. 113. *Foll.*) [P. 264, C. 1.]

(b) *Limitation Act, Arts. 181, 182 and Civ. Pro. Code, S. 48 (a)—Date of decree means the date when the decree becomes executable.*

A compromise decree provided that the money should be payable without interest within six months and that if no such payment was made, the decree-holder should be entitled to recover his money with interest at Re. 1 per mensem from the date of decree. *Held*, that the decree did not become capable of execution till a default had been made by the judgment-debtor to pay the decretal money within the period allowed and whether Art. 181 or 182 (7) was applied, the time would not commence to run till after the expiry of that period. The amount to which the decree-holder became entitled became then determinable and recoverable. (19 A.L.J. 26 (P.C.) and 40 Mad. 989, *Foll.*) [P. 264, C. 2.]

(c) *Civ. Pro. Code, S. 115—Revision allowed in erroneous decision prejudicing one party.*

Where the decision of the Courts below is so palpably erroneous as to amount almost to an improper refusal to exercise a jurisdiction to the prejudice of the party entitled, revision will be allowed. [P. 265, C. 2.]

M. Ahmad—for the Applicant.

H. Sahai—for the Opposite Party.

Judgment:—In this case a preliminary objection has been taken to the hearing of the appeal that no second appeal is

maintainable. The suit was one of a Small Cause Court nature below Rs. 500 in value and as held in *Harakh* v. *Ram Sarup* (1) and *Narayan Parmanand* v. *Nagindas Bhaidas* (2) no second appeal lies against an order of execution of a decree in a suit of that kind. The petition of appeal can, however, be treated as a petition in revision. Let the petition be therefore removed from the register of second appeals and registered as a petition in revision and dealt with as such.

On the 11th of November, 1918 a decree for money was obtained by the decree-holder applicant against Mt. Rajwanti as a legal representative of her husband Mahip Shukul in accordance with a compromise which provided that the money should be repayable without interest within six months and that if no such payment was made the decree-holder should be entitled to recover his money with interest at Re. 1 per mensem from the date of the decree. The terms of the compromise were embodied in the decree.

According to the above decree the money fell due on the 11th of May, 1919. An application for execution was made by the decree-holder on the 7th of November, 1921, against the estate of Mahip Shukul in the hands of Ram Sumer who was described as having obtained possession of the property of the deceased on the death of Mt. Rajwanti as his reversionary heir. Ram Sumer denied that he was in possession of any property of Mahip Shukul or that he was his reversionary heir. He pointed out that Mt. Rajwanti had an adopted son named Ram Anjore and that the decree-holder should obtain execution against him. Ram Anjore appeared and stated that he had been adopted by Mahip Shukul. The name of Ram Anjore was therefore substituted in place of Ram Sumer in the application for execution.

Ram Anjore thereupon filed an objection, stating *inter alia* that he was not bound by the decree, as he had been adopted by Mahip Shukul and had not been made a party to the suit and that the decree was in any case barred by limitation against him. That objection was dismissed for default. The Court in which the execution proceeding was pending, however, proceeded to determine the question of limitation and came to the conclusion that the decree was barred by time, because the substitution of the name of Ram Anjore was made after the expiry of more than three years from the date of the decree. On appeal that order was upheld. Both the Courts below omitted to notice that the decree was not capable of execution till the 11th of May, 1919, that is, till after the expiry of six months from the date of the decree, because the judgment-debtor had been allowed the option of paying the decretal money within that period without interest. No payment was, however, made and as held by their Lordships of the Privy Council in *Rameshvar Singh* v. *Homeshvar Singh* (3), article 181 is applicable to such a case, under which the period of limitation is three years from the time when the right to apply accrues. Their Lordships pointed out that when the Limitation Act of 1908 prescribed three years from the date of a decree or order as a period within which it must be enforced, the language read with its context referred only to an order or decree made in such a form as to render it capable in the circumstances of being enforced. In *Aiyasamier* v. *Venkatachela Mudali* (4) the date of the decree in clause (*a*) of section 48 of the Code of Civil Procedure was similary interpreted as meaning the date when the decree became executable. The decree in the present case did not become capable of execution till a default had been made by the judgment-debtor to pay the decretal money within the period allowed; and whether article 181 or article 182, clause (7) of the Indian Limitation Act (No. IX of 1908) was applied, the time from which the period of limitation began to run would not be deemed to have commenced till after the expiry of that period. The amount to which the decree-holder was entitled became then determinable and recoverable.

It is contended on behalf of the judgment-debtor that article 181 does not apply to cases covered by section 48 of the Code of Civil Procedure and that article 182

(1) (1890) 12 All. 579=(1890) A.W.N. 206.
(2) (1906) 30 Bom. 113=7 Bom. L.R. 641.
(3) (1921) 48 I.A. 17=19 A.L.J. 26=1 P.L.T. 731 =40 M.L.J. 1=(1921) M.W.N. 21=33 C.L.J. 109=25 C.W.N. 337=6 Pat L.J. 182=13 M.L.W. 546=23 Bom. L.R. 721 =59 I.C. 636 (P.C.).
(4) (1916) 40 Mad. 989=31 M.L.J. 513=20 M.L.T. 391=(1916) 2 M.W.N. 296=4 M.L.W. 507 =37 I.C. 741.

clause (7) similarly does not apply where no certain date is fixed for the payment of the decretal money. But section 48 of the Code of Civil Procedure deals with the maximum limit of time provided for execution and does not prescribe the period within which each application for execution is to be made. The right to apply for execution accrues under it from the date when the default in making the payment occurs; and there is nothing in that section governing the provisions applicable to periodical applications for the execution of a decree which can be made after the right to apply for execution has accrued, so long as the decree subsists and is capable of execution. A date capable of being made certain by the computation of the time provided for payment is as certain for the purpose of article 182 of the Indian Limitation Act as a specific date entered in or provided for by a decree or order. The decision in *Yusuf Khan* v. *Sirdar Khan* (5), to which a reference has been made during the hearing, has been considered in *Kaveri* v. *Venkamma* (6) and *Lakshimibai Bapuji Oka* v. *Madhavrav Bapuji Oka* (7). Whatever might be said as regards a decree, directing the payment of an annuity, no such consideration would arise, where a specific period is fixed for the payment of the money and the right to apply for execution is postponed till default is made in payment within that period.

A reference has also been made to the decision in *Lalta Prasad* v. *Sheo Sahai* (8) but in that case the decree, though purporting to have been passed in accordance with the terms of a compromise, did not specify the limit of time within which the decretal money was to be paid.

In any case the substitution of the name of Ram Anjore in the original application for execution of the 7th of November, 1921, had the effect of validating the application for execution made against the estate of Mahip Shukul, though a legal representative who was not in possession of that property was wrongly entered as having been in possession thereof.

The lower appellate Court has referred to the decision in *Gyanendra Nath Basu* v. *Nihalo Bibi* (9) but in that case the second application was made for execution against certain property against the legal representative after the previous application for execution against other property had been dismissed against persons who were not really the legal representatives of the deceased judgment-debtor. The decree in the present case was passed against the estate of Mahip Shukul and it was against that estate that the present application for execution was made, though the legal representative was wrongly described as Ram Sumer instead of Ram Anjore who was eventually substituted in the place of the former.

It is also urged that an erroneous decision on the question of limitation cannot be challenged in an application for revision under section 115 of the Code of Civil Procedure, but whether section 115 of the Code of Civil Procedure or section 107 of the Government of India Act is applied, the decision of the Court below, which ignores that the decree, as it was originally passed was not capable of execution till the expiry of six months from the date of the decree, is so palpably erroneous as to amount almost to an improper refusal to exercise the jurisdiction, which was vested in the Court to execute the decree, to the prejudice of the party entitled to execute the same.

The application, is therefore, allowed and the execution case remanded to the Court of first instance with a direction to reinstate it under its original number and to proceed to dispose of it in the manner provided by the law. The costs here and hitherto will abide the result.

Revision allowed.

(5) (1884) 7 Mad. 88.
(6) (1891) 14 Mad. 396.
(7) (1888) 12 Bom. 65.
(8) (1885) A.W.N. 193.
(9) (1910) 32 All. 404=7 A.L.J. 512=6 I.C. 38.

---

* 1924 Allahabad 265.

STUART AND KANHAIYA LAL, JJ.

Sat Narain—Applicant

v.

Sarju—Opposite party.

Cr. Mis. Nos. 168-170 of 1923, decided on the 21st November, 1923.

Crim. Pro. Code, S. 526—Letters Patent (Allahabad), S. 22—High Court cannot transfer Criminal Proceedings pending before village panchayat.

A village panchayat constituted under the Local Act VI of 1920 is not a "Criminal Court" within the meaning of Chapter II of the amended Crim. Pro. Code; therefore, S. 526 would have no application. So also S. 22 of the Letters Patent (Allahabad) does not apply and the High Court

has no jurisdiction to direct the transfer of a case from a panchayat constituted under the Local Act.

Per Kanhaiya Lal, J. :—A village panchayat is a Court for the purpose of section 22 of the Letters Patent, and in the absence of any limitation imposed by any Act, the High Court has power under that section to transfer any criminal proceeding pending before a village panchayat to another village panchayat empowered to take cognizance thereof. [P. 267, C. 2.]

S. D. Sinha—for the Applicant.

The Government Advocate—for the Crown.

Stuart, J. :—These are three applications by which the High Court is asked to transfer cases pending before a panchayat constituted under Local Act VI of 1920 from the panchayat seized with hearing the cases to some other Court or panchayat competent to entertain the same. The applicants applied to the "Collector" that is to say, to the Sub-Divisional Officer exercising the powers of a Collector under section 74. He refused to interfere in the matter on the ground of the vagueness of their allegations. In respect of the merits of the matter both my learned brother and myself are satisfied that there is no reason for interfering and these applications will be dismissed on the facts. But inasmuch as in the order of reference by which the matter came before us certain points have been raised as to our jurisdiction I consider it advisable to express my own opinion on the competence of the High Court to entertain such applications. It appears to me clear that a village panchayat constituted under the provisions of Local Act VI of 1920 is not a "Criminal Court" within the meaning of Chapter II of the amended Code of Criminal Procedure and as it is not a Criminal Court within the meaning of that Act section 526 would have no application. It has, however, been pressed upon us that this Court would have power to transfer under the provisions of section 22 of the Letters Patent of this Court. Section 22 of the Letters Patent is as follows :—

"We do further ordain that the said Court shall have power to direct the transfer of a criminal case or appeal from any Court to any other Court of equal or superior jurisdiction."

Village panchayats are in no way subordinate to the authority of the High Court. The High Court cannot in any way interfere either in appeal or revision with their decisions. The only authority which can interfere with their decisions is the Collector or the officer to whom the Collector's power are delegated under the provisions of the Local Act. These officers are Revenue Officers. It appears to me impossible to read the words in section 22 of the Letters Patent "From any Court to any other Court of equal or superior jurisdiction" to mean more than "From any Court subordinate to the High Court's authority to any other Court of equal or superior jurisdiction subordinate to the High Court's authority." If a Court is not subordinate to the High Court's authority how can the High Court make its order effective? As far as I can see if this Court ordered a panchayat to transfer a case to another panchayat and either panchayat refused to obey the High Court's order, the High Court would have no method of enforcing its order, and for this reason alone I cannot see that section 22 can have any application. I therefore give it as my view that this Court has no jurisdiction to direct the transfer of a case from a panchayat constituted under the provisions of Local Act Act VI of 1920.

Kanhaiya Lal, J. :—The question for consideration in these cases is whether this Court is competent under section 526 of the Code of Criminal Procedure or section 22 of the Letters Patent to transfer a criminal proceeding pending before a village panchayat to another village panchayat.

The village panchayats were established under the United Provinces Act VI of 1920. As the preamble to that Act shows they were constituted to assist in the administration of civil and criminal justice, and special jurisdiction was conferred on them to try and dispose of certain civil suits and certain classes of criminal cases. Section 43 of the Act provides that in discharging this duty the panchayat shall be bound by no laws of evidence and procedure other than the procedure prescribed under that Act. Section 52 declares that except as provided by section 71 no order or decree of a panchayat shall be called in question in any Court on the ground that it was passed without jurisdiction. By section 71 the Collector is given authority

(*a*) to cancel the jurisdiction of a panchayat with respect to any proceeding or case or,

(*b*) to quash any proceedings of a panchayat at any stage, or

(c) to cancel any order or decree passed by it.

Section 53 lays down that except the Collector, no Court or authority shall have power to revise any decree or order passed by a panchayat in a suit. There is no such provision in regard to a criminal proceeding pending before a village panchayat. But section 526 of the Code of Criminal Procedure is limited in its application to criminal proceedings pending before a criminal Court subordinate to the High Court. This Court has not been given any authority either by the Village Panchayat Act or by the Code of Criminal Procedure to exercise any authority over the Courts constituted under Act VI of 1920. It can call for no returns from those panchayats or issue any directions as to the manner in which they are to discharge their duties.

There is no such limitation however in section 22 of the Letters Patent. Section 20 defines the authority of the High Court as a Court of appeal over the criminal Courts subordinate to it, and section 21 similarly describes the authority of the High Court as a Court of reference and revision over the criminal Courts subordinate to its appellate jurisdiction. But section 22 gives wider powers and authorises the High Court to transfer any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try, though such case may belong in the ordinary course to the jurisdiction of any other officer or Court. Such an officer or Court may or may not ordinarily be subordinate to its appellate authority, but for purposes of transfer would be subordinate. The word "Court" is not defined in the U. P. General Clauses Act or in the Code of Criminal Procedure or the Village Panchayat Act, and as pointed out in *Queen-Empress* v. *Ram Lal* (1), "it must in the absence of any definition be taken in its ordinary sense". According to Strouds' Judicial Dictionary, the word "Court" ordinarily means a place where justice is judicially administered. The preamble to the Village Panchayat Act shows that the village panchayats were constituted for the purpose of assisting in the administration of civil and criminal justice. The village panchayat must therefore be deemed to be a Court for the purpose of section 22 of the Letters Patent, and I am inclined to think that in the absence of any limitation imposed by any Act, the High Court has power under that section to transfer any criminal proceeding pending before a village panchayat to another village panchayat empowered to take cognizance thereof. I concur however with my learned brother in thinking that no sufficient reason for a transfer has been made out and I agree in rejecting these applications.

By the Court:—The applications are rejected.

Applications rejected.

(1) (1883) 15 All. 141=(1883) A.W.N. 59.

1924 Allahabad 267.

MEARS, C.J., AND PIGGOTT, J.

Emperor

v.

Chater Singh.

Govt. Crl. A. No. 853 of 1923, dated 31st October, 1923, against the order of Sessions Judge of Bulandshahr, dated the 14th July, 1923.

Excise Act, S. 3 (2)—Sub-Inspector of Police invested with powers under S. 10, is an excise officer within the Act.

Where a Sub-Inspector as a police officer had been invested with powers under that section, *held* that this was sufficient to constitute him an Excise Officer within the meaning of the definition, wherever the words "Excise Officer" occurred in the Act. It is unnecessary in such a case for the Local Government to issue a further notification authorising persons on whom it had already conferred powers for the purposes of the Act to do something which the Act says any "Excise Officer" may do. [P. 269, C. 1.]

Govt. Advocate—for Emperor.

Shabd Saran—for Chater Singh.

Piggott, J.:—This is an appeal by the Local Government, presenting some peculiar features. The case itself was a simple one. Sub-Inspector Mohan Lal, officer in charge of Aurangabad police station, received information that Chitar Singh, a petty shop-keeper of a village called Saidpura, was selling liquor at his shop, which he kept ostensibly for the sale of groceries. Chitar Singh had no license for the sale of intoxicating liquor. The Sub-Inspector raided the shop. He says, and he is corroborated by at any rate two witnesses, that Chitar Singh was sitting outside his shop as the police officer and

those with him approached, and that he thereupon ran away. The shop being searched, there were found inside seven bottles of country spirit and a barrel of the same, together with a vessel used for filling bottles from the barrel. The expert evidence of Babu Girwar Singh, Excise Inspector, shows that the liquor was of abnormal strength, being more powerful than what is permitted to be issued from Government distilleries. The accused was not found for some days. He was eventually arrested and the Magistrate took cognizance of the case on the report submitted to him by the Sub-Inspector.

The accused's defence was that the shop was raided in his absence, at the instigation of some enemy of his, and that the same enemy must have planted the liquor in the shop.

In view of the quantity found, this is a very improbable suggestion. We have examined the evidence in detail and we do not think there is any force in the accused's defence. Such evidence as he called in his defence was fragmentary and contradictory. We are satisfied that on the facts the Magistrate was justified in convicting Chitar Singh, as he did, of an offence punishable under section 60 clause (*a*) of the Excise Act. He did not think it necessary to record an opinion whether the accused had also been guilty of a further offence, that, of selling country spirit, punishable under section 60, clause (1).

Chitar Singh appealed to the Sessions Judge. His memorandum of appeal challenges the decision of the trial Court on all questions of fact. It suggests that the conduct of the police in making the search was irregular. There is a plea that the Sub-Inspector ought to have reported the matter to the Magistrate more promptly than he did. But apart from a general plea that the conviction is contrary to law, there is no suggestion in the petition of appeal that the trying Magistrate had no jurisdiction to take cognizance of the offence on the report of the Sub-Inspector. Before the learned Sessions Judge however this plea was orally taken, and he allowed it to be argued without insisting on any amendment of the memorandum of appeal. Chitar Singh was accordingly acquitted upon the mere finding that by reason of the provisions of section 7 (1) (*a*) of the Excise Act, the Magistrate had acted without jurisdiction, in that he took cognizance of the offence, not having before him the complaint or report of any Excise Officer.

If the learned Sessions Judge had insisted on this plea being formally taken in writing, it is probable that the Government Pleader would have found an answer to it, and much trouble and expenditure of judicial time would have been saved. Curiously enough however the Local Government in filing this appeal have duplicated the very same mistake. The appeal comes before us on a general plea, that the order of acquittal is against the weight of evidence on the record. We have refused to entertain the appeal on that ground, which obviously is not an arguable one but we have permitted the learned Government Advocate, who is himself not responsible for the drafting of the Government's memorandum of appeal to amend the same by adding a further plea. This is to the effect that, in view of a Government order of the 13th of July, 1910, the Sub-Inspector, being a police officer invested with certain powers under the authority exercisable by the Local Government by virtue of section 10 of the Excise Act, he was by definition an "Excise Officer", and therefore a person competent to make a complaint or report to a Magistrate under section 7 (1) (*a*) already referred to. The appeal has been argued on this basis, and counsel has been engaged to represent the accused Chitar Singh, who has also appeared in person.

There can be no doubt that under section 10 of the Excise Act the Local Government had authority to empower, not only a Sub-Inspector of Police, but any police officer to perform duties and exercise powers under that Act, including the conferment of authority to make a report or complaint. Now the Local Government has in express terms authorised any police officer to arrest and to make searches in connection with a number of offences including the offence of being in illicit possession of intoxicating liquor of which Chitar Singh has been convicted. It would certainly be anomalous if the Sub-Inspector had authority to arrest Chitar Singh and to search his shop, and was moreover required by law to produce Chitar Singh before a competent Magistrate within 24 hours of his arrest but could not by reporting the facts to the Magistrate give that Magistrate authority to take cognizance of the alleged offence.

We think that this anomaly has been avoided by the very wide definition of the words "Excise Officer" contained in sub-clause 2 of section 3 of the Excise Act. According to that definition an "Excise Officer" means not merely a Collector, or other officer appointed as such, but also an officer or person invested with powers under the Act by a Government order lawfully issued under the provisions of section 10. The Sub-Inspector as a police officer has been invested with powers under that section. This is sufficient to constitute an Excise Officer within the meaning of the definition, wherever the words "Excise Officer" occur in the Act. It was, therefore, unnecessary, and would have complicated matters, for the Local Government to issue a further notification authorising persons on whom it had already conferred powers for the purposes of the Act to do something which the Act says any "Excise Officer" may do. The learned Sessions Judge therefore was mistaken in the ground on which he has acquitted Chitar Singh.

We set aside his order of acquittal, and in lieu thereof we restore the conviction recorded by the trying Magistrate. We have given careful attention to the question of sentence. In view of all the circumstances and of the amount and strength of the liquor seized, we do not think the trying Magistrate was in error in imposing the sentence of three months' rigorous imprisonment. We restore that sentence, with effect from the date on which it was passed, that is to say, any period of imprisonment already served by Chitar Singh since the date of his original conviction will be reckoned towards the period of imprisonment which he has been ordered to serve. The accused will be taken into custody and arrangements made for conveying him to the Bulandshahr district to serve out his sentence.

Appeal allowed.

---

* * 1924 Allahabad 269.

WALSH, J.

Ghariba and others—Applicants

v.

King-Emperor—Opposite Party.

Cr. Ref. No. 583 of 1923, decided on the 29th October, 1923, reference made by the Sessions Judge, Jhansi, dated 2nd October, 1923.

Crim. Pro. Code, S. 107—Order without evidence but on the admission of accused, is good.

Certain persons were called upon to furnish security. They appeared and expressed their willingness to be bound over. The trial Court therefore took no evidence and passed an order against them. *Held*, that the consent of accused amounted to a plea of guilty and the order was right. (54 I. C. 784, *Not Foll*; 37 All. 30 and 54 I. C. 411, *Dist*; 34 Cal. 674, *Dissented*). [P. 270, C. 1.]

The parties were not represented.

FACTS.—Two sets of persons were called on to furnish security to keep the peace. They appeared before the Magistrate and consented to execute the bonds. Then the order complained of was made without the taking of evidence.

Judgment:—I am not prepared to interfere in this case. It must be assumed that the Magistrate had some evidence of the likelihood of a breach of the peace being committed by these men before he issued notice. I am inclined to think that I went too far by saying in *Jagdat Tewari* v. *Emperor* (1), that there must be some evidence upon the record beyond a full consent to be bound over, given by the person summoned. I find that each of these persons had the notice read out to him and in answer to the notice expressed his willingness to execute a bond for Rs. 100 to keep the peace. This is in itself evidence on which a Magistrate can act. It is really a plea of guilty, assuming the person summoned understands what he is doing. A man may waive the formal production of evidence against himself. By doing so he saves himself and the Court unnecessary trouble, and he may well consider in the case of a notice, the reason for which he doubtless understands perfectly well, that the evidence against him is sufficient to justify his consenting to an order. I see that in the notice of appeal to the Sessions Judge the objection was taken, no doubt by the lawyer, that the appellants expressed no willingness to execute the bonds, and even if they did so the Court could not make an order under the law in the absence of any evidence. I am afraid that it too often happens that a trick is played upon the Court, which is induced to make an order by consent, so as to avoid the production of formal evidence, and in order to found an argument for the Court of appeal. I think a Court under section 107 is perfectly entitled to act

(1) (1920) 54 I. C. 784.

upon a solemn consent given before it by the accused person as was done in these cases. I can quite understand the Sessions Judge taking the view that he did upon the authorities, but on reconsideration I think I went too far in the case cited above. The case decided by Mr Justice Piggott, *Emperor* v. *Mul Chand* (2) was very different. There was no inquiry at all. I do not agree with the decision in *Ram Chandra* v. *Emperor* (3). In the case before Mr. Justice Ryves, *Chander Shekhar* v. *Emperor* (4) also there was no inquiry. I still think that it would be better for a Magistrate to take formal evidence, and to have an admission on the record, but I do not agree with the view which I formerly took that a consent may not amount to an admission. In any event I should not have done as I did in that case, and sent the case back, but I have to come the conclusion that this is superflous where after due inquiry and notice, a free consent amounting to a plea of guilty, has been given. I may add that I have consulted Mr. Justice Ryves, and another Judge of this Court, and both agree with the view I have taken here. Let the record be returned.

Conviction upheld.

(2) (1914) 37 All. 30=12 A.L.J. 1262=16 Cr. L.J. 61=26 I.C. 653.
(3) (1907) 35 Cal. 674=8 C.L.J. 68=8 Cr. L.J. 128.
(4) (1920) 21 Cr. L.J. 59=54 I.C. 411.

1924 Allahabad 270.

RYVES AND GOKUL PRASAD, JJ.

Habib Khan—Appellant

v.

Fida Husain Khan and another—Respondents.

S.A. No. 455 of 1921, decided on 8th February, 1923, from the decree of Sub-Judge, Azamgarh, dated 22nd December, 1920.

(a) *Civ. Pro. Code, S. 11—Agra Tenancy Act (II of 1901), S. 198—Suit by landlord for rent—Payment to third person pleaded—Third person made party—Decision against third party does not bar civil suit by third party.*

Where in a suit by the landlord for arrears of rent the tenant pleads payment in good faith to a third person who is therefore made a party to the suit and the suit is decided against him, *Held* that such a decision does not preclude the latter from establishing his title in a Civil Court, as the previous suit does not come within the purview of those rulings of this Court which hold that a suit will not lie in a Civil Court if its object is to avoid a decision arrived at by a Revenue Court in a matter in which it had exclusive jurisdiction.

(b) *Civ. Pro. Code, S. 100—Finding of fact based on mistake of fact is not binding.*

A finding entirely based on a mistake of fact is not a finding which can bind the High Court. [P. 271, C. 1.]

Kumuda Prasad—for Appellant.

Mukhtar Ahmad—for Respondents.

Judgment:—The facts out of which this appeal arises are as follows:—Fida Husain Khan, Madar Baksh and Muhammad Ali were co-sharers of the village in suit. Madar Baksh and Muhammad Ali sold their shares to Mt. Saidunnissa, who was the predecessor-in-title of Habib Khan, defendant No. 1. They became ex-proprietary tenants of their *sir*. They relinquished their rights, and Bangur, defendant No. 2, became non-occupancy tenant of the plots in suit. In proceedings under section 36 of the Land Revenue Act it was decided that certain plots, including the plots in suit, were in the exclusive possession of Mt. Saidunnissa Bibi, under a partition of *sir* land in those proceedings. Subsequently, Habib Khan sued Bangur for the whole of the rent of the two plots in suit. Bangur pleaded that he had paid the rent in good faith to Fida Husain. Fida Husain thereupon was made a party to the suit and the suit was ultimately decreed by the appellate Court, which decided against Fida Husain. Thereupon Fida Husain brought this suit for a perpetual injunction restraining the defendant No. 1 from realising more than his share of the rent from the defendant No. 2. Both the lower Courts have decreed the claim. The defendant Habib Khan comes here in second appeal and three grounds have been pressed on his behalf: (1) that the suit is barred by the provisions of section 11 of the Code of Civil Procedure: (2) that the suit is not cognisable by the Civil Courts, and (3) that on a true construction of Ex. A, it is clear that the land in suit is the exclusive property of the defendant-appellant. The first and the second pleas have no force having regard to section 198 (2) of the Tenancy Act. This suit does not come within the purview of those rulings of this Court which have held that a suit will not lie in a Civil Court if its object is to avoid a decision arrived at by a Revenue Court in a matter in which it had exclusive jurisdiction. There remains the third point.

It appears that in the proceedings under section 36 of the Land Revenue Act, to which we have referred, a petition was put in by Mubammad Ali Khan and Madar Baksh to the effect that the *sir* land had been partitioned privately between the co-sharers and Mt. Saidunnissa and that she had been given exclusive possession of certain plots as appertaining to her share, and details were given of the plots which were said to have been allotted to the exclusive possession of Mt. Saidunnissa and also of the plots which had been allotted to the other co-sharers. We find that the two plots in suit were there entered as having been allotted exclusively to Mt. Saidunnissa. The learned Subordinate Judge in the Court below dealing with the question of possession has come to what would appear to be a finding of fact, namely, that the appellant, that is to say, Habib Khan, was not in exclusive possession of the plots in suit. We find that this finding is entirely based on a mistake of fact and, therefore, it is not a finding which can bind us in second appeal. There was no oral evidence in the case. The defendant relied on Ex. A, which was the application already referred to, filed by Madar Baksh and Muhammad Ali in the proceedings under section 36 of the Land Revenue Act. Those proceedings ultimately ended in an order in terms of the application. To those proceedings Fida Husain was a party, and this is the mistake of fact which has vitiated the whole of the finding of the learned Subordinate Judge. He says that Ex. A proves nothing, because the present plaintiff, Fida Husain Khan, was no party to it, and this was the reason which he gives for holding that Habib Khan was not in exclusive possession of the plots in suit. Of course, Fida Husain was no party to the application, but he was a party to the proceedings which ended in an order against him in terms of the application. There being no legal finding on the question of possession under section 103 of the Code of Civil Procedure, we propose to examine the evidence which is entirely documentary to decide the point. We find that the rent suit, to avoid which this suit was brought, was rightly decided on the ground that the *sir* land had been partitioned between the co-sharers, and Mt. Saidunnisa was given particular plots of *sir* land for her exclusive possession and enjoyment, and, as Habib Khan represents her now, he must be held to be in possession of those particular plots of *sir* land and entitled to their rent, whether he cultivates them himself or lets them out to tenants is quite immaterial. It is not a fact, as the learned Munsif seemed to think, that the plots could not be in his exclusive enjoyment if they were actually cultivated by a tenant. In this view of the case the decision in *Debi Pershad* v. *Bhagwan Din* (1) has no application, as the facts are different. In our view the decisions of both the Courts below must be reversed and the suit dismissed. We, therefore, allow this appeal, set aside the decrees of both the Courts below and dismiss the plaintiff's suit with costs in all Courts.

Appeal allowed.

(1) (1913) 35 All. 27 = 10 A.L.J. 437 = 16 I. C. 399.

1924 Allahabad 271.

PIGGOTT, J.

Mt. Sarjo Kuar and another—Appellants

v.

Enait and others—Respondents.

S.A. No. 1499 of 1921, decided on 28th March, 1923, from the decree of Sub-Judge, Jaunpore, dated 14th July 1921.

Pleadings—Alternative prayer cannot be converted into an additional prayer.

In the village in suit there was some waste land appertaining to a *shamilat pitti* in which there were twenty or more co-sharers. One of these determined to bring a number of plots of this waste land under cultivation; but instead of occupying them himself he granted a perpetual lease of the same to two lessees. About a year later the lessees induced seven more of the co-sharers in the *patti* to grant them another perpetual lease. The present suit was brought by two co-sharers who were dissatisfied with this arrangement. The principal relief sought was a declaration that the two leases above referred to "are improper, null and void and are not fit to be enforced." There was an alternative prayer for a decree for joint possession in favour of the plaintiffs and all the co-sharer defendants, "if, for any reason the passing of a declaratory decree be not thought proper by the Court." The Court found the plaintiffs entitled to the declaration sought for and framed its decree accordingly. In appeal plaintiffs prayed for joint possession by actual ejectment of the lessees defendants in addition to the declaration already granted, and not by way of alternative. *Held* that the prayer for ejectment could not be granted as it had been preferred in the plaint only as an alternative. [P. 272, C. 1.]

P. L. Banerji—for Appellants.

M. A. Aziz—for Respondent.

Judgment:—This is a second appeal which could never have come into Court if the plaintiffs had been definitely held to their own pleadings, as they certainly ought to have been. It appears that in the village in suit there was a certain area of waste land, appertaining to a *sahmilat patti* the proprietary rights in which vested jointly in twenty or more co-sharers. One of these determined to bring a number of plots of this waste land under cultivation, but instead of occupying them himself he granted a perpetual lease of the same to two lessees. About a year and a quarter later the lessees, finding that their rights were being questioned, induced seven more of the co-sharers in the *patti* to grant them another perpetual lease. The present suit was brought by two co-sharers (subsequently joined by three others) who were dissatisfied with this arrangement. They impleaded as defendants the two lessees, the lessors, and all the remaining co-sharers who had not joined in the suit. The principal relief sought was a declaration that the two leases above referred to "are improper, null and void, and are not fit to be enforced." There was an alternative prayer for a decree for joint possession, in favour of the plaintiffs and all the co-sharer defendants, "if, for any reason, the passing of a declaratory decree be not thought proper by the Court."

The suit was effectively contested by the lessees-defendants alone. They set up a plea which has been found to be unsustainable, alleging a complete partition of the waste lands amongst the co-sharers. They neglected to set up any alternative case, in the event of the Court's holding that the lessors-defendants had exceeded their rights in granting leases in perpetuity; and it seems to me that this was directly due to the frame of the plaint, in which the prayer for joint possession by actual ejectment of the lessees was preferred in the alternative only, and not as a relief consequential on the declaration of the invalidity of the leases.

The fourth issue fixed by the Trial Court was:—"To what relief, if any, are the plaintiffs entitled?" The Court found the plaintiffs entitled to the declaration sought for and framed its decree accordingly. Incidentally, it remarked that the actual ejectment of the lessees-defendants could only be carried out by the Revenue Court.

The latter appealed, and tried to raise the plea that the entire suit as framed was not cognizable by the Civil Court: this plea was repelled and their appeal dismissed. The plaintiffs also appealed. They very cooly alleged that their own prayer for relief by way of a simple declaration was barred by section 42 of the Specific Relief Act, and now prayed for joint possession by actual ejectment of the lessees-defendants in addition to the declaration already granted, and not by way of alternative.

The learned Subordinate Judge devoted almost the whole of his judgment to the appeal of the lessees; he disposed of the plaintiff's appeal in a few lines, quoting authority for the proposition that the ejectment of the lessees could not be ordered in a suit like the present, but neglecting to point out that the prayer for ejectment had only been preferred in the plaint as an alternative, in the event of the Court's holding that a mere suit for a declaration would not lie.

In appeal to this Court the plaintiffs rely mainly on the case of *Jagar Nath Ojha* v. *Ramphal* (1). There were no lessees concerned in that case and no question arose as to the existence of an agricultural tenancy. I should not myself have ordered the actual ejectment of the lessees-defendants, because I do not regard them as "mere trespassers," but I do not think this is a proper case for general examination of the question of the right of one co-sharer in joint lands to appropriate to his personal use a portion of the area constructively in the possession of all the joint owners, where there are none of them making any particular use of it. In this litigation such questions could only arise in the event of the Courts holding that the plaintiffs were not entitled to a mere declaration without consequential relief; this contingency has not arisen, and the plaintiffs cannot complain of the fact. I dismiss their appeal with costs.

Appeal dismissed.

(1) (1911) 34 All. 150=8 A.L.J. 1312=13 I. C. 79.

1924 ALLAHABAD 273

KANHAIYA LAL J

Balwant Singh—Defendant—Appellant.

v.

Mt. Laiqa Begam and another—Plaintiffs & Defendants-Respondents.

S. A. No. 492 of 1922, Decided on 10th July 1923, from the decree of the S. J. Meerut, D/-18th February 1922.

Civil P. C., S. 144—Does not apply if auction purchaser is not the decree-holder.

One P, held a decree for money against A, in execution of which he attached certain property. Before that attachment A. had died and his daughter-in-law, the plff. had been impleaded as his legal representative. The plaintiff objected to the attachment contending that it did not belong to A. Her objection was finally allowed in appeal. Meanwhile the property attached had been sold by auction in execution of that decree and purchased by the defendant, Plff. then sued for the recovery of possession of that property or in the alternative for the recovery of Rs. 500, the value of the said property.

Held that S. 144 C. P. C. had no application to the case but the plaintiff should be allowed to obtain possession of the disputed property after refunding to the defendant the amount obtained by her out of the sale proceeds. [P 273 C 2]

Panna Lal—for Appellant.

H. Hasan and S. K. Dar—for Respondents.

Judgment.—Premsukh Das held a decree for money against Anwarul Hasan, in execution of which he attached certain property. Before that attachment Anwarul Hasan had died and his daughter-in-law, the present plaintiff respondent, had been impleaded as his legal representative. The plaintiff respondent objected to the attachment of the said property contending that it did not belong to Anwarul Hasan the deceased judgment debtor. Her objection was disallowed by the Court executing the decree but on appeal that objection was upheld and the order of the appellate Court was finally confirmed by this Court.

Meanwhile the property attached had been sold by auction in execution of that decree and purchased by the defendant appellant Balwant Singh. The present suit was filed by the plaintiff respondent for the recovery of possession of that property or in the alternative for the recovery of Rs. 500 the value of the said property. Both the auction purchaser and the decree-holder were made parties to the suit. The Court of first instance dismissed the claim but the lower appellate Court decreed it.

The first question for consideration is whether S. 144 of the Code of Civil Procedure barred the claim.

That provision allows restitution to be made against the decree holder who obtains any benefit under a decree which is afterwards reversed on appeal. It does not allow restitution to be made against a third party. The auction purchaser in the present instance was not the decree-holder and S. 144 C. P. C. has therefore no application. The object of that section is to place the parties to a decree in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed and the relief allowed by that provision can only be claimed against the party to such a decree obtaining the benefit prior to such variation or reversal.

The next point for consideration is whether a suit can be maintained under the circumstances against a *bona fide* auction purchaser for value who purchased in execution of a decree or order which was subsisting on the date on which the execution sale was held. The original judgment-debtor was not however found to have had a saleable interest in the property sold and if he had no saleable interest it was immaterial whether the decree was subsisting or not because the Court holding the sale would have in that event no jurisdiction to sell the property. The decisions in *Rewa Mal* v. *Ram Kishen Singh* (1) and *Nawab Zainul Abdin* v. *Muhammad Asghar Ali Khan* (2) do not apply because in the former case there were cross decrees, one of which was sufficient to satisfy the other in execution of which the sale was effected, while in the latter case the decree had been

(1) [1887] 14 Cal. 18—13 I.A. 106—4 Sar. 746 (P.C.)
(2) [1888] 10 All. 166—15 I.A. 12—5 Sar. 129 (P.C.)

reversed on appeal, the judgment-debtor having in either case a saleable interest in the property, which could have been conveyed by sale to the auction purchaser. In the present case the finding of the appellate Court in the proceeding instituted by the present plaintiff against the sale of the attached property was that it was not liable to sale in execution of the decree or in other words that the original judgment-debtor had not saleable interest therein. The decisions in *Pearey Lal* v. *Hanifunnissa* (3) and *Dulla* v *Shib Lal* (4) also do not apply. In the former the judgment-debtor had a saleable interest. In the latter the omission to raise an objection prior to the sale operated as a bar to the suit.

It is also contended that the plaintiff respondent had withdrawn the surplus sale proceeds and was thereby precluded from suing for the dispossession of the auction purchaser. But that money was withdrawn before the objection of the plaintiff to the sale of the disputed property was allowed by the appellate Court. The learned counsel for the plaintiff respondent is willing to refund that money to the auction purchaser either in this suit, or in any proceeding which may hereafter be instituted by the auction purchaser for the refund of the sale proceeds. It is open to the auction purchaser to seek his remedy by a separate proceeding, but so far as the present plaintiff respondent, who is the legal representative of the deceased judgment-debtor is concerned, it is desirable that she should not be allowed to obtain possession without refunding the surplus sale proceeds which she had received and appropriated before her objection was finally allowed. The amount so obtained by her was Rs. 63/6. The appeal is therefore dismissed except in so far that the plaintiff respondent will not be allowed to obtain possession of the disputed property without refunding to the defendant appellant the sum of Rs. 63/6 obtained by her out of the sale proceeds. In view of the *bona fides* of the auction purchaser the parties are directed to bear their own costs throughout.

Appeal dismissed.

(3) [1916] 38 All. 240—14 A.L.J. 302—34 I C. 303.

(4) [1917] 39 All. 47—14 A.L.J. 846—36 I.C. 281.

1924 ALLAHABAD 274

LINDSAY AND KANHAIYA LAL, JJ.

Sher Muhammad Khan—Defendant-Appellant.

v.

Parbhu Lal and others—Plaintiffs—Respondents.

F. A. No. 44 of 1921, Decided on 18th July 1923, from the decree of Sub. J. Saharanpur.

Pre-emption—Wajib-ul-arz.

A *Wajib-ul-arz* by itself is good *prima facie* evidence of custom and it is not necessary to corroborate a *wajib-ul-arz* by proof of instances in which preemption has been allowed. The evidence afforded by the *Wajib-ul-arz* may be rebutted by other evidence. The fact that the *wajib-ul-arz* contains many provisions relating to matters of contract does not prevent it being treated also as a record of custom. 8 All. 786; (1908) 5 A.L.J. 539; (1909) 6 A.L.J 715 Diss. [P 275 C 1, 2 P 277 C 1]

S. N. Sen—for Appellant.

Nihal Chand—for Respondents.

Lindsay, J.—The sole question for decision in this appeal is whether the existence of a custom of pre-emption which was pleaded by the plaintiffs in the Court below was established on the evidence submitted to the Subordinate Judge.

The property sought to be pre-empted is situated in the Saharanpur district known as Lakhnoti Kalan.

The evidence in support of the custom consisted of a *wajib-ul-arz* prepared at the settlement of 1867 A. D. Another *wajib-ul-arz* was prepared in 1296 F. corresponding with 1889. In addition to these two *wajib-ul-arzes* the plaintiffs produced a decree showing that a claim for pre-emption had been decreed in the Court of the Munsif of Saharanpur in the year 1907. The judgment of the Munsif was based upon the provision of the *wajib-ul-arz* of 1867 which is in evidence in this case.

There was no rebutting evidence put forward on the part of the defendants.

The full text of the *wajib-ul-arz* of 1867 is before us and it has been argued at great length that having regard to the language of the document and to certain of its provisions, it ought to be held in this particular case that the *wajib-ul-arz* is not a record of custom.

In support of his argument the learned Advocate for the appellants has referred us to some of the earlier decisions of this Court in pre-emption cases. He has cited before us the cases of *Dhian Singh* v. *Diwan Singh* (1) and *Bulh Singh* v. *Gopal Rai* (2) and *Tota* v. *Sheo Narain* (3).

While it might be conceded in favour of the appellants that on the earlier decisions of this Court it would be possible to construe the *wajib-ul-arz* before us in the present case as a record of contract rather than of custom; we are decidedly of opinion that it is not possible for us to follow the reasoning of these earlier cases in view of the pronouncement of their Lordships of the Privy Council in the case of *Digambar Singh* v. *Ahmad Sayed Khan* (4). Since that judgment has been published, it has naturally been followed in this Court, and it must be taken that any principles which are laid down in it must be accepted in preference to any statement of law contained in previous decisions of the Court. It was clearly laid down in this case that a *wajib-ul-arz* by itself is good *prima facie* evidence of custom and that it is not necessary to corroborate a *wajib-ul-arz* by proof of instances in which pre-emption has been allowed. At the same time it was laid down that the evidence afforded by the *wajib-ul-arz* may be rebutted by other evidence.

Since that case was decided the pre-emption Bench of this Court has taken up the position that the *wajib-ul-arz* is strong *prima facie* evidence of custom and that in order to overturn the presumption in its favour, there must be convincing evidence to satisfy the Court that in fact the *wajib-ul-arz* could not reasonably be treated as a record of custom.

The evidence which would rebut the presumption may of course be found in the language of the document itself or there may be external evidence. It has been laid down by the pre-emption Bench in the case reported in *Fazal Husain* v. *Muhammad Sharif* (5), that in certain cases the language of the *wajib-ul-arz* will of itself afford sufficient evidence to overturn the presumption that it contains a record of custom. In that case certain observations were made with reference to the previous decision of this Court in *Dhian Singh* v. *Diwan Singh* (1). It was pointed out in that case the *wajib-ul-arz* was peculiar and that in the clause relating to pre-emption there were to be found "a number of other matters which could not possibly have been matters of custom." It was held accordingly that in such a case it might reasonably be held that the record in the *wajib-ul-arz* was not really a record of custom but a record of contract.

We have in recent cases endeavoured, as far as possible, to follow this principle laid down in the case just cited and we may also refer in this connection to the case reported in *Surajbali Singh* v *Muhammad Nasir* (6).

We have, in the present case, as has been stated, the *wajib-ul-arz* prepared in the year 1867 and a subsequent *wajib-ul-arz* prepared in or about the year 1889. This latter *wajib-ul-arz* merely incorporates the provisions of the earlier document and so it is only necessary to consider the language of the *wajib-ul-arz* of 1867.

The document begins with a recital that it is the *wajib ul-arz dasturdehi* of mauza Lakhnoti Kalan. Then there

(1) [1911] 8 A.L.J. 786.
(2) [1908] 30 All. 544—5 A.L.J. 539—(1908) A.W.N. 246.
(3) [1909] 6 A.L.J. 715—3 I. C. 534.
(4) [1915] 37 All. 129—42 I. A. 10—13 A.L.J. 236—19 C.W.N. 393—17 M.L.T. 193—2 L W. 303—21 C.L.J. 237—28 M.L.J. 556—17 Bom. L. R. 393—(1915) M. W. N. 581—28 I. C. 34 (P. C.)
(5) [1914] 36 All. 471—12 A. L. J. 800—24 I. C. 464.
(6) [1918] 16 A.L.J. 879—48 I.C. 220.

follows the declaration of the share-holders who attested the *wajib-ul-arz* and following on this we have a number of provisions contained in 20 paragraphs setting out all the usages and arrangements prevailing in the village.

The particular paragraph with which we are concerned, that is to say the paragraph which relates to pre-emption is paragraph No 6 and that undoubtedly lays down in the clearest possible terms that there is a right of pre-emption in the village. In addition to the provisions relating to pre-emption the paragraph refers to a number of other matters concerning the devolution of property. Certain rules are laid down, such, for example, as the exclusion of a daughter's son or a sister's on. Another rule which is laid down in the same paragraph relates to the custom which is known as *istribant* or *chundabant*. Obviously, therefore, the paragraph does refer to matters other than pre-emption. At the same time we think it is proper to observe that these other matters so referred to are matters which are capable of being the subject of a custom.

In this connection, however, the learned Advocate for the appellants lays particular stress upon two rules which are laid down in the paragraph in question. One of these is that in cases of dispute about the price of the property offered for sale the question is to be settled by the appointment of arbitrators or by a reference to the Court. It is argued that this provision relates to a matter which cannot properly be said to be the subject of a custom. We do not, however, understand this provision in the sense contended for. It appears to us that the custom of pre-emption being recognised, all that the rule in question lays down is that a certain procedure is to be observed in cases where there is a dispute between the parties regarding the price of the property sold. We have to notice in this connection that in the *wajib u' arzes* which were before their Lordships of the Privy Council in *Digambar Singh's* case, (4) there were similar provisions recorded, and it is quite clear that the presence of those provisions in the *wajib-ul-arzes* in question did not prevent their Lordships of the Privy Council from holding that the *wajib-ul-arzes* in those cases were to be treated as records of custom.

The only other argument we have to notice in this connection is one which is based upon the language of the concluding sentence of the paragraph in question which lays down that if there be no male issue or no relatives descended from a common ancestor, the share-holders of the *patti* will become the owners of the property in proportion to their shares. Dr. Sen has argued very earnestly that this provision contained in paragraph 6 cannot properly be treated as relating to any custom He says that it is an endeavour on the part of the co-sharers of this village to prevent the application of the principle of escheat to the Crown in cases where a proprietor dies without leaving any heir. We do not say that this is an impossible construction of the words in question but are very doubtful whether that is the significance of them. It may be that they merely provide a rule or custom whereby other heirs who would take in preference to the Crown are excluded. It is well-known that after the list of all relatives has been exhausted, succession to the property of a deceased Hindu may go to his spiritual preceptor or disciple or even to a Brahman before the Crown can come and claim escheat. We have given this matter our best consideration and we think we ought to hold in the present case that there is no provision in paragraph 6 upon which, acting in accordance with principles laid down, we ought to come to the conclusion that the paragraph does not contain a record of custom. On the contrary, we are of opinion that it does contain such a record.

Something was said in the course of argument regarding the provisions in other paragraphs of the *wajib-ul-arz* and it is pointed out that many of these provisions relate obviously to matters of contract. That, however, is not a matter of any importance because every *wajib-u'-arz* must of necessity contain matters which constitute arrangements between the

cosharers. The fact that such matters are to be found in a *wajib-ul-arz* does not prevent the *wajib-ul-arz* being treated also as a record of custom wherever a clear pronouncement regarding a custom is set out in the document itself.

We have further to notice that the case of the plaintiff is supported by an actual instance in which pre-emption was decreed in the year 1907. To that fact due weight must be given, and we hold accordingly that the *wajib-ul-arz* supported by the judgment in question which was passed in the year 1907 affords sufficient evidence upon which it was competent to the Court below to find that the custom alleged in the plaint does exist. We have not in any way been convinced that the judgment of the first Court is erroneous.

We notice that in the Court below another plea by way of defence was that the plaintiffs could not maintain this suit as they had consented to the sale and had themselves refused to take the property offered to them. The learned Judge of the Court below was of opinion that the evidence which was offered in support of this plea was not reliable and although the point is taken in the memorandum of appeal to this Court, it was not seriously argued here. We have no reason to differ from the learned Judge of the Court below in his estimate of the evidence in question.

The result, therefore, is the appeal fails and is dismissed with costs.

Appeal dismissed.

✱ 1924 ALLAHABAD 277

PIGGOTT AND WALSH, JJ.

Faqir Chand—Plaintiff—Appellant.

v.

Nanug Ram and others-Defendants-Respondents.

F. A. No. 239 of 1920, Decided on 29th March 1923, from the decision of Sub. J., Agra, D/- 17th June 1920.

(a) *Registration Act, S. 17 (1)- Will—A sum of money more than Rs. 100 written off in consideration of transfer of immoveable property—Document is compulsorily registrable.*

Where in a will it was distinctly provided that a sum of Rs. 6,500 out of a share holder's share of the partnership assets, were to be written off in consideration of the transfer by another partner of his moity share in a certain *kothi*.

Held the provision did make the document in question an instrument which acknowledges the receipt of payment of consideration on account of the assignment or extinction of a right, title, or interest in immoveable property of the value of more than Rs. 100 within the meaning of the words in S. 17 (1) and the non-registration of this document made it inoperative in so far as it purported to affect those of the executants in respect of whom it was never registered [P. 286 C. 1]

(b) *Contract Act, S. 253 (10)—Partnership consisting of members of joint Hindu family—Presumption is that partnership is not dissolved on the death of any one partner.*

In the case of partnership between members of a joint undivided Hindu family, a stipulation that the partnership will not be dissolved by the death of any one partner is ordinarily to be inferred. [P. 287 C. 2]

✱ (c) *Minor*—defacto *trustee, investment of minor's money by—Suit to recover - Continuation of suit by minor after majority does not amount to ratification.*

Where a minor on attaining majority adopts a suit instituted by his *Defacto* trusteed, to recover the minor's money, to the extent of executing the decree and obtaining payment, his conduct does not amount to ratification and there is nothing to debar his claim that he may have against the trustee. [P. 289 C. 1]

Piggott, J.—The facts out of which this litigation arises may be stated as follows. About the end of the year 1900 there were living in Agra four brothers, named Anandi Lal, Narain Das Ram Dayal and Sham Lal. After the death of their father in the preceding year there had been a separation, accompanied by a complete partition of the joint family assets, between the brothers. This, again was speedily followed by a business partnership between Anandi Lal and Ram Narain. No deed of partnership was ever drawn up, but the two brothers undoubtedly re-united in business, while maintaining their status as separated Hindus. Early in 1901 Anandi Lal fell into ill health ; reading between the lines of the evidence it seems fairly clear that he was suffering from consumption, and knew it. On May 29th, 1901, he drew up his last Will and testatment, which was presented for registration two days later at his residence in the City of Agra. It is admitted that this document (page A 23 of our record) was

executed by Anandi Lal and that the following persons signed it as attesting witnesses :—Narain Das and Ram Dayal (two of the brothers), also Dwarka Das, Damodar Das, Makhan Lal, Ghasi Ram and Badri Das. The document begins by reciting the existence of a business partnership between the executant and Narain Das in four specified shops, in which the interest of Anandi Lal is ten-sixteenths and that of Narain Das is six-sixteenths. It then declares that the heirs of the executant, both in respect of his interest in the aforesaid business and in all his other properties, are his wife, *Mt.* Chameli, and his son Faqira, now two months old. It then proceeds to create an elaborate trust for the benefit of the said Faqira, or Faqir Chand, appointing as trustees Narain Das (the brother) and four of the attesting witnesses, nemely, Makhan Lal, Damodar Das ("who is my relative"). Dwarka Das and Ghasi Ram ("who is my old karinda and a very honest man in whom I have great confidence.") The trustees are to see to it that the partnership business is carried on until Faqira attains majority and elaborate instructions are laid down for their guidance. Provision is made for contingencies which never in fact occurred, such as the premature death of Faqira, the adoption by *Mt.* Chameli of another son, or the death of that lady herself. *Mt.* Chameli takes a monthly allowance of forty rupees, with a lump sum in the event of her desiring to go on pilgrimage ; the remaining assets are to be held in trust wholly for the benefit of the minor son. In no event, not even if Faqira should die and no son be adopted in his place, shall *Mt.* Chameli "have any power or right to interfere with my business is any way." The executors or trustees may fill up vacancies in their own body caused by death. They are to see the business carried on "with their advice, consultation and unanimity. They should watch and protect the whole of my property, and no such measure should be adopted as may lead to the waste of any part of my money or property." Only in certain specified eventualities are they empowered to dissolve the business partnership. In the meantime they "should keep defraying the expenses incurred in maintaining Faqira, my minor son, and imparting education, etc,, and also the proper expenses incurred in marriages, funerals, illness, etc."

There has been some little controversy before us as to how far the persons who signed this document as attesting witnesses are affected with notice of its contents. I think I may dispose of this point briefly and at once. On the pleadings and the evidence, as well as in consideration of the manifest probabilities of the case, I have no doubt that the trustees or executors named in the Will, when they attested this document, did so with full knowledge of the trust thereby created and of their own appointment as executors : also, that by signing it they intended to signify, and did in fact signify, their own acceptance of the trust. It is a more arguable point how far any of them, and more particulary Narain Das and Ghasi Ram, are bound, in virtue of their signatures, to an admission of any recitals in the deed regarding the nature and extent of the partnership business, or of Anandi Lal's share in the same. I note, however, that the more material points, such as the designation and location of the four shops and the specifications of the shares of Anandi Lal and Narain Das, are admitted in the pleadings. The question of the accuracy of Anandi Lal's assertion that his personal share in the partnership capital amounted to Rs. 58,000 on the date of the Will, does not arise at the stage which the litigation has now reached.

Anandi Lal died on the 13th October 1901. It is alleged by the defendants to this suit that, in the interval, namely, on the 27th June 1901, he and Narain Das executed, each in favour of the other, two unregistered documents (Exs-A and B pp. 25 and 26 of the Record) which materially modified the conditions of the partnership. The defendants are put to proof of these

documents and the question whether they have proved the same will be discussed in due course.

In the month of October 1905 Narain Das was on his death-bed, and he died on the 23rd of the month. Two days previously he executed three documents around which the controversy in this litigation largely hinges : they were presented for registration by Narain Das at his own residence in the City of Agra, on the 23rd October 1905, within about four hours of his death. They are marked Exhibits C. F and E and are re-produced at pages R. 27 to R 37 of our record.

Two of these, viz., Exhibits F and E, are documents of which Narain Das is the sole executant, their execution is admitted, the controversy is as to their binding effect, if any, on the interests of Faqir Chand. Their main importance lies in the fact that their drafting, execution and registration formed part of the same transaction as resulted in the preparation and partial registration of the remaining document, Exhibit C. It will be convenient to examine the three documents at once. Exhibit E, executed by Narain Das alone, and duly registered in his name, recites that the executant is the owner of a half share in a certain building in the City of Agra, "in the kothi of Mr. Campbell," originally purchased by him jointly with his brother Anandi Lal. He relinquishes this moiety share to Faqira, minor son of Anandi Lal and owner of the other moiety, in lieu of a sum of Rs. 6,500 for which the executant has already received credit upon a settlement of partnership accounts between himself and the lawful guardians of the said minor. Exhibit F is the last will and testament of Narain Das. It was undoubtedly executed by him and duly registered in his name under the circumstances already stated. It starts with the dissolution of the partnership between himself and Faqira, treated as an accomplished fact, the executant describing himself as the sole owner of the seven shops into which the partnership business appears to have now expanded. It ricites that the executant leaves as his sole heirs his wife, *Mt.* Pisto, and his daughter, *Mt.* Munni : it appoints as executors to carry on the business for the benefit of the said heirs three persons. One is Ghasi Ram, the faithful servant whom Anandi Lal had already chosen as one of the trustees under his will, the other two are the surviving brothers. Ram Dayal and Sham Lal. *Mt.* Pisto is given authority to adopt a son after the testator's death. The executors are to carry on the business, the control of which is vested in Ram Dayal and Sham Lal ; but minute directions are given in respect of a variety of matters, including the apportionment of the profits. It is laid down that the first charge on the net profits is to be a deduction of ten annas per cent. in favour of the legatees ; the balance is to be divided, one fourth going to Ghasi Ram and three-fourths to the executors for the benefit of the legatees. In one particular shop Dwarka Das and Ratan Lall are given an interest of a one-eighth share each in the profits, after the deduction of ten annas per cent. ; while a similar interest to the extent of three-sixteenths of the profits is created in favour of a servant of the firm named Chhatar Mal. Provision is made for the remuneration of these three men by monthly salaries in the event of the shops in which they are concerned being carried on at a loss ; but there is no similar provision in respect of Ghasi Ram. The provisions of the will which purport to affect the minor Faqira are important enough to be worth quoting textually :—"I have to pay Rs. 44,439 to Faqira minor on account of the share of Anandi Lal in partnership business, and Rs. 2,000 belonging to Faqira minor which is with me for meeting the expenses of a *dharamsala* and I shall pay the same. If I fail to do so the said executors shall have power to take out of the funds of my business Rs. 44,439 due to Faqira minor and purchase any property with the said amount. Lala Ram Dayal and Sham Lal aforesaid shall have power to keep the money in deposit with them so long as they do

not acquire any property, to meet the expenses of *Mt.* Chameli, widow of Anandi Lal, and Faqira minor with the interest on the said money, to take a receipt from the executors of Anandi Lal when property is purchased and to look after the minor and the property. Lala Ram Dayal and Sham Lal shall keep in deposit with them Rs. 2,000 out of the fund of my business and Rs. 2,000 due to Faqira minor aforesaid, in all Rs. 4,000, and shall continue to meet the expenses of the joint *dharamsala* of me the executant and Anandi Lal."

I now come to the important document. Exhibit C. It purports to be a bilateral agreement for the dissolu- of the partnership referred to in the will of Anandi Lal, and to be executed by Narain Das on the one side and on the other by Makhan Lal, Damodar Das, Ghasi Ram and Dwarka Das, the four remaining trustees, on behalf of the minor Faqira, as well as by *Mt.* Chameli "as the guardian of her minor son Faqira." It begins with a statement of the partnership business, specifying the seven shops to which it had by this time extended, and speaking of the same as "carried on in partnership with Anandi Lal deceased whose son is Faqira minor." It then continues :—"The accounts of the said shops have now been examined and the partnership has been dissolved. Rs. 2,939 have, after allowing credit for the money for the construction of the *dharamsala*, been found due to Faqira, minor aforesaid son of Anandi Lal, and I, Lala Narain Das aforesaid, Second Party became the owner of the entire business of the said shops, money dealings and all kinds of goods and articles in the shops." The remaining executants, described as the "First party" purport to acknowledge the receipt of this sum of Rs. 52,939 in full discharge of all claims on the part of the minor in respect of his share in the partnership, according to the following detail :—

(*a*) Rs. 6500 is credited back to Narain Das as the price of a moiety share referred to in the agreement, Exhibit C.

(*b*) Rs. 2,000 are to be made over to Ram Dayal and Sham Lal on the understanding that they will pay interest on the same at 6 per cent. per annum and apply this interest to "meeting the expenses of the *dharamsala*."

(*c*) Rs. 44,439 Narain Das acknowledges to be in deposit with himself, nd he says that he will "purchase property" with the same within three months. Until this is done, however, this very considerable sum of money is to be deposited with Ram Dayal and Sham Lal, and the document continues :—"The interest of the said money shall continue to be accumulated and the exp nses of *Mt.* Chameli and the minor aforesaid shall be met therefrom. Lala, Ram Dayal and Sham Lal shall be liable to look after the property which exists at present or shall be purchased in future, the said minor and the business which may be carried on in future" The result of these transactions considered as a whole, on the position of Ram Dayal and Sham Lal, is peculiar. Under the will of Narain Das they become the *de facto* managers of the partnership business. Out of the assets of that business they are to take Rs. 44,439 plus Rs. 2,000 and use the same at their discretion, provided they keep up a certain *dharamsala* and take over from the trustees all responsibility for the maintenance of *Mt.* Chameli and her minor son. If ink and paper can do it, the trustees have divested themselves of all responsibility and handed over their duties, along with the assets of the minor, to two brothers of Anandi Lal whom that gentleman, whatever may have been his reasons, had carefully excluded altogether from the provisions of his will, Sham Lal tells us in his deposition (P. 71R) that as a matter of fact, he used the deposit of Rs. 44,439 to start a shop under the name of "Chhatar Mal-Anandi Lal," which was closed after carrying on business for eight or nine years. Out of the profits of this shop he supported the minor and *Mt.* Chameli and he holds to the credit of Faqir Chand a balance now amounting to Rs. 47,000 and Rs 48,000.

Faqir Chand must have attained his majority sometime in the month of March 1919. In may of that year

he issued notices to his two surviving trustees, Makhan Lal and Ghasi Ram, and to Nanaq Ram, son of Narain Das, in which he asked for an account of their dealings with the partnership business in which he claimed a ten-sixteenths share in accordance with the provisions of his father's will. He intimated, further, that he desired a dissolution of the partnership and separated possession over his own share in the accumulated assets. He received very guarded replies, drafted and forwarded under legal advice The most significant passage in these replies is to be found in the second paragraph of that sent in by Ghasi Ram, which is to the following effect :—"All the accounts of Lala Faqir Chand were settled with *Mt.* Chameli, natural guardian and mother of the said Lala Faqir Chand, in the lifetime of Lala Narain Das, and she took all the accounts and the partnership was dissolved. The whole amount including interest etc., which was found due to Lala Faqir Chand was deposited with Lala Ram Dayal and Sham Lal, proprietors of the firm of Chhater Mal-Ram Dayal, and Faqir Chand and his mother benefited by the said sum and set up even a separate business with it." The result was the institution, on the 12th of July 1919, of the suit with which we are now concerned. Lala Faqir Chand, as plaintiff, impleads seven persons as defendants. The first three are Nanag Ram, described in the plaint as alleging himself to be the adopted son of Lala Narain Das, *Mt.* Pisto widow of the said Narain Das, and *Mt.* Mohan Dei, his daughter, these three are impleaded as representing between them the entire estate of Narain Das. The fourth defendant is Ghasi Ram, impleaded as a trustee under the Will of Anandi Lal and also as a partner in the firm. The next two defendants are Ram Dayal and Sham Lal, impleaded as the *de facto* managers of the partnership business, and also as persons into whose hands assets of that business in which the plaintiff claims a share have actually passed. The remaining defendant is Lala Makhan Lal, the other surviving trustee. It is an admitted fact that, besides Narain Das himself, two other trustees, namely, Dwarka Das and Damodar Das, had died prior to the institution of the suit. The plaint is a lengthy document and it does not seem to me surprising, under the circumstances, that the plaintiff should have spread his net wide and appealed to the Court in broad terms to give him such relief as might be found appropriate, after a complete investigation of the facts, and against such persons as, upon the facts so ascertained, might be found liable. Undoubtedly, the plaint as drafted is, first and foremost, a claim for dissolution of partnership and settlement of accounts between the plaintiff and the remaining partners. It is equally certain that the liability of Ghasi Ram, as trustee under the Will of Anandi Lal, is asserted and made part of the cause of action, while Makhan Lal is impleaded solely and entirely by reason of his liability as a surviving trustee. I am further of opinion, though I do not regard the point as material, that as against the heirs of Narain Das the plaint is so drafted as to claim relief against the estate of Narain Das, both on the ground of partnership in the business, and on the ground of that gentleman's position as one of the trustees The pleadings of the first three defendants raised a question which is certainly not before us now in appeal *Mt.* Mohan Dei denied the adoption of Nanag Ram and apparently wished to have it put in issue at this trial. So far as we are now concerned, we take it as established, and not contested by any pleadings now before us, that Nanaq Ram was validly adopted by *Mt.* Pisto, widow of Narain Das, and that he is in fact, as he has asserted himself to be throughout this litigation, the heir of Narain Das and the representative of his estate. In his written statement, as well as in that of Ghasi Ram, various pleas were taken more or less of technical character. These defendants were obviously anxious to tie the plaintiff down to a suit for dissolution of partnership pure and simple, so that the suit might fail altogether in the event of the Court's finding that the part-

nership had ceased to exist on some date in the year 1905. They made it a grievance that,if the plaintiff desired to enforce any liability against the trustees appointed in his father's Will,he should not have impleaded the heirs of legal representatives of the deceased trustees, Damodar Das and Dwarka Das. Nanag Ram distinctly pleaded that the partnership was dissolved by the agreement,Exhibit C of the 21st of October 1905, insisting on the fact that this agreement was entered into, not only with *Mt.* Chameli but with all the trustees other than Narain Dsa himself.He contended that this dissolution of partnership was preceded by an honest and thorough examination of the accounts and that the plaintiff was given his full share in the partnership assets. In respect of that share it was pleaded that, although the original partnership between Anandi Lal and Narain Das had undoubtedly been entered into on the basis that the former held a share of ten-sixteenths and the latter one of six-sixteenths only, this arrangement had been modified by the execution of the two documents, Exhibits A and B of the 27th of June 1901 already referred to, in accordance with which the shares of the partners had been fixed from that date at one moiety each. There was also a plea to the effect that the plaintiff had so benefited by the settlement embodied in the agreement of the 21st of October 1905, and approbated the same since he attained majority, that he was in some way estopped from attempting to go behind that settlement. The written statement of Ghasi Ram follows much the same lines. There has been some little argument before us as to whether Ghasi Ram did or did not admit himself to have been at any time a partner in the business referred to in the plaint. I do not think there can be any real doubt as to the position taken up by Ghasi Ram. He never admitted having been a partner of the plaintiffs at any time, his case being that the partnership in which the plaintiff was concerned came to an end in October 1905. But he did admit having become a partner in business with the heirs and successors of Narain Das from the date of that gentleman's death, and I might add that it is obvious that he did become a partner under the terms of the Will of Narain Das. In one particular, the written statement filed by Nanag Ram goes beyond that of Ghasi Ram. The latter, in my opinion, distinctly pins himself down to the plea of a dissolution of partnership effected in the lifetime of Narain Das by the execution of the deed, Exhibit C. The former, in paragraph 32 of his defence, does put forward as a sort of alternative pleading the allegation that any partnership existing in the lifetime of Narain Das was, in any event, dissolved by that gentleman's death. Of the remaining defendants, Ram Dayal entered no appearance. Sham Lal filed a brief written statement, in which he alleged that he,at any rate, had no concern in any business in which the plaintiff was ever a partner, that the plaint disclosed no cause of action as against him, that he had kept full accounts of all monies entrusted to him for the benefit of the plaintiff, and that he was ready at any moment to pay into Court any sum of money which the Court might direct. I think I may fairly add in this connection that, although Ram Dayal entered no formal appearance, there are a number of pleadings on the record which show that he practically made common cause with Sham Lal and the two fought the case together. At one stage of the trial in the Court below these defendants offered to pay into Court a substantial sum of money which they admitted themselves to be holding in deposit on the plaintiff's account. At the last moment, however, the Counsel representing these defendants insisted that his clients would make no such payment into Court, unless the plaintiff were prepared to accept the same as a full and complete discharge of their liability towards him. As the plaintiff, not unnaturally, declined to accept any such condition, no deposit was ever made.The last defendant, Makhan Lal, was eventually exempted by the plaintiff from his claim. He went into the witness-box on the plaintiff's behalf and gave evidence

of considerable i nportance to which I shall have to refer later. There has been no little controversy as to the credibility of the evidence given by Makhan Lal, and it has been suggested that he has colluded with the plaintiff and made statement in the latter's favour, in return for the latter's exempting him from liability in respect of any misconduct or negligence in the performance of his duties as one of the trustees. On this point I think I might say at once that Makhan Lal, on his showing, did so neglect his duties as a trustee that it would have been open to the plaintiff, as a matter of law, to hold him liable, in the last resort, for any loss which the plaintiff might prove that he had suffered in consequence of such neglect. On the other hand, it is obvious enough that Makhan Lal, from the plaintiff's point of view is not worth powder and shot. There is no reason to doubt that the defendants Nanag Ram, Ghasi Ram, Ram Dayal and Shyam Lal are in a position between them to make good to the plaintiff any sum which may be found due to him, and the latter had no adequate motive for pressing his case against Makhan Lal.

What I have called the technical pleas sought to be raised by various defendants have no real force. As a matter of fact, in the conclusions at which I have arrived on the main issues of fact and of law, the plaintiff has made out his case for relief by way of a decree for dissolution of partnership and rendition of accounts; but in any case I think he was quite entitled, in one and the same suit, to claim relief either as a partner in a subsisting business, or in the alternative as against trustees who had played ducks and drakes with his interests during his minority. Nor was he bound to implead the legal representatives of the deceased trustees Damodar Das and Dwarka Das. The liability of the trustees was joint and several and the defendant Nanag Ram being impleaded principally on the allegation of a subsisting partnership, although his possible liability as an heir in possession of the assets of a defaulting trustee, was also included. The position of the defendants, Ram Daya and Sham Lal, was certainly peculiar; but it arose naturally and inevitably out of the responsibilities which they took upon themselves in connection with the Will of Narain Das and the transactions which followed thereupon. If the plaintiff succeeds in making out his case that there had never been any dissolution in law of the partnership which subsisted between himself and Narain Das the position of these two defendants seems to me clear enough. As executors under the Will of Narain Das they virtually took over the entire assets of the partnership business and made themselves responsible for its management. They chose to open certain books of account, according to which the greater part of the business was carried on as a business in which the partners were Ghasi Ram and the heirs of Narain Das, three other employees of the firm being remunerated by way of a percentage on the profits earned by particular branches of the business. One shop was carried on in the building at Agra referred to in the exhibits as the *kothi* of Mr. Campbell. This the defendants elected to treat as a separate business, carried on for the benefit of Faqir Chand alone, the capital of which was stated to be a specified sum and earmarked as the separate property of this particular person. The plaintiff, however, supposing that he makes good his plea as to there having been no legal dissolution of the partnership, is entitled to go behind this artificial division of the partnership assets and to have all the shops carried on under the management of Ram Dayal and Sham Lal, including the shop described as that of Chhater Mal. Anandi Lal in Mr. Campbell's *kothi* at Agra, treated as branches of one and the same partnership business. As the *de facto* managers of this business, Ram Dayal and Sham Lal are liable, along with Nanag Ram and Ghasi Ram, to render to the plaintiff true accounts of the same. As to any liability which might attach to these two defendants in the alternative, that is to say, in the event of its being found against the plaintiff that the previously existing partnership was dissolved, either on the 21st of

October 1905 by the execution of the document. Exhibit C, or on the 23rd of October 1905, at the death of Narain Das, this question does not really arise in view of the findings I propose to record on the main issues in the case. I am, however, clearly of opinion that, on any possible view of the pleadings, these two defendants were admittedly liable to the plaintiff for a sum of money stated by Sham Lal himself in his deposition to be something between Rs. 47,000 and Rs. 48,000. This is the first case I have ever come across in which two defendants against whom relief was undoubtedly sought (at least in the alternative) by way of a decree for money, who admit themselves to be liable to the plaintiff for a large sum of money, have had the entire suit against them dismissed, merely on the ground that they had offered to pay that money into Court, but had eventually declined to do so except upon a condition which it was obviously impossible for the plaintiff to accept.

The case went to trial in the Court below upon a multitude of issues, loosely framed and overlapping one another to such an extent that seven out of the thirteen issues were finally lumped together by the Trial Court when it came to write its judgment. In substance, the learned Subordinate Judge has found that the agreement, Exhibit A and Exhibit B of the 27th of June 1901, are proved, so that from this date Anandi Lal and Narain Das became owners of the partnership business in equal shares. He has found that the agreement, Exhibit C, of the 21st of October 1905, was duly executed by all the persons who purport to have executed it, that it is binding on the plaintiff, that it operated as a dissolution of the previously existing partnership and as a complete discharge, in favour of Narain Das and his heirs after him, in respect of all liabilities in connection with the said partnership. Curiously enough, as it seems to me, this finding has nevertheless been qualified. The learned Subordinate Judge has held that the settlement of accounts effected on the 21st of October 1905 was incomplete, in that it failed to take into account the profits for the last year of the partnership. He has held that the heirs of Narain Das (from the use of this word in the plural I presume that he means defendants Nos. 1, 2 and 3) are liable to render an account to the plaintiff from a date somewhat vaguely specified in the decree up to either the 21st or the 23rd of October 1905, the period indicated being apparently the last of the partnership. The Trial Court has further found, in the alternative, that if the previously subsisting partnership was not dissolved on the 21st of October 1905 it came to an end two days later (October 23rd 1905), on the death of Narain Das, by operation of the principle of law embodied in S. 253, clause (10), of the Indian Contract Act, IX of 1872. He has held that all the defendants, other than the heirs of Narain Das, are exempt from liability so far as this suit is concerned, because the suit could only be treated as one for dissolution of partnership and rendition of accounts, and could succeed, if at all, on that basis alone. Against the decree framed in accordance with these findings the plaintiff has filed First Appeal No. 239 of 1920. The memorandum of appeal is unnecessarily prolix and argumentative. Some of the paragraphs are merely pleas, to the effect that the conclusions arrived at by the Court below are wrong. A number of others are directed against details in the procedure followed in the Trial Court: none of these seemed to me of any particular consequence, or to be seriously pressed upon us in the course of argument A large number of pleas, argumentative in form, attack the finding of the Trial Court as to the execution of the deed, Exhibit C, of the 21st of October 1905 by the trustees other than Narain Das and Ghasi Ram, and as to its validity against the plaintiff, either by reason of its execution by *Mt.* Chameli, or in the event of its execution by the whole body of trustees being proved. Along with this question it will be necessary to take the question whether the two unregistered deeds, Exhibits A and B, of the 27th of June 1901, are genuine and valid. For one thing, the settlement of the 21st of October 1905 avowedly proceeds upon the basis that Anandi Lal and Narain Das were

partners in equal shares on the date of Anandi Lal's death; it being admitted that the partnership was constituted on the basis that Anandi Lal held a ten-sixteenths and Narain Das a six sixteenths share, the agreement of the 21st of October 1905 fails, independently of any other considerations unless the contesting defendants can prove affirmatively that Anandi Lal had agreed before his death to an arrangement which reduced his share in the divisible profits to half. Moreover, it so happens that a signature purporting to be that of the trustee Damodar Das who is a brother of *Mt.* Chameli, the widow of Anandi Lal, appears as an attesting witness both to Exhibit A (Anandi Lal's agreement of the 27th of June 1901) and as an executant of Exhibit C (the agreement of the 21st October 1905). It was a matter of particular importance for the defendants to prove that Damodar Das had signed both these documents, and the result is that a mass of evidence has been produced on this point which must, in my opinion, either be accepted as proving the signature of Damodar Das to both documents, or must be held insufficient to prove his signature to either. Of the remaining pleas in the plaintiff's memorandum of appeal there are only two which seem to require notice. One is against the Trial Court's finding by which Ghasi Ram is exempted from all liability to render accounts and awarded his full costs, the other relates to the entire dismissal of the suit as against the defendants Ram Dayal and Sham Lal. We have also before us a petition of objections by the defendant-respondent, Sham Lal, to the effect that the Trial Court ought to have awarded him his costs. Finally, a separate appeal, First Appeal No. 347 of 1921, has been filed by the defendant, Nanag Ram. This defendant, not unnaturally as it seems to me, contends that the Court below, on its own findings was clearly mistaken in passing any decree whatever against him. If the agreement, Exhibit C, of the 21st of October 1905, is a duly executed document and binding on the plaintiff, it must operate as a full discharge of Narain Das from all liability in respect of the partnership accounts other than the liability stated in the agreement itself. It has been conceded before us in argument that, if this Court on the plaintiff's appeal, arrives at the conclusion, either that the deed, Exhibit C, is not proved to have been executed by all the trustees under the Will of Anandi Lal, or that this document even if so executed is not binding on the plaintiff, or does not operate as a full discharge in favour of Narain Das, then there is nothing in this appeal which can be pressed.

I now take up the two main issues of fact in the case, which (for reasons already stated) I think must be considered together.

Is it proved that Anandi Lal executed the agreement, Exhibit A, of June 27th, 1901?

Is it proved that Makhan Lal, Damodar Das and Dwarka Das, that is to say, the trustees other than Narain Das and Ghasi Ram, executed the agreement, Exhibit C, of October 21st 1905?

I have come to the conclusion that the finding on both these issues must be in the negative, and that it is, therefore, unnecessary to consider the further questions of law which could only arise in the event of an affirmative finding on the question of execution.

[The judgment then discussed the evidence relevant to the issues and while coming to the question of registration continued as follows:—]

While I am on this question of registration, there is a point of law on which it is perhaps expedient that I should express an opinion, namely, the effect of the non-registration of this document on behalf of four of the executants, Makhan Lal, Damodar Das, Ghasi Ram and Dwarka Das. It is not a question whether the partnership business purporting to be thereby dissolved did, or did not, in the month of October 1905, possess immoveable property of the value of Rs. 100, and upwards. The document itself avoids making any statement on the subject, taking refuge in an "*et cetra*", just where one would have expected a reference to such immoveable property. When, however, the

executants come to specify what is being done about the sum of Rs. 52,939 which represents the share of Faqir Chand in the partnership assets, it does distinctly state that Rs. 6,500 of the above are written off in consideration of the transfer by Narain Das of his moiety share " in godown No. 1564 in the *kothi* of Mr. Campbell. Belanganj, Agra. " In my opinion this provision does make the document in question an instrument which acknowledges the receipt of payment of consideration on account of the assignment of extinction of a right, title or interest in immoveable property of the value of more than Rs. 100, within the meaning of these words as they appear in section 17 (1) of the Indian Registration Act. XVI of 1908. Apart, therefore, from other considerations, the non-registration of this document makes it inoperative in so far as it purports to affect those of the executants in respect of whom it was never registered.

Returning from this digression to the question of the execution of the document, there is one last argument from probability which I ought perhaps to notice before recording my conclusion. It has been strongly pressed upon us on behalf of the respondents that the arrangements made in this document were in fact acted upon from the date of its execution, and must have been so acted upon to the knowledge of the trustees under the Will of Anandi Lal, and more particularly of Makhan Lal and Damodar Das. The suggestion is, that these two men at any rate, if they had not actually joined in the execution of Exhibit C at the time, must have seen from the way in which the business was being carried on that a dissolution of the partnership had actually taken place, must have been put upon enquiry and must, therefore, have come to know of the existence of Exhibit C and have denounced it as a forgery long before the institution of the present suit. This argument sounds plausible and is not without real force, though I very much doubt whether a mere argument from probability could, under the circumstances of this case, be used to supplement the failure of the defendants to prove the execution of the document by the best available evidence. I have come to the conclusion however that the whole force of the argument is gravely discounted when we come to consider the evidence given by the defendants. Ghasi Ram and Sham Lal, at to what was actually done after the death of Narain Das. Under the terms of that gentleman's Will the whole management of what had previously been the partnership business passed into the hands of Ram Dayal, Sham Lal and Ghasi Ram, the two first named being the responsible managers. There had previously been one of the shops belonging to the partnership firm carried on in the building in Mr. Campbell's *kothi*, and this was treated as the head-office of the firm. After the death of Narain Das this head-office was removed to another location in the City of Agra. I am by no means clear on the evidence whether there was any real interval between this removal of the head-office and what the defendants call the re-starting of the new shop in the very same building, for the sole and separate benefit of the minor Faqir Chand. In any case, the interval was one of a few months only. A trustee of the minor, who was not scrupulously interesting himself in the discharge of his duties, would only see, at most, that there had been a change in the disposition or arrangement of the shops belonging to the partnership; but that (it may be after some brief interval) a shop of the same description as had existed previously was being carried on in the same locality, by the same persons who were the *de facto* managers of the entire partnership business. I do not consider that anything happened which was likely, on the face of it, to arouse the suspicions of Makhan Lal or Damodar Das and to put them upon enquiry. A careful examination of the partnership accounts and of the accounts maintained by Sham Lal and Ram Dayal in respect of the shop in Mr. Campbell's *kothi* might no doubt have suggested the necessity for enquiry in the interests of the minor; but I find nothing incredible in the evidence given by Makhan Lal

as to his failure to make such an enquiry or seriously improbable in the suggestion that Damodar Das was equally negligent. So long as *Mt.* Chameli and her minor son were being kept in reasonable comfort, and so long as such matters as the marriage of the minor were properly arranged for in due course and the necessary funds supplied by Sham Lal and Ram Dayal, *Mt.* Chameli was not likely to make any complaint, or to appeal to the executors of her husband's Will to look into the condition of the partnership accounts. I am of opinion, therefore, that no valid inference in favour of the defendants can be drawn from the fact that neither Makhal Lal nor Damodar Das ever denounced this document, exhibit C, as a forgery at any time prior to the institution of the present suit.

My finding, therefore, on the issue now under consideration is that it is not proved that Anandi Lal executed the agreement, Exhibit A, of the 27th of June 1901; and it is not proved that Makhan Lal, Damodar Das and Dwarka Das executed the agreement, Exhibit C. of October the 21st 1905.

I now pass on to consider two questions of law which are not concluded by the findings of fact hitherto recorded.

The first of these is, whether the previously subsisting partnership was dissolved by the death of Narain Das on the 23rd of October 1903. The law on the subject is contained in S. 253 (10) of the Indian Contract Act, IX of 1872. The law itself is simple enough: whether the partnership be regarded as one entered into for the term of the minority of Faqir Chand, or whether it be not so regarded, the death of Narain Das dissolved the partnership " in the absence of any contract to the contrary." In a country where the terms of a partnership are usually embodied in a regular instrument such a provision is not difficult of application. In this country partnerships amongst members of one and the same family are very commonly entered into without any formal partnership deed, and in the case now before us no such deed was ever drawn up as between Anandi Lla and Narain Das. As betwen Anandilal and Narain Das the question we have to consider is whether a stipulation that this partnership would not be dissolved by the death of either or both of the partners, but would continue on the lines of a joint family business, at least until Faqir Chand exercised an option one way or the other on attaining his majority, can be fairly inferred from the established facts and the circumstances of the case generally The Courts in this country have frequently held that in the case of a partnership between members of a joint undivided Hindu family, a stipulation that the partnership will not be dissolved by the death of any one partner is ordinarily to be inferred. The only case to which we were referred in argument, of which the facts present any real analogy to those now before us, is that of *Muhammad Kamil* v. *Haji Hedayatulla* (1). On the principles there laid down the partnership between Anandi Lal and Narain Das would ordinarily have been dissolved by the death of Anandi Lal; that, it seems to me, we are on absolutely firm ground in holding that that partnership was not then dissolved by reason of a contract to the contrary, perfectly understood by both the parties and assented to by Narain Das when he signed the will of Anandi Lal as an attesting witness. In the course of argument before us, as the importance of this point became obvious, the learned Counsel who was arguing the case for the respondents contended, or at least suggested, that we ought to hold that the original partnership of Anandi Lal and Narain Das was dissolved by the death of the former and that we are dealing with a new partnership entered into by Narain Das on the one hand and his minor nephew Faqir-Chand (as represented by the trustees or executors named in the Will of Anandi Lal) on the other. There is not a trace of any such contention to be found in the pleadings of the defendants, or in any part of the record as it stood up to the conclusion

(1) 1922 Cal. 122—48 Cal. 906—33 C. L. J. 411—26 C. W. N. 463—64 I. C. 861.

of the trial in the Court below. Even if the defendants had raised the point, I think it must have been decided against them. I have already recorded my opinion that when Narain Das signed the Will of Anandi Lal as an attesting witness, he did so with a full knowledge of its contents and he intended by his signature to certify both his knowledge of the contents and his acceptance of the trusteeship. I am satisfied, therefore, that Anandi Lal and Narain Das agreed amongst themselves that their partnership would not be dissolved by the death of the former (an event which was clearly anticipated as inevitable before long), but should continue as a partnership between Narain Das and the minor Faqir Chand. I am not prepared to say that it seems to be equally obvious that it was part of the agreement that neither upon the death of Narain Das should the partnership be dissolved; but there are two or three considerations which strike me as weighty, and indeed decisive. (*a*) The partnership between Anandi Lal and Narain Das was not precisely a partnership between members of a joint undivided Hindu family. The two brothers had separated after their father's death and they certainly did not re-unite for all purposes. Each of them obviously regarded his interest in the partnership business as his own separate property, over which he retained full powers of testamentary disposal and which would descend, in the absence of such disposal, to his own heirs, instead of devolving upon the other by right of survivorship. The fact remains, however, that it was a partnership between two brothers, and there is nothing surprising or abnormal in the suggestion that the partners, as between themselves, regarded it as subject to the ordinary incidents of a joint family partnership, *i.e.*, as an arrangement which would continue between their heirs after them until formally dissolved at the instance of one or other member of the partnership. (*b*) It seems to me that it would be altogether anomalous to hold that *A* and *B* entered into a contract of partnership which would not be dissolved upon the death of *A*, but would be dissolved upon the death of *B*. (*c*) I am further greatly impressed with the conduct of Narain Das on the 21st of October 1905. It seems to me a matter of clear inference from his conduct on that date that Narain Das himself did not regard the partnership as one which would be automatically dissolved by his own death. He drew up the three documents Exhibits C, E and F in imminent expectation of death, and he actually died within a few hours of their presentation to the Registration Officer. It would have been easy for him to draw up a Will based upon the assertion that the partnership would be automatically dissolved by his own death and making suitable provision for that contingency. The force of this argument is no doubt somewhat weakened by my finding against the genuineness of Exhibit C; but the Will of Narain Das itself proceeds upon the assumption of a partnership already dissolved by previous arrangement. It seems to me a matter for fair inference that Narain Das himself did not regard the partnership as one which would be automatically dissolved by his death.

For these reasons I am of opinion that a contract to the contrary, within the meaning of that expression in S. 253 (10) of the Indian Contract Act, may fairly be inferred from the established facts of the present case and that the partnership did not come to an end under the provisions of clause (10) of that section when Narain Das breathed his last.

The next question of law is as to the alleged ratification by the plaintiff of the agreement of October the 21st 1905 after he attained majority. The learned Sub-ordinate Judge framed an issue on this point, but he has not really decided it. He takes note of the fact that the plaintiff had actually been maintained during his minority, all the expenses of his marriage met, and so forth, out of funds in the hands of the defendants, Ram Dayal and Sham Lal, which they purport to provide from the profits of a shop, which they were carrying on as the separate business of the minor plaintiff. He does not appear to me, however, to have recorded any definite finding as to whether this circumstance, or any

action taken by the plaintiff after he attained majority, would serve to estop the latter from claiming any of the reliefs sought in the present suit. On the findings at which I have arrived the plaintiff is obviously entitled to treat the business carried on by Ram Dayal and Sham Lal at the shop in Mr. Campbell's *kothi* as part and parcel of partnership business, and the fact that money derived from the profits of that shop was applied for his benefit during his minority in no way affects the present suit, except in so far as the defendants may claim credit for the said expenditure upon a fair settlement of accounts. The action taken by the plaintiff since he attained majority, which has been suggested as amounting to a ratification of the agreement of October, the 21st 1905, cannot possibly have any such effect. It appears that Ram Dayal and Sham Lal had invested a portion of the funds which they held to the credit of the plaintiff by lending the money out on mortgage. They had brought a suit upon the mortgage and obtained a decree. When the plaintiff attained majority he adopted this transaction to the extent of executing the decree and obtaining payment. He was obviously entitled to do this without prejudice to any claim which he might have against Ram Dayal and Sham Lal or against any other of the defendants, for money due to him upon a complete settlement of accounts. Indeed, the proceedings in execution of the decree could scarcely have been continued after Faqir Chand attained majority by any one but Faqir Chand himself, and the money would have been lost altogether if the plaintiff had not taken action. The money thus realised by him will have to be taken into account upon a final settlement between the parties, but there is nothing about the plaintiff's conduct in this matter to debar him from maintaining the present suit.

(*c*) Where a minor on attaining majority adopts a suit instituted by his *defacto* trustees to recover the minor's money to the extent of executing the decree and obtaining payment, his conduct does not amount to ratification and there is nothing to debar his claim that he may have against the trustee.

From the findings which have now been recorded it is obvious that the appeal of Nanag Ram, First Appeal No. 347 of 1921, must fail and there is nothing for us to do but to dismiss the same with costs, including fees on the higher scale. Similarly, the cross-objections taken by the respondent Sham Lal in First Appeal No. 239 of 1920 also fail and must be dismissed with costs.

The form of decree which requires to be substituted for the very inadequate decree passed in favour of the plaintiff by the Trial Court requires careful and detailed consideration. To begin with, the plaintiff has substantially succeeded in his appeal and, whatever else may happen; he is entitled to the costs of this appeal, including fees on the higher scale. I would award him these costs jointly and severally against the defendants-respondents Nanag Ram, Ghasi Ram, Ram Dial and Sham Lal.

Secondly, the plaintiff is clearly entitled to a preliminary decree for dissolution of partnership and settlement of accounts as against the same four defendants. Strictly speaking, the decree for dissolution of partnership must be against Nanag Ram and Ghasi Ram alone; but I would include the defendants, Ram Dayal and Sham Lal, in the decree for rendition of accounts, on the ground that they are the *de facto* managers of the partnership business.

The account must begin with an ascertainment of the capital to the credit of Anandi Lal on the date of that gentleman's death. I do not think that the defendants, or any of them, should be held to be bound by the recital in the Will of Anandi Lal by which this capital is stated at Rs. 58,000. There is force in the contention raised by Ghasi Ram that this is no more than a rough estimate on Anandi Lal's part, and that it includes profits which Anandi Lal expected to make by the end of the year then current. The accounts will have to be examined up to the date of Anandi Lal's death and, amongst other things, the defendants should be permitted to prove, if they are able to do

so, that Anandi Lal in his life-time gave directions for a sum of Rs. 5,000 to be contributed out of his share of partnership capital towards the construction of a *dharamsala*. The alleged agreement by which a further sum of Rs. 4,000 was to be contributed in equal shares by the two members of the partnership, to provide for the maintenance and expenses of the *dharamsala* must also be gone into. From the date of Anandi Lal's death, after the amount due to him as his share of partnership capital on that date has been ascertained, the accounts of all the shops carried on as part of the partnership business must be gone into, and the annual profits divided in the proportion of five-eighths assigned to the plaintiff and three-eighths to the defendants. The Court need not concern itself with the apportionment of this share of three-eigths as amongst the defendants, unless this point is expressly raised by the defendants, Nanag Ram and Ghasi Ram. If it should be so raised, I think our decree must leave it open to the Court below to exercise its discretion in the matter. In this settlement of accounts the profits of the shop carried on by Ram Dayal and Sham Lal in the building known as Mr. Campbell's *kothi* must be treated as part and parcel of the partnership profits and divided between the parties in the ratio already stated.

The defendants will be entitled to debit against the plaintiff, from year to year all money expended on his behalf, or for his benefit or for that of his mother. provided the expenditure be such as is warranted by the terms of Anandi Lal's Will. The money actually realised by the plaintiff's since he attained majority under the mortgage-decree already referred to must be brought into account as part payment of the amount due to him. I find it a little difficult to decide as to the proper directions to be given regarding certain items of immoveable property, referred to in detail in the course of the cross-examination of Ghasi Ram, which the plaintiff alleges to have been acquired out of partnership funds. I think our decree must leave it open to the plaintiff to raise this question and to the Court below to adjudicate upon it in such manner as it may determine to be just after the facts have been fully gone into.

Any money found due to the plaintiff must be recoverable, in the first itstance, out of the assets of the partnership business in the hands of the various defendants. I am not sure that we are called upon to provide for the contingency of such assets being found insufficient to meet the plaintff's claim. In case of such insufficiency Ghasi Ram, as a defaulting trustee, would certainly be liable to make it good. Nanag Ram, as the heir of another trustee, would also be liable to the extent of any monies which might have passed into his hands by reason of any breach of duty on his father's part. Ram Dayal and Sham Lal would not, I think, be liable, except to the extent of partnership funds in their hands.

In this connection, however, I think there is one point of considerable practical importance to be dealt with at once. On the admission of Sham Lal himself, these two defendants are in possession of a sum of from Rs. 47,000 to Rs. 48,000 which is due to the plaintiff and which they held to his credit. They represent it as coming out of the accumulated profits of the shop which they carried on for the benefit of the plaintiff in Mr. Campbell's *kothi* at Agra ; on our findings the money represents simply a portion of what is due to the plaintiff on a fair division of partnership assets. It is admittedly in the hands of these two defendants and I can see no reason why they should not be made to hand it over at once. Some time must yet pass before a final decree can be worked out on the basis of the decision at which we have arrived. It would be clearly unfair to the plaintiff that he should be left in difficulties for ready money while this large sum was lying to his credit in the hands of the two defendants. I think, therefore, that we ought to include in our decree a direction requiring them to fulfill their own undertaking by paying the money into Court within a period to be limited by the decree ; the said money to be taken into account hereafter in the

final decree, in partial discharge of the plaintiff's claim and in liquidation of any sum which may be found due to the plaintiff from these particular defendants.

Walsh, J.—I have read my brother's judgment, and agree. There seems to me to be a great deal in the learned Subordinate Judge's interlocutory proceedings in the case, and in his final judgment, which is open to criticism. Once the conclusion is reached that the re-distribution of shares in the partnership sought to be effected by the deed of June 1901 was not executed by Anandi Lal, it stands as a piece of sheer robbery of the minor by Narain Das, of which his trusted *karinda* must have been cognisant, and colours the whole of the subsequent proceedings. For example, a point to which my brother has not referred, the assignment to the minor as part of his share, of the half *kothi*, for Rs. 6,500, the amount originally paid for the whole, and that without any pretence at a valuation, was a transaction which could not possibly stand in any view of the case, and was plainly a fraud upon the infant.

Subsequently to the death of Narain, the defendant, Ghasi, was the moving spirit in the business, and he has been throughout this suit the pillar of the defence. It is sufficient to say that, in my opinion, he was a witness unworthy of credit, and is contradicted by most of the other witnesses, against many of whom nothing can be suggested. He appears to have failed to grasp the essential difference between his duty as a trustee, and his interest as a partner, or if he realised it to have deliberately neglected the one for the benefit of the other, and then to have resorted to a method of defending his conduct, which is, unfortunately, only too common in these courts namely, that of setting up in Court the supposed consent of an ignorant and helpless mother to the abandonment of the legal rights of her still more helpless child. I am satisfied that even if the document had been satisfactorily established in fact by proof, the alleged dissolution was a sham, not understood by the trustees, except those who were to profit by it, and that it was not binding on the minor whose consent could only be lawfully given by them.

By the Court.—(1) First Appeal No. 347 of 1921 is dismissed with costs, including fees on the higher scale.

(2) In First Appeal No. 239 of 1920 we set aside the decree of the Court below, and in lieu thereof we decree the plaintiff's claim as follows.

(*a*) We grant him a preliminary decree for dissolution of partnership and rendition of accounts as against the defendants, Nanag Ram, Ghasiram, Ram Dayal and Sham Lal.

(*b*) There will be an ascertainment of the capital representing Anandi Lal's share in the partnership business on the date of that gentleman's death, subject to the directions given in the earlier part of the judgment of this Court.

(*c*) Thereafter, an account will be taken of the net profits which accrued year by year on each of the shops constituting the partnership business including the seven shops referred to in the Will of Narain Das and the shop started by the defendants, Ram Dayal and Sham Lal, (ostensibly as a separate business for the benefit of the plaintiff alone) in the building known as Mr. Campbell's *kothi* in the City of Agra : in the profits thus ascertained the plaintiff's share will be ten-sixteenths and that of the defendants six-sixteenths. The Court will have discretion to apportion the shares of the defendants amongst themselves if they move it to do so.

(*d*) The Court will enquire whether any immoveable property now belongs to the partnership firm, or has been acquired out of partnership funds, and will pass such orders regarding the same as appear just.

(*e*) The defendants will be entitled to charge against the plaintiff all money expended on his behalf, or for his benefit or for that of his mother, provided the expenditure be such as is warranted by the terms of Anandi Lal's Will. They will also be allowed credit for the money realised by the plaintiff on the mortgage decree referred to in the earlier part of this judgment.

(*f*) Any money found due to the plaintiff will be recoverable, in the

first instance, out of the assets of the partnership business in the hands of the defendants, Nanag Ram, Ghasi Ram, Ram Dayal and Sham Lal. In the event of the entire amount not being realised, the balance will be recoverable from Ghasi Ram personally and from Nanag Ram to the extent of any money which the Court may find to have passed into his hands by reason of any breach on the part of Narain Das of his duties as a trustee and executor under the Will of Anandi Lal.

3. The defendants, Ram Dayal and Sham Lal, will pay into Court within two months from the date of this decree, the sum of Rs. 47,500 to the credit of the plaintiff, who will be permitted to withdraw the same unconditionally. The defendants will be allowed credit for this payment against any sum found due to the plaintiff on the final settlement of accounts.

4. The suit as against the defendants, *Mt.* Pisto, *Mt.* Mohan Dei and Makhan Lal, will stand dismissed, but these defendants will bear their own costs.

5. The plaintiff will get his costs of this appeal against the defendants, Nanag Ram, Ghasi Ram, Ram Dayal and Sham Lal jointly and severally including fees of the higher scale. The Court below will pass suitable orders respecting all costs in that Court when it comes to pass its final decree.

6. The cross-objections of the defendant, Sham Lal, are dismissed with costs including fees on the higher scale.

Appeal allowed ;
Cross-objections dismissed.

✱ 1924 ALLAHABAD 292

WALSH AND RYVES, JJ.

Bindhiachal Rai and another – Defendants—Appellants.

v.

Sita Ram Misir and another—Plaintiffs—Respondents.

S. A. No. 742 of 1922, Decided on 13th March 1923, from the decree of D. J. Ghazipur D/–13th March 1922.

✱ *C. P. Code, O. 34 R. 6—Order passed on application under, is not one in execution and* ad-valorem *court fee is to be charged on appeal from such order.*

Where the final decree contained no provision for payment of the balance and for the recovery of such balance from the debtor and the mortgagee was driven to make an application under O. 34, R. 6.

Held that the application under O. 34 R. 6 was in substance an application for a personal decree of the balance ascertained as a result of the realisation by the sale. Appeal from an order passed in that application is a regular appeal and *ad-valorem* court fee must be paid.

(P. 293 C. 1)

M. L. Agarwala—for Appellants.

U. S. Bajpai—for Respondents.

Office Report.—The case out of which this appeal has arisen was not at all concerned with execution proceedings but with an application under O. 34, R. 6 of the Code of Civil Procedure praying for a simple money-decree for Rs. 874-10-5 in favour of the petitioners, Sita Ram Misir and Raj Ballan Misir. The Trial Court having allowed the petition ordered the decree to be prepared as prayed. Bindhiachal Rai and Mahendra Rai, opposite parties, then went in appeal to the lower Appellate Court but that Court, too, upholding the decree of the First Court dismissed the appeal. Thereupon the same gentlemen preferred this second appeal valuing it at Rs.874-10-5 but paying Court-fee of Rs. 2 only treating it as an execution second appeal. The facts given above clearly show that it cannot be treated as an execution second appeal but as a regular second appeal and Court-fee payable should be *ad valorem* on the amount claimed, Rs. 874-10-5, which comes to Rs. 66. In both the Appellate Courts, therefore, the Court-fee payable was Rs. 132 but annas eight having been paid in lower Appellate Court and Rs. 2 here, in all Rs. 2-8-0, there is a deficiency of Rs. 129-8-0 payable by appellants for this and for the lower Appellate Court.

Referring Order.

Ryves, J.—After the appeal was filed a note was made by the Taxing Officer of the Court that there was a deficiency in the Court-fees payable both in the lower Appellate Court and in this Court. This note was shown to the learned Counsel for the appellants and signed by him on the 13th of December 1922. The deficiency in the Court-fees payable to this Court was made good but on

the matter being laid before Mr. Justice Daniels on the 10th of January 1923 the learned Counsel for the appellant stated that he would contest the alleged deficiency in the Court-fees paid in the lower Court at the hearing of the appeal. It seems to me that under rule 10 of the Rules of this Court of 18th January 1898 it is not open now to the learned Counsel to dispute the accuracy of the Taxing Officer's report. This matter seems to me of importance and as far as I know, has not been previously decided. I think it is of sufficient importance to lay before a Bench of two Judges. I direct accordingly.

Judgment.—We think that, having regard to the fact that the final decree of November 1915 contained no provision for payment of the balance and for the recovery of such balance from the debtor the mortgagee was driven to make an application under O. 34 R. 6. The position, no doubt, was a difficult one but we think that we ought to look at the substance, and an application under O. 34 r. 6, was in substance an application for a personal decree of the balance which had been ascertained as a result of the realisation by the sale. That amount could not be finally ascertained until the sale had been confirmed. The view that the Court below took on the matter of limitation, therefore, was right and the view that our Stamp Reporter took that this was a regular appeal was also right. The appeal is dismissed with costs including in this Court fees on the higher scale.

We exempt the respondent from any liability under which he may otherwise be for payment of the deficiency in the Court below.

The Court below must do its best to recover the deficiency from the appellant.

Appeal dismissed.

1924 ALLAHABAD 293

GOKUL PRASAD, J.

Chhajju and another — Plaintiffs—Appellants.

v.

Jhabba and others — Defendants—Respondents.

S. A. No. 200 of 1922, Decided on 9th May 1923, from the decree of Addl J. Moradabad, D/-8th November 1921

Agra Tenancy Act (II of 1901) S. 63—Muafidars and sub-tenants.

In a suit by plaintiffs muafidars for ejectment the defendants pleaded acquisition of occupancy rights. It was found that defendants never paid any rent to plaintiffs, nor did they ever assert their title to the land to the knowledge of plaintiffs.

Held that the defendants were sub-tenants and liable to be ejected. [P 294 C 2]

K. C. Mital—for Appellants.

M. L. Agarwala—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for ejectment. The plaintiffs who are *muafidars* sued under S. 63 for the ejectment of the defendants as their tenants. The first written statement filed by the defendants was to the effect that the defendants had been in possession for more than 12 years and as the plaintiffs were *muafidars* the defendants had acquired occupancy rights and were occupancy tenants. This was on the 6th of January 1921. A supplementary written statement was filed on the 1st of April 1921 in which the defendants pleaded that they were zemindars and as the plaintiffs were *muafidars* they ought to have proceeded under S. 79 of Act No. 11 of 1901 and having failed to take any such steps for 14 years the suit was liable to dismissal. They further contended that the relationship of landlord and tenant did not subsist between the parties. The suit was brought in the Revenue Court and the Assistant Collector found that the relationship of landlord and tenant subsisted between the parties and that the suit was not barred by limitation. He also came to the conclusion that the defendants were sub-tenants of the plaintiffs and as they had never paid rent they could be only non-occupancy tenants and had not acquired any

right of occupancy. On these findings the Assistant Collector decreed the claim. The defendants went up in appeal and the learned District Judge has found that the plaintiffs are *muafidars khairati* and could not be tenants in chief and therefore the defendants are not sub-tenants. The learned Judge has further found that the defendants having been in possession for more than 12 years without payment of rent had become occupancy tenants. On this finding he has dismissed the suit. The plaintiffs come here in second appeal and their first contention is that the defendants having been in possession without the consent of the plaintiffs, the plaintiffs were entitled to treat them as tenants under S. 34 and sue for their ejectment. So far as the plaint itself goes the suit has not been brought on these allegations. The learned Vakil for the appellants has referred me to a large number of rulings to show that the Board of Revenue has held that where a squatter has been in possession of a plot of land without the consent of the landlord his occupation for any number of 12 years would not vest him with the rights of an occupancy tenant, but that occupancy rights would commence to accrue only from the date the squatter commences to pay rent. This is evident from the last portion of S. 34 itself and does not require any ruling in support. The question however about which the Board itself is not consistent is when does the presumption arise that the possession of the tenant is without the consent of the landlord. In my opinion the decision of this question would depend upon the particular facts of each case and it is not a question capable of a uniform answer. It is obvious that S. 79 of the Tenancy Act has no application to the facts of this case because the plaintiffs are *muafidars khairati* and not tenants. It is also evident that the defendants, zemindars, could not have put in 12 years necessary for the acquisition of a right of occupancy because they have admittedly not paid rent. The defendants zemindars could not have acquired proprietary rights because there is nothing to show that they ever asserted a title adverse to the plaintiffs' the muafidars, to their knowledge. The plaintiffs have treated them as tenants by bringing this suit for their ejectment (see in this connection the case of *Babu Sat Narain Prasad* v. *Ram Kumar*, selected Decisions of the Board of Revenue, United Provinces, No. 3 of 1910 page 2.) The defendants being neither proprietors nor occupancy tenants ought to have been ejected and the decree of the first Court should not have been interfered with. I therefore allow, the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in all Courts.

Appeal allowed.

1924 ALLAHBAD 294

LINDSAY AND KANHAIYA LAL, JJ.

Chhiddu—Plaintiff—Appellant.

v.

Desraj and others—Defendants-Respondents.

F. A. No. 267 of 1921, Decided on 17th July 1923, from the decree of Sub. J. Banda.

(a) *Bundelkhand Encumbered Estates Act, S. 12—Validity.*

Where the person who was acting for plaintiff (a minor) as his next friend was also acting in the same proceedings as the agent of the opposite parties.

Held that the proceedings were not regularly taken. [P 296 C 1]

(b) *Evidence Act, S. 101—Execution.*

The execution and registration of the document being admitted if the defendant makes the allegation that the document had been executed merely for show and was purely fictitious the burden of proof rests upon him. [P 295 C 1]

K. N. Laghate—for Appellant.

Peary Lal Banerji — for Respondents.

Lindsay, J. — This was a suit for redemption, the appellant being the plaintiff. The principal defendant in the suit was one Desraj who was alleged to be the mortgagee.

According to the particulars set out in paragraph 2 of the plaint a mortgage was executed on the 3rd of June, 1890 by one Atbal Singh father of the

plaintiff. The mortgage was in favour of the first defendant Desraj, the mortgage money was Rs. 2,100, and the mortgage was with possession.

The principal defence which was set up in the suit and which was accepted by a learned Judge in the Court below was that the deed upon which the plaintiff claimed a right of redemption, although it had been duly executed and registered, yet did not operate as a mortgage at all, inasmuch as the transaction was entirely fictitious. It was pleaded that this mortgage had been executed by Atbal Singh in favour of Desraj merely in order to defeat the claim for pre-emption which had been brought in respect of the property by one Gopal. It seems that on the very day on which Gopal filed his suit for pre-emption against one Kamta who was the first purchaser, Kamta sold the property to Atbal Singh, and three or four days after Atbal Singh executed the mortgage upon which the present suit is based.

In the Court below there seems to have been a good deal of discussion regarding the burden of proof with respect to the plea that the document of the 3rd of June, 1890, was a fictitious document.

The opinion of the Subordinate Judge was that the burden lay upon the plaintiff. In this matter we have no doubt that the Subordinate Judge was wrong. The execution and registration of the document having been admitted, if the defendant made the allegation that the document had been executed merely for show and was purely fictitious, the burden of proof rested upon him.

The pleaders of both parties declined to produce oral evidence in the case.

Certain facts were brought to notice and certain documents were before the Court which led the Subordinate Judge to the conclusion that on whichever of the parties lay the burden, it was established to his satisfaction that the mortgage was in fact fictitious transaction. He referred in particular to a pre-emption suit, suit No. 544 of 1890 in which the question of the genuineness of this deed of mortgage had been gone into by the Court. That was a suit in which Gopal the pre-emptor was a plaintiff and in which both Atbal Singh the mortgagor, and Desraj the mortgagee were impleaded as the defendants. It was certainly held in that case that the mortgage was a sham and had been entered into for the purpose of defeating Gopal's claim for pre-emption.

The Judge, however, was not right in saying that the judgment in this suit could be accepted as evidence of the facts stated therein. We do not mean to lay down that the judgment was altogether inadmissible, but we think it was not such a strong piece of evidence in favour of the defendant's case as the Subordinate Judge thought it to be.

And after all whatever importance we may attach to the finding in that suit regarding the fictitious character of this mortgage, we have the outstanding fact that subsequently Desraj himself professed to purchase the equity of redemption of this mortgage from one Khalaq Singh for a sum of Rs. 400. As a fact, however, Khalaq Singh was not the owner of the equity of redemption, nevertheless it is clear that Desraj had treated the mortgage as a genuine transaction.

It had been pointed out that Desraj did not go into the witness-box to sustain the plea which he raised by way of answer to the plaintiff's claim. The reason for this is apparent. There can be no doubt that in the pre-emption suit brought by Gopal Desraj had sworn to the genuine character of this mortgage. He was not, therefore, going to take the risk of prosecution for perjury by going into the witness-box in this case and swearing that the transaction was fictitious.

On the evidence as it stands we are satisfied that the plea raised by Desraj that this mortgage was a fictitious mortgage was not established.

We must, therefore, hold that the document is to be treated for the purposes of the suit as a genuine document of mortgage.

This brings us to another part of the case. In his plaint the plaintiff claimed that he was entitled to redemption without paying any sum. This plea was based upon the fact that certain proceedings had been

taken on the plaintiff's behalf under the Bundelkhand Encumbered Estate's Act (Act I of 1903).

We have upon record the judgment and award of the Special Judge of Mahoba dealing apparently with the estate of the present plaintiff. This order is dated the 18th of December, 1905 (See Exhibit 7, page 23 of the printed record).

It is pleaded, therefore, that because proceedings were taken under this present Act, and because the judgment and the award were made as already indicated, all the debts on the estate of the plaintiff must be deemed to have been discharged, regard being had to the provisions of S. 12 of the Encumbered Estates Act.

The difficulty which we feel about this argument is that we have not before us the full record of the proceedings in the Court of the Special Judge. We observe from the order of the Special Judge that the application which was made under the Act on behalf of the plaintiff Chhiddu (who was at that time a minor) was made by one Jujhar Singh who, strangely enough, was acting in those very proceedings on behalf of his own father Gopal Singh who was one of the persons who was pressing his claims against Chhiddu's estate. This fact attracted the notice of the learned Judge, but he appears to have thought no harm to act upon the application, although it was made by a person apparently unauthorized.

We might, in the first instance, assume that proceedings were regularly taken under the Special Act, but the presumption must be overturned when we find it clearly stated that the person who was acting for the minor Chhiddu as his next friend was also acting in the same proceeding as the agent of one of the opposite parties.

In the circumstances we hold that these proceedings were not regularly taken, and that consequently, we are not in a position to conclude that this particular mortgage-debt with which we are now concerned became duly discharged under the provisions of S. 12 of the Special Act.

The result, therefore, is that the mortgage-deed is held to be a genuine document and the mortgage-debt is still outstanding.

We think the plaintiff is entitled to a decree for redemption, and we order accordingly. The appeal is allowed. The decree of the Court below is set aside, and it is ordered that a decree for redemption be drawn up in favour of the plaintiff. The plaintiff must pay Rs. 2,100. We give six months from the date of this decree for payment.

Having regard to all the circumstances, and in particular to the fact that the plaintiff has strongly pressed his case for redemption without payment of any sum, we think it proper to direct that the parties do bear their own costs both here and in the Court below.

The office will prepare a decree in terms of order 34 rule 7 of the Code of Civil Procedure.

Appeal allowed.

✱ 1924 ALLAHABAD 296

STUART, J.

Tarsu Beg—Applicant.

v.

Muhammad Yar Khan and others—Opposite Parties.

Cr. Rev. Nos. 526 and 527 of 1923, Decided on 12th November 1923, from the order of Second Addl. Ss J. Gorakhpur, D/- 24th July 1923.

✱ *Criminal P. C. S. 195—Complaint not requiring sanction, though combined with one requiring it, must be enquired into.*

No complaint, the instiution of which requires sanction under S. 195, can be entertained unless that sanction exists. But when a complainant combines such a complaint with a complaint which deos not require sanction, the Court must investigate the complaint which does not require sanction while refusing to investigate the complaint which requires it.

[P 297, C. 1]

J. M. Banerji—for Applicant.

S. D. Sinha—for Opposite Parties.

Judgment. — Criminal Revision Nos. 526 and 527 have been put together and have been argued together but they involve absolutely distinct matters which must be carefully separated. What occurred was this

Muhammad Yar Khan and others tenants of the village of Mahson in the Basti district instituted a complaint against Tarsu Beg, Rustam Bari and others on the allegations that Tarsu Beg, and Rustam Bari, who are servants of the Raja of Basti, attacked their village on a certain day and committed dacoity and arson. Tarsu Beg put in a cross-complaint under two heads. In the first place he stated that he had been assaulted and wrongfully confined by the complainants in the dacoity and arson case, and secondly he sought to prosecute the complainants in the dacoity and arson case for lodging a false complaint against him. Rustam Bari put in a cross-complaint in which he charged the complainants in the dacoity case with having illegally seized cattle belonging to the Raja, and added in the same way as Tarsu Beg had added, a complaint of a false charge.

The Magistrate who tried these cases found that the charges of dacoity and arson were not established and discharged the accused, but he refused to investigate the complaints of Tarsu Beg and Rustam Bari on the ground that they had not obtained saction under S. 195 of the Code of Criminal Procedure in respect of the complaint as to the false charge. His orders were upheld by the Sessions Judge.

The law on the subject is this. No complaint, the institution of which requires sanction under S. 195 of the Code of Criminal Procedure, can be entertained unless that sanction exists. But when a complainant combines such a complaint with a complaint which does not require sanction, the Court must investigate the complaint which does not require sanction while refusing to investigate the complaint which requires it. This is what the Magistrate failed to do. I set aside his order refusing to investigate Tarsu Beg's complaint that simple hurt had been caused to him and that he had been wrongfully confined while upholding his order refusing to entertain the remaining complaint. It appears that he directed an investigation under S. 202 but then refused to hear Tarsu Beg's witnessess. He will now continue the investigation under S. 202 and pass orders according to the law. I allow therefore Criminal Revision No. 526 to that extent. Revision No. 527 must however fail in entirety for although the same principles apply there is a defect in the complaint itself. Under the provisions of S. 20 Act I of 1871 the complaint should have been made within ten days of the alleged offence. It was not made till later. I therefore reject the Revision application No. 527.

Application No. 526 *partly allowed.*

Application No. 527 *rejected.*

✱ 1924 ALLAHABAD 297

PIGGOTT AND WALSH, JJ.

Parshottam Saran—Appellant.

v

Brahma Nand and others—Respondents.

E. F. A. No. 123 of 1922, Decided on 10th July 1923, from the decree of Sub. J. Moradabad, D/-18th March 1922.

✱ *Civil P. C., O. 21 R. 2—Mortgage decree—Partial satisfaction can be pleaded in execution.*

Even after a decree has been passed upon a mortgage it is open to a judgment debtor to enter in the execution Court a pleading to the effect that something has taken place since the passing of the decree which amounts to a partial satisfaction of the decree. If such a plea be entered the execution Court is entitled and indeed is under a duty to enquire into the same and to continue the execution proceedings in respect of so much only of the decree which it finds after enquiry to be still unsatisfied. [P. 298 C. 2]

Durga Prasad—for Appellant.

N. P. Asthana—for Respondents.

Piggott, J.—The appellants Sahu Parshottam Saran has purchased at auction, in execution of a simple money decree, the interests of one Khalilur Rahman in village Karam Alipur. Khalilur Rahman mortgaged to the respondent Brahma Nand his rights in village Karam Alipur, along with a number of other properties, and Brahma Nand has obtained a decree upon the said mortgage which is now in process of execution. The share purchased by the appellant in village Karam Alipur having been put up to sale in execution of the

mortgage decree, the said appellant filed an objection. The main point on which he apparently insisted in his petition of objection to the execution Court was that the decree-holder was bound to proceed against the various items of property involved in the mortgage decree in the order in which they were specified in the decree itself, that order being of course identical with the order followed in the specification given at the foot of the mortgage. There was no force whatever in this plea. It was rightly overruled in the Court below and it cannot be pressed in this Court. In the third paragraph of the petition of objection in the Court below, Sahu Parshottam Saran made a vague allegation, to the effect that the decree-holder was not acting in good faith in proceeding against the share in village Karam Alipur before taking any action against the mortgaged properties in two other villages, namely Miranpur and Shekhupur. He suggested that the decree-holder's action was in consequence of some bargain entered into between himself and the owners of the mortgaged properties in Miranpur and Shekhupur, the terms of which were being kept concealed from the Court. The decree-holder filed a written pleading, in the course of which he denied having entered into any bargain whatever with the owners of the properties in Miranpur and Shekhupur. He insisted that he was entitled to proceed against the mortgaged properties in such order as he might think best in his own interests. He entered certain other pleas intended to suggest the fact that the objector Sahu Parshottam Saran has made a very good bargain by his purchase of the Karam Alipur property and was intentionally obstructing the execution proceedings, in order to enjoy the usufruct of that prcperty for as long a period as possible. The execution Court has held that there was nothing in the pleadings before it upon which an issue of fact could be framed, that the decree-holder was clearly within his rights in proceeding against the property in village Karam Alipur, and that there was no force in the objection. In the petition of appeal to this Court an attempt is made to represent this case as one bearing some analogy with those cases in which the Courts have held that the integrity of a mortgage has been broken up by reason of the acquisition of a portion of the mortgaged property by the mortgagee himself. We were referred in argument to the decision of a Bench of this Court in the case of *Sarju Kumar Mukerji* v. *Thakur Prasad* (1). The learned Judge who decided that case obviously felt that they were applying a recognised principle of law to circumstances to which it had never previously been applied in any reported case. Their decision however amounts to no more than this. Even after a decree has been passed upon a mortgage it is open to a judgment-debtor to enter in the execution Court a pleading, to the effect that something has taken place since the passing of the decree which amounts to a partial satisfaction of the decree. If such a plea be entered, the execution Court is entitled, and indeed is under a duty, to enquire into the same and to continue the execution proceedings in respect of so much only of the decree which it finds after enquiry to be still unsatisfied. It seems to us quite impossible to read the vague and doubtful plea set up in the third paragraph of Sahu Parshottam Saran's petition of objection in the Court below as amounting to a plea that any portion of the decree had been in any manner satisfied. As it stands the plea amounts to no more than this, that the decree-holder had reasons of his own, which he has not disclosed to the Court, for taking action against the property in Karam Alipur before proceeding against the properties in Miranpur and Shekhupur. This plea cannot be brought within the purview of the principles laid down in the reported case above referred to, and we think the execution Court was quite right in brushing it aside. We dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

(1) [1920] 42 All. 544—18 A.L.J. 690—58 I.C. 732.

✱ 1924 ALLAHABAD 299

WALSH, J.

Umed Singh—Applicant.

v

Emperor—Opposite Party.

Crim. Rev. No. 337 of 1923, Decided on 23rd July 1923, from the order of Sess. J. Kumaon.

(a) *Penal Code, S. 499—Public good.*

If a person really is out-casted a statement to the members of the brotherhood that he was out-casted is for public good. So long as caste prevails, any attempt to minimise, ignore or brush on one side existing regulations, existing sanctions or respect for existing decisions must be regarded from the Indian point of view as contrary to the public good. [P 301 C 1]

(b) *Civil P. C. S. 439—Findings of fact if perverse or contrary to law can be upset.*

In the ordinary course of things findings of fact are accepted by a revisional Court as binding upon it but revision would be an idle farce if the revisional Court had not the power which has been exercised 100, possibly 1000, times throughout the High Courts in India to look into the evidence for itself and see if these findings can be justified by what appears upon the record A revisional Court does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact but it may be compelled to dissent from a finding of fact which is either perverse or has been arrived at contrary to well established principles of law. [P 300 C 1]

✱ (c) *Criminal Trial—Accused's conduct may affect his credibility but can't affect his right to compel prosecution to prove its case.*

In a criminal case an accused person is not to be judged by how he pleads or fails to plead in the proceedings the precise and pedantic requirements of civil procedure. There is no such language as pleading in a criminal Court. The subsequent conduct or statement of an accused person may affect his credibility. It cannot destroy his right assuming him to be an innocent person until his guilt has been established without any reasonable doubt. [P 300 C 2]

M. L. Agarwala—for Applicant.

K. N. Katju—for Opposite Party.

Walsh, J.—This is an exceptionally difficult matter to know what to do with but I have come to a sort of rough conclusion which I think will conform to the procedure laid down by this Court in other cases, and, possibly in the end, be more satisfactory to both parties than the present state of things. One Uchhab Singh complained before a Special Magistrate, at Naini Tal, that he had been slandered by the accused Umed Singh by reason of a statement made by Umed Singh to the effect that Uchhab Singh had suffered the penalty of being out-casted by reason of his social relations with one Lachhi who himself was an outcaste. The matter had already assumed considerable proportions before it reached the Magistrate. Nothing else could account for the extremely elaborate judgment in which he has dealt with the matter, and although he describes it as a trifling matter (he is an Indian and ought to know better than I do, but I think that these caste questions in village communities are very far from being trifling matters) such an agitation was caused that 50 villages have been affected directly and 100 villages indirectly within a short time. It sounds more like the description of an incurable epidemic, and so serious has it become that marriage parties have been put under the ban. Yet says the Magistrate in his finding the allegation is false, and if that is so, it would seem to follow that the accused is a man of enormous influence, because it certainly is a startling thing that by the mere repetition of a false accusation which ought to be able to be proved or disproved by the brotherhood without much difficulty, he has nonetheless been able to affect 100 villages. The mere fact that 100 villages are affected for good or for evil, confirms me in my view that it is really a public question. I cannot help thinking that there is something out of the ordinary in this finding by the Magistrate. In the result, finding that the accused had uttered a false statement, which means of course false to his knowledge, and if defamatory, one of the worst turns which one man can do to another in the same society, the Magistrate sentenced him to the somewhat mild punishment of one month's simple imprisonment. The matter came before the learned Sessions Judge of Kumaun in revision. Dr. Katju, upholding in one sense the order of the learned Sessions Judge, while at the same time he asks me to ignore it and to hold that it was

made without jurisdiction, because his only jurisdiction was to refer the question to this Court, has argued that the learned Judge had no right to go behind a finding of fact. I cannot agree with that statement framed in that bold way. In the ordinary course of things, findings of fact are accepted by a revisional Court as binding upon it, but revision would be an idle farce if the revisional Court had not the power, which has been exercised 100, possibly 1,000 times throughout the High Courts in India, to look into the evidence for itself and see if these findings can be justified by what appears upon the record. A revisional Court does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact, but it may be compelled to dissent from a finding of fact which is either perverse or has been arrived at contrary to well established principles of law. In this case, so far as the finding is concerned, it does seem that the learned Judge was abundantly justified. He says that it seems that in January Uchhab Singh was out-casted, and Dr. M. L. Agarwala for the applicants has drawn attention to a written *panchayatnama* signed by several of the brotherhood, by which the brotherhood decided that he was out-caste, and did it in January, whereas the statement complained of made by the accused, was not until March. But though the finding of fact by the Sessions Judge on this documentary evidence seems *prima facie* justified, it does not seem to have been arrived at according to law. The learned Judge did not issue notice, never heard the complainant, and having his attention drawn to this document assumed against the complainant that he had been out-caste, although in all human probability the only reason why the complainant brought the charge at all was to clear himself and stop these ugly statements being made about him. So that the order of the learned Judge, although in one sense in favour of the complainant, becomes an injustice, because it overrules the Magistrate on a fundamental issue of fact without giving the other side a chance of being heard. But, further, the order of the learned Sessions Judge meets with my strong disapproval on a totally different ground. In vulgar parlance he seems to have given each party a slap in the face. Turning to the accused the learned Judge has said that he did not plead justification before the Magistrate, and that, therefore, although the statement about the complainant having been out-casted might be true, he has nonetheless got to go to jail. A touch of humour is added by the fact that the accused has already gone to jail, has served the full term of imprisonment, and that what I am doing is really almost idle and superfluous. But I dissent totally from the proposition that in a criminal case an accused person is to be judged by how he pleads or fails to plead in the proceeding. Much injustice may be done by applying to criminal proceedings theprecise and pedantic requirements of civil procedure It is quite true that in dealing with defamation, the Penal Code has introduced a series of provisions adopted partly from the old common law in the nature of defences. but it has not altered the fundamental principle of the criminal law, that the complainant or prosecution must prove the accused to be guilty, or, in other words the absence of such facts as happen to bring the case within either of the defences or exceptions laid down in the section. There is no such language as pleadings in a criminal Court. The subsequent conduct or statement of an accused person may affect his credibility. It cannot destroy his right, assuming him to be an innocent person, until his guilt has been established without any reasonable doubt. The view of the learned Judge that the accused did not plead justification is in this case doubly fallacious, because in fact the Magistrate had framed an issue on that very question and had decided it adversely to the accused. But, in my opinion, the complainant was bound to prove that the statement was false, and further, that if it was true, it was not for the

public good. What is for the public good is a question of fact, but until I am corrected I should hold that if a person really was out-casted, a statement to the members of the brotherhood that he was out-casted, was the kind of statement contemplated by the expression for the public good. So long as caste prevails, and it must be remembered that it is sanctified by religious and by racial tradition going back for centuries and forming one of the fundamental characteristics of social life in India, any attempt to minimise, ignore or brush on one side existing regulations, existing sanctions or respect for existing decisions, must be regarded from the Indian point of view as contrary to the public good. If it is not from the Indian point of view for the public good, caste ought to be abolished. It seems to me that there is no way out of that dilemma, and, therefore, to justfy this conviction it was necessary to hold, not merely that the statement was untrue, but that if, as the Sessions Judge thought, it was true that it was a statement not honestly made for the benefit of the brotherhood. Unfortunately that does not conclude the difficulties raised by this order of the Sessions Judge- Dr. Katju himself, who appeared for the complainant to defend it, while at the same time somewhat illogically asking me to ignore it, pointed out to me that it was passed without jurisdiction. Strictly speaking he is right. On the matter coming before the Sessions Judge under S. 435, his duty, if any question arose which he thought ought to be further dealt with, was to refer the matter to the High Court under S. 438. It may be said in answer to this that the learned Judge did not think that there was anything to refer, because *ex parte* he was so satisfied with the Magistrate's order. But the difficulty in taking that view is that, as I have pointed out, even the learned Judge has fallen into two fundamental errors, and one of them is a finding of fact adverse to the complainant without a hearing. My attention has been drawn to the important decision in the case of *Sharif Ahmad* v. *Qubul Singh* (1), also a case of defamation and a case having an important bearing on the case now before me, in which the Chief Justice has approved the following dicta of Mr. Justice Piggott :-

"It is obviously advisable that this Court should make it a rule of practice that a person dissatisfied with any order or proceeding in a Court of inferior jurisdiction to that of the Sessions Judge or of the District Magistrate, should, in the first instance, obtain the opinion of the Sessions Judge or of the District Magistrate on the matter in question, before invoking the jurisdiction of this Court. Such a procedure tends to prevent the time of this Court from being wasted over frivolous or unsustainable applications. It also ensures the further advantage that, if the matter eventually comes before this Court, it comes upon a record containing an expression of opinion by a Court of superior jurisdiction, such as that of the Sessions Judge or of the District Magistrate."

The value of that practice is of course entirely discounted if the opinion of the Sessions Judge therain mentioned, as desirable to be laid before the High Court, is arrived at by an *ex parte* finding. The result is that owing to a chapter of accidents I really am unable to come to a satisfactory conclusion in this case. One party wants me to quash the order, the other party wants me to ignore it. It struck me that I might deal with it by certain dicta and leave the accused in this case to repeat the slander and the complainant to fight it out with him in the Civil Court, where the matter can be finally and more satisfactorily determined, but that might be a hardship on the parties who possibly are not anxious to spend large sums on litigation, and as they have chosen this tribunal, I think it more satisfactory to ensure that they get a full adjudication in it. Holding myself, therefore, empowered to

(1) [1921] 43 All. 497—19 A.L.J. 425—63 I.C. 875.

deal with it with a free hand, I allow the revision and I refer the whole matter back to the learned Judge to deal with the original revision application made to him by the accused according to law after hearing both parties and going into the evidence, and referring any question to the High Court which he thinks fit to do, if on a reconsideration of the matter he should come to the conclusion that the conviction of the accused was not according to law.

Revision allowed.

✱ 1924 ALLAHABAD 302

SULAIMAN, J.

Rati Ram—Plaintiff—Applicant.

v.

Burhmajit and others—Defendants—Opposite Parties.

Civ. Rev. No. 85 of 1923, Decided on 18th July 1923, from the order of J. of C. S. C. of Mainpuri.

(a) *Civil P. C., O. 21 R. 63—Suit for refund of sale consideration.*

Suit for refund of sale consideration and not for possession of the property is not governed by one year's rule of limitation. [P. 302. C. 2.]

✱ (b) *Civil P.C., O. 21 R. 63–Judgment debtor if party.*

A judgment debtor who is not in fact a party to the claim proceedings does not in the eye of law become such by reason solely of his being the judgment debtor. [P. 303 C. 1.]

Panna Lal—for Applicant.

Baleshwari Prasad—for Opposite Parties.

Sulaiman, J.—This is a revision under S. 25 of the Provincial Insolvency Act from a decree of the Judge of Small Cause Court, Mainpuri, dismissing the plaintiff's suit. The plaintiff's case in the plaint was that the defendants had executed a sale-deed of certain crops on the 9th of February, 1921, in his favour, that one Kirat Singh attached these crops and objection being preferred to the attachment by the plaintiff, the Execution Court dismissed his objection on the 13th of May, 1921; that after that the defendants took away the crops and also refused to return the sale-consideration; hence the suit.

In their written statement the defendants pleaded that the whole of the sale-consideration had not been paid. They also said that it was the plaintiff himself who had appropriated the crops and that no part of the crops came into the possession of the defendants; it was further pleaded that the attachment in favour of Kirat Singh had fallen to the ground for want of payment of expenses of the sale. The amount of the sale-consideration was also challenged, and, lastly, it was contended that the sale-deed had been found by a Court to be invalid and no suit on the basis of it was maintainable. Then there were general pleas that the plaintiff was not entitled to any money or relief. The learned Judge of the Court below has thrown out the suit on the preliminary ground that the objection having been dismissed on the 14th of May, 1921, and the present suit having been brought more than a year after that order, it was not maintainable. He relies on a ruling of this Court which has a bearing on Order 21, rule 63 of the Code of Civil Procedure.

There has been a gross irregularity in this case as there has really been no proper trial on the merits. Order 21 rule 63 is a bar to a subsequent suit instituted to establish the right which the plaintiff claimed to the property which was in dispute in the proceeding in which the objection was raised. It is manifest that in the present suit the plaintiff did not put forward any claim to the property which was then in dispute. He was suing for refund of sale-consideration and not possession of the property. Order 21 rule 63, therefore, had no application and nor has the ruling cited by the Court below. A case of this kind is not governed by one year's rule of limitation.

The learned Vakil who appears for the respondents sought to support the decree on a slightly different ground. His point was that the order of the 14th of May, 1921 was conclusive between the parties and that it is not now open to the present plaintiff to go behind the finding on which that order was based. That finding, according to his contention, means that the

sale transaction was a fictitious one. This matter has not been gone into by the Court below and, therefore, I do not propose to go into it now in revision. I may, however, point out in passing that it is not quite clear whether the judgment-debtor was a party to the proceedings relating to the previous objection, that is to say, whether any notice had been issued to him and he had appeared in Court. It has been held in the case of *Krishnasami Naidu* v. *Soma Sundaram Chettiar* (1) that a judgment-debtor who is not in fact a party to the claim proceedings does not in the eye of law become such by reason solely of his being the judgment-debtor. Furthermore, according to the plea raised in the written statement, the attachment itself fell through because of non-payment of the expenses of sale. If the attachment was released, it is difficult to say why the objector should have been compelled to institute a suit to establish his right. As I have pointed out above, the case has not been decided by the Court below on the merits. It has simply thrown it out on the preliminary ground that it was brought more than a year after the order passed in the execution department. I accordingly allow the application, set aside the decree of the Court below and remand the case to that Court for disposal according to law. Costs here and hitherto will abide the event.

Application allowed.

(1) [1907] 30 Mad. 335—17 M.L.J. 95—2 M.L.T. 116 (F.B.)

1924 ALLAHABAD 303

GOKUL PRASAD, J.

Ali Ahmad and others—Defendants-Appellants.

v.

Kishan Prasad—Plaintiff — Respondent.

S. A. No. 891 of 1921, Decided on 12th December 1922, from the decree of S. Addl. D. J. Aligarh, D/- 3rd March 1921.

C. P. Code, O. 41 R. 27—That evidence was necessary to pronounce judgment is not sufficient reason to admit additional evidence.

Where the only reason given by lowee appellate Court for admitting oral evidence was that it was necessary to enable him to pronounce judgment, but as to the documentary evidence he gave no reasons at all.

***Held*, that the findings of the lower Appellate Court were vitiated by the admission of such additional evidence.**

Panna Lal—for Appellants.

Gulzari Lal—for Respondent.

Judgment.—This is an appeal by the defendants arising out of a suit for possession and profits brought by the plaintiff-respondent. The plaintiff claims under a sale-deed in his favour by Johar made in the year 1912. The defendants deny the title of the plaintiff or his transferor and plead title in themselves and possession for more than 12 years. The First Court, in a careful judgment and after giving the parties the fullest opportunity of producing evidence, came to a conclusion adverse to the plaintiffs. I have read the whole of the order-sheet in the case very carefully, and I was led to do so because of the remark in the judgment of the lower Appellate Court that the suit was tried very purfunctorily by the Munsif and this led to the admission of the additional evidence in appeal. The lower Appellate Court examined two new witnesses and admitted three documents as additional evidence when the case was before it in appeal. There might be some excuse for examining the two witnesses, one of whom was the vendor of the plaintiff but there is absolutely no reason given by the Judge for admitting the additional documentary evidence. This admission of additional evidence, at least so far as the documents are concerned, is contrary to the provisions of O 41, r. 27 of the Code of Civil procedure and the admission of such additional evidence has certainly prejudiced the defendants who had got a decree in their favour from the Trial Court. This appeal should have been decided without the admission of additional evidence. As to the admission of oral evidence the only reason which the learned Judge gives for admitting it is that it was necessary to enable him to pronounce judgment, but as to the documentary evidence he does not give even this

reason, if it is a reason at all. I think the findings of the lower Appellate Court are vitiated by the admission of additional evidence without sufficient reason, see the case of *Hansraj* v. *Shiam Sunder* (1). I. therefore, allow this appeal, set aside the decree of the lower Appellate Court and send the case back to it for trial according to law after eliminating from its consideration the additional documentary evidence received by it in appeal. Costs here and hitherto will abide the event.

Case remanded.

(1) [1921] 19 A. L. J. 407—63 I.C. 423.

✱ 1924 ALLAHABAD 304

DANIELS, J.

Ram Kishen Rai—Appellant.

v.

Sheo Sagar Pandey and others—Respondents.

S. A. No. 1477 of 1922, Decided on 4th April 1923, from the decree of D. J. Ghazipore D/- 23rd May 1921.

✱ (*a*) *Partition—Private partition–Document not necessary.*

A private partition can be effected without any written document. [P 304 C 2]

✱ (*b*) *Registration Act, S. 49–Document useful as admission—Registration not necessary.*

An application for correction of papers filed in the Revenue Courts in which the defendant admitted that the plaintiffs were in possession of the area in suit by mutual arrangement and asked that the papers should be corrected accordingly to prevent future disputes, is not a document of title; it is merely an admission of possession based on a previous arrangement between the parties and a request to the Court to give effect to that possession and, as such admission, it is admissible without registration. [P 304 C 2]

(*c*) *Agra Tenancy Act, S. 32—Suit against lawful holder.*

S. 32 does not apply to a suit to recover a fractional share in a holding against a person in lawful possession, 37 A. 336 Foll. [P 305 C 1]

Haribans Sahai—for Appellant.

M. L. Agarwala—for Respondents.

Judgment.—This appeal by the defendant, Ram Kishen Rai, arises out of a suit for possession of a ¼th share in plot No. 590-I in the village of Kosara in the Ballia District in which the parties are permanent tenure-holders. The plaintiffs' title to a ⅛th share in this plot based by purchase is admitted. The dispute is as to the remaining ⅛th. In the plaint the plaintiffs simply set up their ownership of the plot and their unlawful dispossession by the defendant in June 1918. The case which they set up at the trial and which has been accepted by both the Court below is that they came into possession of the remaining ⅛th share under a private partition which took place 8 or 10, according to one witness, and 15 or 16 years ago, according to another. A private partition can be effected without any written document. In this Court the defendant's appeal is urged on two grounds neither of which was put forward in either of the Courts below and which this Court might, therefore, well refuse to entertain on this ground alone.

In support of the plaintiffs' case reliance was placed by the Courts below on an application for correction of papers filed in the revenue Courts in 1916 in which the defendant admitted that the plaintiffs were in possession of the area in suit by mutual arrangement and asked that the papers should be corrected accordingly to prevent future disputes. The proceedings for correction of papers were ultimately struck off for default but this fact is immaterial. It is the admission that is relied on. The plea put forward here is that this application is being relied on as a document of title and that as such it was inadmissible in evidence without registration. In fact, the document is not and does not purport to be a document of title, it is merely an admission of possession based on a previous arrangement between the parties and a request to the Court to give effect to that possession. In my opinion the ruling in *Jagrani Misrain* v. *Besheshar Dube* (1) on which the appellant relies does not apply. It is said that, apart from this document, there was no evidence of title but the

(1) [1916] 38 All. 366—14 A.L.J. 449—35 I. C. 701 (F. B.)

judgment of the Trial Court which the learned District Judge has confirmed shows that this was not the case. The document was not relied on as a foundation of title but as an admission of it. The second plea is that the suit was barred by S. 32 of the Tenancy Act. S. 32 contains two sub-sections. The first declares that no division of a holding should be binding on the land-holder unless he consents. In this case the land-holder is not a party to the proceedings and no question of his consent was ever raised. The second sub-section forbids the Courts to entertain a suit for the division of a holding. It has, however, been held in *Kelar* v. *Deo Narain* (2) that this section does not apply to a suit to recover a fractional share in a holding against a person in lawful possession. For these reasons the appeal, in my opinion, fails and I accordingly dismiss it with costs.

Appeal dismissed.

(2) [1915] 37 All. 656 = 13 A.L.J. 919 = 30 I. C. 89.

1924 ALLAHABAD 305

KANHAIYA LAL AND LINDSAY, JJ.

Ram Govind Pande—Plaintiff—Appellant.

v.

Danna Lal and others—Defendants Respondents.

S. A. No. 215 of 1922, Decided on 24th July 1923, from the decree of D. J. Azamgarh.

Pre-emption—Who can pre-empt.

Where a person purchased a plot of land situated within a share in a village.

Held he was to be deemed a cosharer in the village and such a person would be treated as a cosharer in the village even though his name did not appear in the revenue papers. [P 306 C 1]

P. L. Banerji and *N. P. Upadhiya*—for Appellant.

S. N. Sen—for Respondents.

Lindsay, J.—The facts of this case may be briefly stated as follows :—On the 17th January 1919, one Panna Lal, who owned a one-anna six pies share, sold a plot comprised in that share, namely, plot No. 177 together with two trees to Sahdeo and others, defendants.

On the 20th September 1919, Panna Lal sold his entire 1 anna and 6 pies share to the same persons.

A suit for pre-emption was brought by the plaintiff-appellant, Ram Gobind Pande for the purpose of pre-empting both these sales.

It has been held by both Courts below that the plaintiff cannot pre-empt the first sale, that is to say, the sale of the isolated plot, on the ground that he had notice of the sale and had an opportunity of exercising his right to pre empt which he refused to avail himself of. It must be taken, therefore, for the purposes of the present decision that the first sale is not liable to pre-emption.

The question, therefore, remains whether the plaintiff is entitled to succeed in his suit for pre-emption so far as it concerns the sale of the 1 anna 6 pies share which, as we have said, was carried out on the 20th September 1919. The finding of the Court below is that the suit must fail on the ground that the vendees had already become co-sharers in the village by reason of their having purchased the plot No. 177 under the sale-deed executed on the 17th January 1919.

It has been strongly contended here that this purchase did not give the vendees the status of co-sharers in the village (*hisse daran mauza*), to quote the words of the *wajib-ul-arz*.

There is a great deal of case law in the decisions of this Court regarding the position of persons who have purchased isolated plots of land and the question has arisen again and again for decision whether or not the purchasers of such plots are for the purposes of pre-emption to be deemed co-sharers in the village. The cases fall into different categories which depend upon the nature of the land which is purchased. We have, for example, cases of purchases of plots of *muafi* land not assessed to revenue. Again we have other cases known as *arazi duri*; cases where sales have been made of certain isolated plots of land which are assessed to revenue but which nevertheless are outside the *mahal*.

And, lastly, we have cases like the present where a plot sold is within the *mahal* and forms a portion o a defined share in the village, that is to say, a defined area of land forming part of a definite share assessed to revenue.

This latter class of cases has been dealt with in a series of decisions beginning with the Full Bench decision of the Court in *Safdar Ali* v. *Dost Muhammad* (1). In that case it was held that where a person purchased a plot of land situated within a share in a village, he was to be deemed a co-sharer in the village and it was held in the case reported in *Dakhni Din* v. *Rahim-un-nissa* (2) that such a person would be treated as a co-sharer in the village even though his name did not appear in the revenue papers.

Another case on this point is to be found in *Ali Husain Khan* v. *Tassaduk Husain Khan* (3). That case is, so far as we can see, on the same footing as the case with which we are now concerned. It is not necessary for us to refer to the decisions on the other classes of cases for clearly they would not be applicable in the present instance. Here we are dealing with a plot of land comprised in a 1 anna 6 pies share which is assessed separately to revenue, and which is recorded separately in the *khewat*. That being so, the case falls within the principle laid down in *Ali Husain Khan* v. *Tassaduq Husain Khan* (3). It is true that there have been other decisions of this Court which seem to point in a contrary direction. One of these to which we have been referred is to be found in 15 I. C. 251. But there the facts are not fully set out and it is impossible to gather from the language of the report what was the particular nature of the plots in question in that case.

We are satisfied, therefore, with the decision of the Court below in this particular case that the vendees who purchased this plot No. 177 on the 17th January, 1919, were entitled to claim the status of *hissadaran mauza*, and that being so, we hold that the suit of the plaintiff was rightly dismissed. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) [1890] 12 All. 426—(1890) A.W.N. 117 (F.B.)
(2) [1894] 16 All. 412 —(1894) A.W.N. 134.
(3) [1905] 28 All. 124—2 A.L.J. 612—(1905) A.W.N. 219.

1924 ALLAHABAD 306

SULAIMAN, J.

Jafar Husain and others—Applicants.

v.

King Emperor—Opposite Party.

Cr. Rev. No. 528 of 1923, Decided on 14th September 1923, from the order of Dist. Magistrate, Meerut D/- 13th August 1923.

Criminal P. C., S. 106—Conviction for assault under certain circumstances may justify order under S. 106.

Where there was no express finding that there was an apprehension of a breach of the peace and the accused were convicted of an offence of assault but Magistrate had also expressed an opinion to the effect that the accused persons appered to be very troublesome. [P 307 C 1]

Held: that there was no legal flaw in the judgment and order under S. 106 was justified.

Mushtaq Ahmad—for Applicants.

Judgment.—This is an application in revision. The first point taken is that the learned District Magistrate has under an oversight rejected the application filed before him summarily and has not considered the case on the merits. It is conceded that no appeal lay to him.

However I have heard the learned vakil for the applicants and have also examined the grounds on which the judgment of the trial Court is sought to be set aside Two points have been urged. The first is that the prosecution evidence has not been thoroughly discussed. I cannot accept this. The judgment of the trying Magistrate, who tried the case summarily, covers more than a page in type. He has referred to the four witnesses who had seen the occurrence, and after stating what they

opposed to, has come to the conclusion that they should be believed. On the finding recorded by him the accused went about canvassing and on a refusal by the complainant to vote for him struck him with a lathi and two of his companions, the co-accused, beat him with hands. This case has been proved according to the trying Magistrate against him. In my opinion the finding on that point is clear and cannot be interfered with.

The next point urged is that the order binding them over under S. 106 was improper inasmuch as there was no express finding that there was an apprehension of a breach of the peace. Reliance is placed on a case reported in 43 Cal., 586. That case however is clearly distinguishable because there the conviction was neither for riot nor for assault-and before proceeding under S. 106 the Court had to be satisfied that the offence was one which involved a breach of the peace, or of abetting the same. In the present case the accused were convicted of an offence of assault. In any case the learned Magistrate has also expressed an opinion to the effect "that the accused persons appear to be very troublesome." I am of opinion that there is no legal flaw in the judgment. The case was a very simple one, and the accused were bound over because of the feelings which may be created in an election campaign. I am satisfied that the Magistrate must have thouget it necessary to bind them over. The application is without force and I dismiss it.

Application dismissed.

✱ 1924 ALLAHABAD 307

STUART AND MUKERJI, JJ.

Abdul Shakur—Appellant.

v.

Syed Muhammad Matin—Respondent.

E. S. A. No. 873 of 1923, Decided on 7th January 1924, from the decree of D. J. Allahabad.

✱ *Execution—Collector can't divide as to how much was due to decree holder and how much of decree was satisfied.*

Where a decree is transferred for execution to the Collector he has absolute jurisdiction to choose the best method allowed to him by law for raising money to satisfy the decree but beyond that it is not within his province to decide how much money is due to the decree holder and how much of the decree has been satisfied' [P. 308 C. 1, 2]

N. P. Aspthana—for Appellant.

Zafar Mehdi—for Respondent.

Mukerji, J.—The facts which have given rise to this appeal are these. There were two decrees one No. 15 of 1912, in favour of one Parsidh Narain and against the judgment-debtor Muhammad Matin. There was another decree No 95 of 1912, in favour of Abdul Shakur against the same judgment debtor Muhammad Matin. The decree No. 95 of 1912 ordered the sale of some property which was included in the decree No. 15 of 1912. In fact the decree No. 15 of 1912 was passed on an earlier mortgage. The two decrees were put into execution and, the property involved being ancestral, they were sent to the Collector for execution. The subsequent mortgagee Abdul Shakur satisfied the earlier decree No 15 of 1912, on 18th of September 1914. He then asked the Subordinate Judge that the amount of the prior decree should be added to the amount due under his own decree, namely, decree No. 15 of 1912. The learned Subordinate Judge, by order dated 3rd July 1915, found that this could not be done but he suggested that Abdul Shakur might proceed under the provisions of the Code of Civil Procedure, Schedule I, Order 34, rules 12 and 13. Thereafter the decree No. 95 of 1912, was again sent to the Collector for execution by order, dated 22nd June 1916. When execution was proceeding before the Collector, Abdul Shakur made an application to the Subordinate Judge on 30th January 1917, asking that the Collector might be informed that the sum of Rs. 2,075 which had been paid by him to Parsidh Narain for the satisfaction of decree No. 15 of 1912, should also be realised and the property sold,

not subject to the mortgage created in favour of Parsidh Narain, but free from incumbrance. This application he was competent to make under the provisions of law already quoted, namely, Order 34, rules 12 and 13 of the Code of Civil Procedure. The learned Subordinate Judge acceded to this request and ordered that the application of Abdul Shakur might be sent to the Collector for his information. The property was sold on 20th August, 1918, and was purchased by Abdul Shakur. He gave a receipt, a copy of which is on the record. He thought that the point should be made clear that the property had been sold free from encumbrance and that the amonnt of money for which he bad purchased was to be credited first towards the decretal amount due under the decree No. 15 of 1912 and the balance should go to satisfy his own decree. His application to the Collector and his appeal to the Commissioner were unsuccessful. Subsequently he made an application before the Subordinate Judge for recovery of what was due to him under his decree. He gave credit for the money realised by the Collector towards the satisfaction of the prior decree and the balance applied towards part payment of his own decree. Objections were raised as to his execution with the result that this second appeal comes before us.

The learned District Judge held that the orders of the Collector and the Commissioner stood in the way of the decree-holder getting his money. He found that Collector and the Commissioner were the executing Courts and that. they having decided that the only decree that was executed was the decree No. 95 of 1912 nothing further could be done in the matter.

The contention that has been raised by the learned Counsel for the decree-holder before us is this. The Collector was to find out the best method of raising money in order to satisfy the decree passed by the Civil Court. He had absolute jurisdiction to choose the best method allowed to him by the law but beyond that it was not within his province to decide how much money was due to the decree-holder and how much of the decree had been satisfied. In support of this proposition of law the learned Counsel has quoted two cases, namely, *Tapesri Lal* v. *Deokinandan Rai* (1) and *Bhurchand Hansraj* v. *Vira Champa* (2). Both these cases support his contention. Any comment of the decree-holder could not give the Collector any jurisdiction which he did not possess under the law. One important fact which must not be lost sight of is this. No rights of any third party are involved. It was the decree-holder who was prepared to forego his rights as a prior mortgagee which he acquired by payment of the decree passed in favour of Parsidh Narain. He unequivocally declared that he was not going to rely on any prior mortgage. The judgment-debtor was there and orders were passed in the case and it must be taken that he was all along aware of the same. No attempt has been made to show that the procedure of the learned Subordinate Judge has in any way prejudiced him. In the circumstances it appears to us to be clear that the three properties which were sold on 20th August 1918, were sold free from the encumbrance created in favour of Parsidh Narain and the money that was realised must be credited first towards the satisfaction of Parsidh Narain's decree and the balance should go towards the part payment of the decree No. 95 of 1912.

It remains to notice the receipt which was given by Abdul Shakur on his purchase. As the learned District Judge has remarked that receipt does not say that Abdul Shakur bought the property in full satisfaction of his decree No. 95 of 1912 and in execution of no other decree. The property that was sold could be sold free from encumbrance with the consent of Abdul Shakur. The receipt does not say that Abdul Shakur purchased the property subject to the mortgage in his own favour.

The result is that we allow the appeal, set aside the decree of the

(1) [1894] 16 All. 1
(2) [1913] 37 Bom. 32.

Court below and remand the execution case through the lower appellate Court to the first Court for disposal according to law. Costs of this appeal and the appeal in the Court below must be paid by the judgment-debtor-respondent. Costs in this Court will include fees on the higher scale.

Appeal allowed.

✱ 1924 ALLAHABAD 309

MEARS, C. J. AND PIGGOTT, J.

Bhim Singh—Defendant—Appellant.

v.

Ram Singh and another—Plaintiffs—Respondents.

L. P. A. No. 100 of 1922, Decided on 4th January 1924, from the decree of D. J. Mainpuri.

✱ *Hindu Law—Joint family—Alienation.*

Alienation by father, in satisfaction of earlier mortgage and mortgage decree is for antecedent debt and if the debts are not tainted with immorality the sons are bound by the alienation. 44 I. A. 197; 1924 P. C. 50, foll. [P. 309 C. 2]

Iqbal Ahmad, S. N. Mukerji and *S. P. Sinha*—for Appellant.

S. N. Chaube—for Respondents.

Piggott, J.—This was a suit by two Hindu sons to contest an alienation of joint family property made by way of sale on the 14th of October 1919, by their father in favour of Bhim Singh, who is now the appellant before us. It has been found that the consideration for the sale consisted of the satisfaction of two older debts. One of these was incurred under a mortgage of December 5th, 1904, and the other under a mortgage of the 19th July 1910. On the bond of 1904 a suit has been brought and a decree passed. The satisfaction of this decree formed the major part of the consideration for the sale in suit. The satisfaction of the mortgage of 1910 constituted the remainder of the consideration. Both these mortgages had been contracted by the father of the plaintiffs. In the plaint the transactions were challenged on the ground that these older debts, incurred in the years 1904 and 1910, were for immoral purposes and, therefore, not binding upon the sons. This point was found against the plaintiffs. Nevertheless the lower appellate Court and the learned Judge of this Court who heard the case in second appeal, having regard to the principles which have been deduced by this Court from the decision of their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1), held that the older mortgages of 1904 and 1910 could not in themselves constitute an antecedent debt for the discharge of which the father could alienate a portion of the joint family estate It was not proved to the satisfaction of the lower appellate Court that these older mortgages had themselves been executed for lawful necessity and, consequently the suit brought by the sons was decreed. Since the decision of the learned Judge of this Court their Lordships of the Privy Council have reviewed the entire question in the case of *Brij Narain Rai* v. *Mangal Prasad* (2). We have no doubt that on the principles laid down in that decision the older mortgage of 1910 and the decree passed upon the mortgage of 1904 constitute antecendent debts, being, as their Lordships have put it, antecedent in fact as well as in time. They were wholly independent of the transaction now impeached, namely, the sale of October 14, 1919, and were in no sense parts of that transaction. It was, therefore, within the competence of the father of the plaintiffs to alienate a portion of the joint family property in satisfaction of these antecedent debts of his own, so long as those debts had not been incurred for an immoral purpose. This appeal must, therefore, succeed. We set aside the decree of the learned Judge of this Court and also that of the lower appellate Court. We restore the decree of the Court of first instance dismissing the plaintiffs' suit. The defendant is entitled to his costs throughout, including fees on the higher scale in respect of both hearings in this Court.

Appeal allowed.

---

(1) [1917] 39 All. 437.
(2) 1924 P. C. 50.

✱ 1924 ALLAHABAD 310

WALSH AND RYVES, JJ.

Ram Prasad—Plaintiff—Appellant.

v

Mahabir and another—Defendants—Respondents.

S.A. No 266 of 1922, Decided on 14th December 1923, from the decree of Sub. J. Mirzapur.

(a) Civil Procedure Code, S. 11—Conflicting decisions.

Out of inconsistent and contradictory judgments inter parties, the later judgment must prevail. Prior decree becomes unenforceable after later decree, but where later decree does not cancel prior decree the fruits got in execution of prior decree are not restored to the judgment-debtor in the prior decree, who was held entitled to prevent further execution only by a still later decision in his favour, on his filing a suit for the purpose.

✱ *(b) Civil P. C., S. 11—Co-defendants—Principle applies if there is mutual conflict.*

As regards co-defendants, adjudication which is necessary to give the proper relief to the plaintiff is *res judicata* as between the co-defendants as well, provided there is a conflict of interest. (P 310 C 2)

K. N. Katju—for Appellant.

J. B. Lal—for Respondents.

Walsh, J.—This is a matter which is perfectly simple and straightforward, but which by a combination of circumstances has got into a slight tangle. The whole question turns upon the interpretation of a will, about which unfortunately there has been a difference of opinion. But that question was finally and conclusively determined against the parties to this suit by a judgment of the Chief Justice and Mr. Justice Banerji, on the 5th of December, 1919. In order to simplify this judgment, we propose to call the parties merely appellant and respondents. The appellant and respondents to this appeal were entitled by a will of an ancestor dated the 10th of April, 1882, to a half share of a business. A controversy has arisen ever the meaning of the will as to the house. The respondent brought a suit against the appellant to determine that question. It reached the High Court in second appeal and every Court was against the appellant, and it was decided by a single Judge of this Court, in May, 1916, that the house belonged to the parties in equal shares, half and half. That decision was final and binding upon the parties for the time being. But when the respondent, who had been successful in that suit, started to enforce his rights in the execution Court, the usual *tertium quid* appeared upon the scene in the character of a separated member of the joint family to which the appellant had belonged, and he claimed unsuccessfully in the execution Court his half share in this property which had been joint and had been partitioned to him. That was a sort of *jus tertii* independently of any decision in the previous litigation. If he was right, the decree in the previous litigation could only operate upon the balance which was left after his rights had been separated and given to him. Thereupon he brought a suit claiming his share of which he had been deprived in the execution Court, and he made both the appellant and the respondent parties to that suit. In that suit the interpretation of the will undoubtedly came substantially into question. The suit could not be decided without interpreting the will, and as you cannot interpret half a document, it necessarily followed that the interpretation adopted in that suit would not only affect the rights of Sheo Prasad but also the rights *inter se* of the appellant and respondents who were then co-defendants. So that as regards the interpretation of the will, the following principle of law, which nobody is concerned to dispute, came into play. As regards co-defendants, adjudication which is necessary to give the proper relief to the plaintiff, is *res judicata* as between the co-defendants as well, provided there is a conflict of interest. In the end that suit also reached the High Court and Mr. Justice Ryves, before whom the appeal in second appeal came, was of opinion that the interpretation of the will in the previous suit on appeal was erroneous. He referred it to two Judges. It ultimately came before the Chief Justice and Mr. Justice Banerji who in the decree we have already referred to, dated the 5th December, 1919, held that the previous interpretation of the will was erroneous and that the house had been bequeathed to the appellan

solely, the result of which was that the plaintiff in that suit was entitled to his share and the appellant to what was left. It was not necessary on that occasion to go into the consequences of the decree which was passed. It was a matter which might be left, if the Court thought fit, to be dealt by arrangement between the parties themselves, or by any other Court which might have to interpret the effect of that decree. The High Court might on that occasion have given a declaration as between the two co-defendants as to their rights. It had in fact expressed those rights in so many words. It was not asked to do more. The parties were left to their existing rights. Those rights are not difficult to state. From the 5th December the appellant had his half share. Sheo Prashad had his half share. The respondent was out in the cold. But inasmuch as the decree of the High Court of 1916 was not affected by the decree of the High Court of 1919, it remained *pro tanto* good and anything done under it was *pro tanto* valid. Something had been done under it. The respondent had not slept upon his rights. He had done his best to enforce them as the result of his triumphant but temporary success in 1916 and he brought one suit for rent in 1917 which ended in a compromise, and even after December, 1919 he applied to the execution Court, namely, in March, 1921, to execute his decree, which, although he never ought to have obtained in the light of what the High Court had subsequently held, he still enjoyed as the result of the 1916 decision. The Subordinate judge who dealt with that execution proceeding took a perfectly right course. It was pointed out to him by the appellant before us that there was a subsequent decision which showed that the respondent ought not to have recovered that decree. He declined to fall into the trap which was laid for him. His business was to execute the decree and to decide any legal grounds which might be raised in objection to its execution, and although in giving his reasons he indulged in certain *dicta*, which is the way of Judges who are unfortunately expected, even if not compelled, to give reasons for what they do, *dicta* which, we are bound to say, we should probably have expressed ourselves as one of our reasons for the order with reference to the state of things created by the decision of the High Court. In substance he expressed that the prior decision of the High Court was *res judicata* and binding upon the parties, and Mr. Jang Bahadur Lal, on behalf of the present respondents, relies upon these *dicta* as amounting in themselves to *res judicata* binding upon the appellant before us. He might have appealed from the order of the execution Court. He did not. Therefore, says Mr. Jang Bahadur Lal, everything which the Judge said in his judgment is binding upon the appellant for ever. But of course that is not so. The question of whether the previous proceedings were *res judicata* between the parties was not either directly or substantially in issue in the execution Court. The later decision of the High Court differing from the prior decision, as we have already pointed out, left the existing decrees untouched. The execution Court had to execute such decrees in accordance with the law without regard to what any Judge might have said or done in some other suit which was not before it. But in the light of this somewhat incongruous state of things, namely, that a party who had been declared by the High Court to have no interest whatever in the property was still successfully executing decrees which gave him the profits thereof, it is not surprising that the appellant looked round to see how he could right the wrong, which it undoubtedly was, and he brought the present suit. For the moment we will pass by the criticisms which the respondent's counsel Mr. Jang Bahadur Lal has based upon the form of the relief claimed. The substance of the matter is a suit to declare in his favour as against the respondents, with reference to this much debated point, the rights which had been established in his favour by the subsequent decision of the High Court, and he started upon that suit undoubtedly with the object of enforcing in his favour that decision and of

doing so by means of the principle of *res judicata* which in his view under S. 11 of the Code made the decision of the 5th of December, 1919 binding upon the respondents. In the decision of that question, which was really the only question in suit, the lower Courts have gone off the line. The question substantially and directly in issue in the prior litigation which ended in the decree of December, 1919, was, what were the rights of the parties in respect of the house under the will? The absence of Sheo Prasad from the first suit, and the fact that the second suit only related to half the house, are both irrelevant. The greater includes the less, and a decision as to the whole house ofcourse includes a decision as to the half, and it was impossible to decide the issue in Sheo Prasad's suit which ended in the decree of December, 1919, without deciding the rights over the whole house. We come without hesitation to the conclusion that the decision with regard to the interpretation of the will, and, therefore, the devolution of the whole house, was substantially and directly in issue between the appellant and respondents as co-defendants in Sheo Prasad's uit within the meaning of S. 11. and hat, therefore, both the lower Courts have come to a wrong decision, and that the plaintiff is entitled to succeed in this appeal and substantially in the suit. We now come to the que tion as to the form of the relief. Mr. Jang Bahadur Lal with regard to this has taken a good point. The plaintiff claims that the decree in No 455 of 1914 which has been wrongly passed may be cancelled. Putting this into plain English, it is asking the Munsif to cancel a decree of a Single Judge of the High Court which, as we have already said, is dangerously near to contempt of Court, and it is clear that the Munsif was not disposed to do it. Mr. Jang Bahadur Lal for the respondents now contends that he has not decided the issue at all But in asking for this relief the plaintiff either by good luck or judgment happens to have put in the necessary words which entitle us to do justice in the case. He says that under the will dated the 10th of April 1882, the defendants have got no right in the house known as *Arhatwala*. That is really what he was trying to do, namely, to establish that the decree of the 5th of December, 1919 was binding upon the respondents, that the respondents had no right to the house, and that therefore he, the plaintiff, was entitled to a declaration that he was, and the fact that he put in an ancillary claim which it was impossible for the Court to grant. does not in our view disentitle him to what is obviously just and right in the circumstances as they now exist. Though it may be useless, we think it right to indicate to the parties our view of how matters should for good and all rest between them. The respondents are clearly entitled, in our opinion, to the fruits of what they have been able to recover as the result of the decision in their favour in 1916 without qualification. That is to say, as regards any decision in execution proceedings taken even after the 5th of December, 1919, the *status quo* is to continue. On the other hand, as the result of this decision, the plaintiff is not entitled in law to restitution of anything which he may have paid in the meantime. But as from today the decree of 1916 and any proceedings in the lower or execution Courts based thereon must be regarded as at an end, Mr. Jang Bahadur Lal has very naturally pressed upon us on behalf of his clients that we ought to remit the case for the determination of other issues. Technically he possesses this right, but we have gone into the matter very thoroughly and we are convinced that no further issue remains to be determined. Furthermore there was an agreement between the gentlemen conducting the case on either side in the Munsif's Court that no oral evidence should be produced. This creates an estoppel. The appeal must be allowed and the plaintiff's suit decreed in the terms of this judgment with costs here and below.

Appeal allowed.

1924 ALLAHABAD 313

STUART AND MUKERJI, JJ.

Mt. Mahadei—Defendant-Appellant.

v.

Jagan Nath Das—Plaintiff—Respondent.

E. S. A. No. 1268 of 1922, Decided on 7th January 1924, from the decision of D. J. Allahabad.

Civil P. C., S. 47—Party.

Where mortgage decree against two persons is set aside against one in appeal objection by successful defendant that judgment debtor had no interest in property sought to be sold must be tried in execution proceedings as the successful defendant is a party. [P 313 C 2]

Damodar Das—for Appellant.

Haribans Sahai—for Respondent.

Stuart. J.—The litigation which has resulted in this appeal has taken a most unfortunate course. A woman called Mahadei, the widow of a Halwai called Mahadeo, on the death of her first husband married a certain Chunni Lal. Second marriages are permitted amongst Halwais. Mahadeo had owned two houses. On the 26th February 1907, a mortgage was executed for consideration in favour of Mahant Ishar Das by which these two houses were hypothecated. Ishar Das successor-in-interest filed a suit upon this mortgage against Mahadei and Chunni Lal. The suit was decreed against both of them. Mahadei alone appealed. The District Judge found in appeal that there was an irregularity in the execution of the mortgage which vitiated it against both executants but as Chunni Lal had not appealed, he allowed Mahadei's appeal only. It is quite clear that the effect of his judgment was in no way to absolve Chunni Lal from liability and that the preliminary decree remained a good decree as against Chunni Lal. The decree as it stood was against Chunni Lal personally with a lien declared upon the two houses but a final decree was subsequently prepared against Chunni Lal only ordering the sale of the two houses. This decree as it stands does not affect Mahadei in any way. She is not named in it and to read the decree it can only mean that Chunni Lal's interests in the two houses are to be brought to sale That is all that a mortgage decree can mean. It is passed against property standing in the name of a particular person and implies that the interests of that particular person in the specified property are brought to sale. When this decree was put into execution for the sale of the two houses Mahadei put in an objection in which she stated that the houses in question did not belong to Chunni Lal but belonged to her and that they should not be sold by auction. She continued that if they were sold at auction it should be proclaimed at the time of the sale that she owned these two houses and that Chunni Lal had no right, title or interest therein. This objection appears to us not to be in any way an ojection impugning the decree but an objection setting forth a desire to explain the decree. Mahadei was undoubtedly a party to the suit in which the decree was passed under the explanation to S. 47, C. P. C., and the question that she raised was clearly to our mind a question relating to the satisfaction of the decree. So S. 47 is applicable to the matter and Mahadei's objection should have been decided upon the merits as was ordered by the late Mr Shibendra Nath Banerji, on the 7th November 1921. We cannot agree with the views taken by the late Mr. Benerji's successor and by the District Judge. We hear that in the meanwhile Mahadei has filed a suit for a declaration to the same effect, that she has succeeded in this suit and that the suit is now pending before the District Judge in appeal. The fact that she has done so renders the remainder of the proceedings somewhat academic. It is absolutely clear that what must be decided is to whom these houses belong and whether the question is decided under S. 47 or by a regular suit appears to us not very material in the circumstances of the case. What appears to be desired is a correct decision and what seems to be less important is the method of arriving at it. Fortunately the law now meets any difficulty in this matter for a proceeding under S. 47 can be treated as a suit and a suit can be treated as a proceeding under S. 47

We, accordingly, remit the matter to the learned District Judge for decision according to law. He will be seised both with the appeal in the regular suit and this present objection. Costs here and hitherto will abide the result.

Appeal allowed.

✱ 1924 ALLAHABAD 314

MEARS, C. J.

S. M. Bose—Applicant.

v.

Emperor—Opposite Party.

Cr. Rev. No. 681 of 1923, Decided on 13th December 1923, from an order of Ss. J. Allahabad.

Companies Act, S. 282—Contravention.

Prospectus was sent to Registrar showing 5 Directors. Though 2 Directors out of them had not paid their share money accused stated that every Director had paid it.

Held though registrar could have detected it before permitting commencement of business, accused came within S. 282. [P 314 C 2]

P. L. Banerji—for Applicant.

Mears, C. J.—I am of opinion that this application in revision must be rejected. The facts are very simple. In November, 1919, Mr. Bose sent a prospectus to the Registrar, Joint Stock Companies, a memorandum and articles of association and from those documents it appeared that five persons consented to be Directors of the Company, and as such had undertaken to take up 500 shares of Rs. 10 each. Three of those persons subsequently did discharge their obligations but Raja Ram Gopal Singh of Manda and Goshain Rampuri never paid any sums due from them and beyond the fact that their names were given out as Directors of the Company, they did nothing whatever. On the 10th of September, 1920, nearly a year after, Mr. Bose made a declaration, as required by statute, to the Registrar of Joint Stock Companies, with the object of inducing the Registrar to grant permission to allow the Company to commence business. In that declaration he stated: "Every Director of the Company has paid to the Company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription. The only information that the Registrar had of the persons who were described as Directors was that there were five persons including the Raja of Manda and Goshain Rampuri; that is to say, had he attempted to ascertain what was meant by the phrase "every Director" and had turned to the list of Directors, furnished by Mr. Bose, he would have seen five names. It is suggested that if he had turned to another document where in shares were allotted he would have seen that in point of fact a period of two months had expired without the Raja of Manda and Goshain Rampuri having paid their dues as Directors, and, therefore, by a process of reasoning and by applying some knowledge of law he would have been able to decide for himself that the Directors had dropped from 5 to 3. I am of opinion that the Registrar was under no duty of that character, that he was entitled to assume that the five Directors, whose names had been given to him by Mr. Bose, were intended to be and were in fact included in the words "every Director" entered in the declaration given in September; and if anything had happened in the interval between November 1919 and September 1920 to reduce the number of Directors, it was the duty of Mr. Bose to tell that to the Registrar as one of the material facts to be taken into consideration by him in deciding whether this Company should be allowed to commence business. His omission to make this clear to the Registrar brought him in the opinion of the Joint Magistrate and in the opinion of the Sessions Judge within S. 282 of the Act, and also in my opinion.

It is said that six months' rigorous imprisonment is too severe a sentence in the circumstances, I do not agree with that view. It is of the utmost importance that in a country such as this, where everybody hopes that there will be a very great extension

of industrial prosperity, and that industrial prosperity probably conducted along the lines of Limited Companies, that the persons who embark on Company floatation, and who assume offices of responsibility, should understand that they have got to carry out their duties not only carefully but honestly. I accept the conclusion that the Sessions Judge has come to; and, as I said at the outset, this application in revision must be and is rejected.

Application rejected.

1924 ALLAHABAD 315

LINDSAY AND SULAIMAN, JJ.

Raghunandan Singh and others—Defendants—Appellants.

v

Tulshi Singh and others—Plaintiffs—Respondents.

F. A. No. 263 of 1921, Decided on 11th July 1923, against the decree of the Sub. J. Jaunpur, D/-21st of April 1921.

Hindu Law—Alienation by widow—Gift by widow should be set aside at the instance of the reversioners indemnifying the donee to the extent to which he has sufferred at the hands of reversioners.

A suit was brought by two persons who alleged themselves to be the presumptive reversioners of G. who died sometime ago and was succeeded by his widow. On the 7th of February 1914 the widow executed a gift by which she purported to transfer the entire estate left by her husband in favour of J. a third presumptive reversioner. Plaintiffs prayed for a declaration of the invalidity of the deed of gift as against them after the death of the executant, the widow. While G. was still alive two usufructuary mortgages were executed by his mother in favour of certain mortgagees One of these mortgage was in favour of a number of persons including the plaintiffs. After the deed of gift was executed in favour of J. he redeemed his mortgage from plaintiffs.

Held: that plaintiffs should be granted the declaration but that in the event of the present plaintiffs surviving the widow, they will only be entitled to actual possession of their share of the property which was mortgaged, on payment to J. or his legal representatives, their quota of the mortgage debt. 23 W.R. 409 P.C. Foll. [P 316 C 2]

Harnandan Prasad — for Appellants.

Haribans Sahai—for Respondents.

Judgment.—We think that on the main question decided in the Court below the judgment of the Subordinate Judge is correct. The suit was a suit brought by two persons Jesri Singh and Tulshi Singh who alleged themselves to be the presumptive reversioners of one Gaya Din Singh who died some time ago and was succeeded by his widow Mt. Sonkali.

On the 7th of February 1914 Mt. Sonkali, the widow of Gaya Din, executed a gift by which she purported to transfer the entire estate left by her husband in favour of Jagannath Singh who is also one of the presumptive reversioners.

Jagannath Singh was impleaded in this litigation as defendant No. 1. He has since died and is now represented by his descendants.

The case for the plaintiffs was that this deed of gift was an invalid document and they prayed for a declaration of its invalidity as against them after the death of the executant Mt. Sonkali.

Jagannath Singh and certain other reversioners who were impleaded as defendants put up the defence that this deed had been executed with the consent of the plaintiffs. Some of the defendants who are reversioners gave evidence to this effect but the learned Judge of the Court below has refused to believe them and we think, having regard to all the circumstances, that he was perfectly right. The document itself does not refer to any consent given by the other reversioners. On the contrary the gift purports to have been made by Mt. Sonkali in favour of Jagannath in consideration of services which Jagannath Singh had rendered to her. We have already adverted to the fact that the gift comprised the entire estate which was left by Mt. Sonkali's husband.

One of the plaintiffs Jesri Singh died while the suit was pending. The other plaintiff his brother Tulshi Singh, gave evidence in the case and denied that he had ever given any consent to the execution of this deed of gift. We may also mention another circumstance which is of some importance. In the year 1916, some other reversioners one of whom was

Khunkun Singh brought a suit for a declaration of the invalidity of this very same document. At page 21 of the paper book we find the written statement of Jagannath which was filed by way of defence in that case. Not a word was said there about the consent of the other reversioners and we think it may rightly be inferred that this defence of consent was an after-thought. On the whole we are quite satisfied that there was no consent and that the plaintiff's suit was not barred on this ground.

There is however one other matter to be considered. It is proved that while Gaya Din Singh was still alive two usufructuary mortgages were executed by his mother in favour of certain mortgagees. One of these mortgages was for Rs. 40 and the other for Rs. 948.

This latter mortgage was in favour of a number of persons including the plaintiffs in the present suit and it was stated by Tulshi in his evidence that he and his brother Jesri Singh were in possession of the entire mortgaged property under this latter mortgage of Rs. 948.

It is proved that after the deed of gift was executed in favour of Jagannath he redeemed this mortgage. That fact is admitted by Tulshi Singh and is also proved by the evidence of one Mahabir Singh.

In the Court below the defendant Jagannath pleaded that if the plaintiffs were found to be entitled to the declaration they were seeking that declaration ought to be qualified with some provision for Jagannath's interests. Jagannath Singh pleaded that having freed the family property from these mortgages he should be held entitled to be re-imbursed by the reversioners who may eventually become entitled to actual possession of the property. The learned Judge of the Court below thought there was no need to make any declaration in favour of Jagannath.

The point has been argued at great length before us and we find that a similar case came before a Bench of this Court *Ghansham Singh* v. *Tej Bahadur Singh* (1). In that case the learned Judges refused to make a declaration in favour of the defendant such as was sought here by Jagannath and is now sought by Jagannath's legal representatives.

We think however that there is one fact which distinguishes the case we are now dealing with from the case just referred to. The mortgagees who have been redeemed are the plaintiffs themselves and it certainly appears to us that there can be no injustice in declaring in the present suit that in the event of these plaintiffs surviving Mt. Sonkali and becoming entitled to immediate possession of the property they ought not to be allowed to get possession from Jagannath or his legal representatives without paying their proportionate share of the mortgage debts. This equitable principle was recognised in the case reported as *Mahomed Shumsool Hooda* v. *Shewakram* (2). That was a case decided by their Lordships of the Privy Council.

While we hold therefore that the judgment of the Court below is correct and that the decree should stand we think it proper to modify the decree by inserting the following declaration, namely, that in the event of the present plaintiffs surviving Mt Sonkali they will only be entitled to actual possession of their share of the property which was mortgaged on payment to Jagannath or to Jagannath's legal representatives their quota of the mortgage debt With this variation in the decree of the Court below we dismiss this appeal.

Parties will pay their own costs.

Decree modified

(1) [1912] 9 A.L.J. 496—13 I.C. 191.

(2) [1875] 2 I. A. 7—14 B. L. R. 226—22 W.R. P.C. 409 (P. C.)

1924 ALLAHBAD 316

DANIELS, J.

Puttoo Lal and others—Applicants.

v.

The Crown—Opposite-Party.

Cr. Rev. No. 296 of 1923, Decided on 12th July 1923, from the order of the S. J. Farrukhabad, D/- 9th April 1923.

Criminal P. C. Ss. 234 and 239—Joint trial of offences under S. 324 and 342 I.P.C. is illegal.

Six accused were tried at one trial for offences under Ss. 147, 333, 342 alleged to have been committed on 25th January.

Held that their joint trial cannot be justified under S. 234 or 239 Cr.P.C. 25 M. 61 P.C. Foll. 40 Cal. 318 and 30 A. 351 Ref. [P. 317 C. 1.]

C. Thompson—for Applicants.

Asst. Govt. Advocate — for the Crown.

Judgment. — This application in revision is based on a misjoinder of charges which constitutes an illegality invalidating the entire trial under the Privy Council ruling in *Subrahmania Ayyar* v. *King Emperor* (1). The six accused were tried at one trial for offences under Ss. 147 and 325 of the Indian Penal Code alleged to have been committed on the 24th of January, and at the same time for offences under Ss. 147, 323 and 342 of the Indian Penal Code alleged to have been committed on 25th January. This joint trial cannot be justified under S. 234 or 239 of the Criminal Procedure Code. The offences are not offences of the same kind, since the offence under S. 342 at any rate is an offence quite different from that under S. 325. Neither were the offences committed in the same transaction. It has been held in several cases that Ss. 234 and 239 of the Indian Penal Code cannot be combined *e.g.*, *Emperor* v. *Jiben Kristna Bagchi* (2) and *Emperor* v. *Mata Prasad* (3). I must therefore, and hereby do, set aside the convictions and direct a retrial of the accused. The offences alleged to have been committed on January 24th must be tried separately from those alleged to have been committed on January 25th. I regret this result inasmuch as no objection was taken at the time of the trial or even in the appeal to the Court below. I have been asked to let the accused on bail. I make no order on this application but leave it to the Court before whom the accused may be brought to pass orders on any application that may be made to it.

Retrial ordered.

(1) [1902] 25 Mad. 61—28 I.A. 257—11 M.L.J. 233—3 Bom.L.R. 540—5 C.W.N. 866—10 M.L.J. 147 (P.C.)

(2) [1913] 40 Cal. 318—14 Cr.L.J. 428—20 I.C. 412.

(3) [1908] 30 All 351-(1908) A.W.N. 152—5 A.L.J. 450—8 Cr.L.J. 4.

✱ 1924 ALLAHABAD 317

KANHAIYA LAL, J.

Jaswant Singh and others—Applicants.

v.

King Emperor—Opposite Party.

Cr. Rev. No. 416 of 1923, Decided on 16th November 1923, from an order of the Mag. First Class, Agra.

Criminal P C., S. 208—Refusal of Magistrate to examine defence witnesses vitiates committal.

It is obligatory on a committing Magistrate to record such evidence as the accused wants to produce. [P. 318 C. 1.]

G. W. Dillon—for Applicants.

R. Malcomson—for the Crown.

Kanhaiya Lal, J.—This is an application asking the Court to set aside an order of committal under S. 395 of the Code of Criminal Procedure. S. 208 requires that the order of committal should not be passed till the Magistrate has heard the complainant and taken such evidence as may be produced in support of the prosecution or on behalf of the accused. After the evidence for the prosecution was heard and the statements of the accused persons were taken down, the Magistrate framed a charge against the accused, under S. 395 of Criminal Procedure Code, without asking the accused whether they had any evidence to produce. After the charge was read over and explained to them, an application appears to have been made on their behalf, asking that certain witnesses should be summoned. That application is not on the record; but Mr. Dillon, who appears on behalf of the accused, has satisfied the Court from a certified copy which he had in

his possession that such an application was made, and the order passed by the trying Magistrate was that he could not entertain it, because it had been made after the charge had been framed and while he was writing the order of committal. The learned Magistrate also considered that it would be a waste of time to record the evidence. It was, however, obligatory on him to record such evidence as the accused wanted to produce. He put no question to them about their evidence, and as has been held in *Queen-Empress* v. *Ahmadi* (1) and *Emperor* v. *Muhammad Hadi* (2), he failed to discharge the duty imposed on him by law and passed an order of committal without considering the defence. The order of committal is, therefore, set aside and the case sent back to the trying Magistrate with a direction that he should summon and examine the witnesses which the accused may like to produce and then proceed according to law. The application aforesaid should be traced and placed upon the record.

Order set aside.

(1)[1898] 20 All., 264—(1898) A.W.N 52.

(2) [1903] 26 All. 215—(1903) A.W.N. 177.

✱ 1924 ALLAHABAD 318

LINDSAY AND SULAIMAN, JJ.

Amla Nand and others—Applicants

v.

Nandu—Opposite Party.

Mis. Ref. No. 387 of 1923, Decided on 20th December 1923.

✱ (a) *Pre emption—Basis—Right must rest in contract, custom or statute — Custom can be deduced from decisions—Variation in rule deduced from previous judgments is not permissible.*

A right of pre-emption must in the absence of statute be based either on contract or custom. In the absence of any statutory enactment or any entry in the public record of rights the custom may be deduced from a long series of decisions. Where a rule of custom is deduced from previous judgments it should in no way be departed from merely because it is thought more equitable that a new rule should prevail. [P 319) 2]

(b) *Pre-emption—Custom in Kumaun—Sharer in laga village cannot pre-empt sale in asl village.*

Under the custom prevailing in Kumaun where the *asl* village and the *laga* village are held under one revenue engagement the hissedar of the *laga* village is not entitled to preempt against a hissedar in the *asl* village. [P 319 C 1]

P. L. Banerji—for Applicants.

M. P. Bhargava—for Opp. Party.

Lindsay, J.—This reference raises a somewhat difficult question but, as we understand the matter, we are asked to say whether the law relating to pre-emption as laid down in a ruling of Mr. Giles, Officiating Commissioner of Kumaun, in the case of *Datt Ram* v. *Raghunath* decided on the 11th of July 1892, is or is not to be applied to the case with which we are concerned.

It seems that both the Deputy Commissioner and the Commissioner sitting in appeal have differentiated this case from the one which was considered by Mr. Giles in the ruling just referred to.

Taking the law to have been correctly laid down in Mr. Giles' judgment, we find it stated as follows :—

"For purposes of pre-emption the *asl* village and the *laga* village are one. A hissedar of a *laga* village has no right of pre-emption against a purchaser who is a hissedar of the *asl* village."

If this ruling is to be applied literally to the facts of the case with which we are now dealing, it seems to us, that the claim of the pre-emptor in this case must be disallowed for his status, at best, appears to be merely that of a hissedar of a *laga* village, whereas the person who is now the purchaser of the property, namely, Amla Nand is a hissedar of the *asl* village.

We have been referrred to a little book called the Manual of Land Tenures in the Kumaun Division compiled by Mr. Stowell.

In this book we find an *asl* mauza defined as being the chief or parent village to which the *lagas* or subsidiary villages are attached. The definition winds up by saying that the *asl* village and *lagas* are held under one revenue engagement.

Reading the judgment of Mr. Giles in the light of this definition, we take it as laying down, therefore, that where the *asl* village and the *laga* village are held under one rovenue

engagement the hissedar of the *laga* village is not entitled to pre-empt against the hissedar of the *asl* village.

It is said, however. in the present case that the village Rauthiya in which the property sold is situated oes not really stand to Khandoli, the village in which the purchaser Amla Nand resides, in the relation of a *laga* to an *asl* village. In the judgment of the first appellate Court this village Rauthiya is described as *pakka khaikar laga* and it is said that it has its own separate settlement map and "*phant.*" Mr. Mason, the Deputy Commissioner (District Judge) describes Rauthiya as 'being really a separate fiscal unit.

It is not clear from this description whether the learned District Judge intended to find that Rauthiya was separately assessed to revenue and was not included in the same revenue engagement as the other village Khandoli.

The Commissioner as Judge of the High Court of Kumaun, agrees with the opinion of the first appellate Court. Indeed, his judgment would lead us to believe that he intended to find that this village of Rauthiya is not at all a *laga* village but a village quite independent of the other village of Khandoli. In his judgment the learned Commissioner is unable to say how this village came to be recorded in the revenue papers as a *laga* or off-shoot of Khandoli. He certainly seems to think that it can be nothing of the sort.

It appears to us that the whole question of the right of pre-emption in this case turns upon the relation which is to be traced between these two villages Rauthya and Khandoli. If they stand to each other in the true relationship of *asl* and *laga* villages, that is to say, if they are both held under one revenue engagement, then we are of opinion that the customary law, as found by Mr Giles in his judgment in *Dutt Ram* v. *Raghunath*, ought to be followed in this case. In other words, the claim of the pre-emptor ought to fail and ought to be dismissed,

On the other hand, if it be the fact that these villages are not truly related as *asl* and *laga* villages but that the village of Rauthiya is a separate fiscal unit as decribed in the judgment of the first appellate Court, then we are of opinion that the pre-emptor in this case has a better right than the purchaser Amla Nand.

We should like to add that a right of pre-emption must, in the absence of statute be based either on contract or custom. No contract has been suggested in this case. Presumably the right claimed is based on customary law. In the absence of any statutory enactment or any entry in a public record of right, the custom may be deduced from a long series of decisions. When a rule of custom is deduced from previous judgments we are of opinion that the rule deduced therefrom should in no way be departed from merely on the ground that it is now thought more equitable or convenient that a new rule should prevail.

As regards costs in this Court we leave the parties to bear their own costs.

Reference answered.

1924 ALLAHABAD 319

SULAIMAN, J.

Emperor

v

Bidha

Cr. ef. No.548 of 1923, Decided on the 31st October 1923, from the Dt. Mag. Aligarh.

Penal Code, S. 73—Solitary confinement can not be ordered under Criminal Tribes Act.

Under S. 73 there is no authority for imposing a sentence of solitary confinement when a person is convicted under some other Criminal Act. The criminal Tribes Act (No. III of 1911) makes no provision for imposing a sentence of solitary confinement on persons convicted under that Act.

[P. 320 C. 1]

The parties were not represented.

Sulaiman, J.—In this case the accused was convicted under S. 22 of the Criminal Tribes Act (No. 3 of 1911) and was sentenced to undergo rigorous imprisonment for one year including one month's solitary confinement. The learned District Magistrate has referred the case to the High Court with a recommendation that so much of the sentence as relates to the solitary confinement be set aside. This reference must be accepted.

Solitary confinements are imposed under S. 73 of the Indian Penal Code. Under that section whenever any person is convicted of an offence for which under that Code the Court has power to sentence him to rigorous imprisonment the Court may by its sentence order that the offender shall be kept in solitary confinement for any portion of the imprisonment to which he has been sentenced. Under that section there is no authority for imposing a sentence of solitary confinement when a person is convicted under some other Criminal Act. The Criminal Tribes Act (No 3 of 1911) makes no provision for imposing a sentence of solitary confinement on persons convicted under that Act. I am therefore of opinion that the Magistrate had no jurisdiction to order that any part of the sentence of the accused should be one of solitary confinement. I accordingly set aside that part of the order. Let the record be returned.

Order set aside.

1924 ALLAHABAD 320

LINDSAY, J.

Keshab Deo—Applicant.

v.

King Emperor—Opposite Party.

Cr. Ref. No. 67 of 1923, Decided on 2nd February 1923, by the Addl. S. J., Aligarh.

Criminal Trial — Procedure — Order to accused to be ready with defence, before prosecution evidence is over, is improper.

An order to the accused before prosecution witnesses are examined, that he must be ready with his witnesses for the defence on a certain date, is an improper order. [P330 C 2]

S. N. Mookerjee and *S. B. Johari*—for Applicant.

Judgment.—The Additional Sessions Judge having jurisdiction over the Etah district has reported this case recommending that the trial under S. 110 of the Code of Criminal Procedure be set aside and that a fresh trial be ordered in some other district either Budaun or Aligarh.

In his order dated the 16th January, 1923, the learned Sessions Judge refers to certain irregularities which were committed at the trial in the Court of the Deputy Magistrate.

It is not necessary for me to refer to all that is set out in the referring order of the Judge nor perhaps would I be able to subscribe to all the criticism which the learned Additional Sessions Judge has passed upon the procedure in the Deputy Magistrate's Court. However, there is this much to be said that the learned Additional Sessions Judge has laid stress upon an irregular order which was passed by the Deputy Magistrate on the 14th November 1922. The Deputy Magistrate has been asked for an explanation and his explanation is before me. He tried to defend his order of the 14th November 1922, by stating that it merely amounted to a warning to the accused person that he would be called upon to enter upon his defence on the 29th November, after the remaining prosecution witnesses had been examined. I have examined the order which was passed by the Deputy Magistrate on the 14th November 1922. That order which is repeated in the *Furd ahkam* distinctly states that the accused was informed that he must be ready with his witnesses for the defence on the 29th November. I agree with the learned Additional Sessions Judge in holding that this was an improper order.

I do not propose to discuss the other irregularities which are set out in the order of the Additional Sessions Judge beyond saying that I am not prepared to hold that it was not open to the Deputy Magistrate to demand enhanced bail during the course of the trial if there were circumstances which in the opinion of the Deputy Magistrate called for that course to be taken.

I have decided, however, that in the interests of the accused it is proper that a fresh trial should be had and, accepting the recommendation of the Additional Sessions Judge, I direct that the former trial be set aside and that the accused be tried *de novo* in the Aligarh district in such competent Court as the District Magistrate of Aligarh may appoint for that purpose.

Reference accepted.

---

* 1924 Allahabad 321.

(FULL BENCH.)

PIGGOTT, LINDSAY AND SULAIMAN, JJ.

B. Randhir Singh—Appellant

v.

Rajpal Misir—Respondent.

F. A. F. O. No. 85 of 1923, decided on 18th December, 1923, from the order of District Judge, Azamgarh, dated 3rd February, 1923.

Wajib-ul-arz—*Pre-emption—Right of redemption given to a stranger cannot be a record of custom.*

A provision in a *wajib-ul-arz* which confers a right of redemption upon a person who is a stranger to a mortgage cannot in any sense be treated as being a record of a custom. The general presumption is that an entry in the *wajib-ul-arz* which is headed "custom of pre-emption" is to be treated as the record of a custom. This principle, however, has always been qualified by one condition, namely, that it shall not be apparent from anything in the *wajib-ul-arz* itself that what purports to be the record of a custom is in reality the record of a contract or agreement arrived at by the co-sharers amongst themselves at the time of the settlement. [P. 322, Cs. 1 & 2.]

Iqbal Ahmad—for Appellant.

S. N. Sen—for Respondent.

Lindsay, J.:—This is a defendant's appeal which has arisen out of a suit for pre-emption. It came before a Bench consisting of Mr. Justice Sulaiman and myself and in view of the course which the case took in the lower appellate Court we found it necessary to refer it for decision to a Full Bench by our order, dated the 22nd of November last.

The question is one of general importance for we have to construe a *wajib-ul-arz* of a type which is very common in the Azamgarh District. This case we may mention comes from the district of Azamgarh.

A string of cases beginning with the case of *Surajbali Singh* v. *Muhammad Nasir* (1) has laid down certain principles of decision which govern the interpretation of *wajib-ul-arzes* which are framed in this peculiar way and if those cases are to be followed it must be held in the case now before us that the *wajib-ul-arz* relied upon by the plaintiff does not contain a record of custom.

In thi particular case, however, the Judge of the lower appellate Court considered that he was entitled to rely upon an older case than the case to which I have referred, namely, the case in the Allahabad Law Journal Reports. The case which was relied upon by the Judge in the Court below was the Full Bench case of *Majidan* v. *Hayatan* (2). In that case with one exception perhaps the language of the *wajib-ul-arz* under consideration was identical with the *wajib-ul-arz* with which we are concerned in the present appeal and there can be no doubt whatever that the Full Bench in that case decided that the *wajib-ul-arz* before them did set out a record of custom.

The particular point upon which the controversy turns in this case is one which arises out of the concluding words of the clause relating to pre-emption. The clause begins by reciting the general rule about pre-emption and specifying the classes of co-sharers who are entitled to preference and to take in the order of that preference. Following upon this recital there is a further recital that in the case of out and out sales the purchase-money is to be calculated at a rate of interest equivalent to 6 per cent. per annum, and in case of other transfers, not being out and out sales the sum which changes hands is to be calculated at the rate of 12 per cent. per annum.

Then follows another provision that if in the case of a mortgage by conditional sale the mortgagor is unable to redeem and the property be about to be foreclosed, a co-sharer, according to his right of pre-emption as recited above, would be entitled to pay off the mortgagee and to take possession of the property till he is himself redeemed by the mortgagor.

A clause framed in this latter language was in the *wajib-ul-arz* which was under consideration in the Full Bench case of *Majidan* v. *Hayatan* (2) in the year 1897 and there can be no doubt that the attention of the learned Judges composing that Bench was directed to the provisions of this clause. On the other hand it is to be observed that there is nothing in the report of the case which would indicate that any argument was ever raised before the learned Judges as to whether a recital of this kind could properly be treated as recital of custom.

Referring to the case of *Suraj Bali* v. *Muhammad Nasir* (1), it is clear that this matter was argued before the Judges of the special pre-emption Bench and in

(1) (1918) 16 A.L.J. 879.

(2) (1897) A.W.N. 3.

dealing with this matter the learned Chief Justice who delivered the judgment pointed out that a clause similar to the clause we are now considering conferred a right of redemption upon a person who had no interest whatever in the mortgaged property.

In that case too there were, as in the present case, certain conditions which laid down the price at which the property could be purchased or mortgaged.

We have no doubt whatever that the case of Surajbali Singh was decided on the principle that the last clause in the *wajib-ul-arz* contained matter which could not properly or possibly be the subject of custom, and that being so, the conclusion arrived at by the learned Judges was that, although *prima facie* the *wajib-ul-arz* was a record of custom the internal evidence in the case overturned this presumption and showed that the record was not in truth a record of custom.

This case of *Surajibali Singh* v. *Muhammad Nasir* (1) was decided on the principle which was laid down in the earlier case of *Fazal Husain* v. *Muhammad Sharif* (3). The relevant passage is to be found at page 473, and the principle there laid down is that where a *wajib-ul-arz* in the very same clause in which reference to pre-emption is made, contains reference to other matters which could not possibly be matters of custom, it ought to be held that the record is not one of custom at all.

It is not necessary therefore to enter into discussion of the cases decided subsequent to the case of *Surajbali Singh*. They have all been decided upon the principle which has just been enunciated.

Speaking for myself, I have no doubt whatever that the decision of Richards, C.J., in *Surajbali Singh's* case was perfectly correct and that a provision in a *wajib-ul-arz* which confers a right of redemption upon a person who is stranger to a mortgage cannot in any sense be treated as being a record of a custom.

That being so, and following the *cersus curiae*, I am of opinion that in the present case the *wajib-ul-arz* ought not to be treated as containing a record of custom and consequently the finding of the Court below ought to have been that the custom of pre-emption was not proved.

There is, of course, the additional reason already mentioned, namely, that this *wajib-ul-arz* professes to lay down the rates at which sales and mortgages are to be made and it is hardly necessary to say that an entry of this nature could not possibly be a record of custom.

It is however necessary to express an opinion regarding the soundness of the judgment in the Full Bench case of *Majidan* v. *Hayatan* (2) and it was for that purpose that this reference was made to a Full Bench. Speaking for myself, I am of opinion that that case cannot be held to be authority against the view which has prevailed since the pre-emption Bench has been constituted. As I have mentioned, the particular point with which we are dealing here was never raised before that Full Bench and in my opinion it cannot rightly be laid down that a record conferring a right of redemption upon a stranger to a mortgage can be a record of custom. If the Full Bench case of *Majidan* v. *Hayatan* (2) purports to lay down the law in any other sense then, in my opinion, it ought to be overruled and declared to be no longer good law.

Piggott, J.:—I concur with Mr. Justice Lindsay. We start with the general presumption that an entry in the *wajib-ul-arz*, and more particularly an entry such as the one before us in this case, which is headed "custom of pre-emption", is to be treated as the record of a custom. This principle, however, has always been qualified by one condition, namely, that it shall not be apparent from anything in the *wajib-ul-arz* itself that what purports to be the record of a custom is in reality the record of a contract or agreement, arrived at by the co-sharers amongst themselves at the time of the settlement. The necessity for such a qualification is obvious. You might conceivably have a *wajib-ul-arz* entry under the above heading which began by expressly reciting that there had hitherto been no custom of pre-emption in the village, but went on to say that the co-sharers agreed among themselves to be governed hereafter by such and such rules in the matter. This of course is an extreme case, but entries of this kind have actually come under the notice of this Court; it would be clearly preposterous to lay down the principle that such an entry must be regarded as the record of a custom, because in the *wajib-ul-arz* it has been wrongly inserted in

(3) (1914) 36 All. 471.

the place provided for the record of the custom relating to pre-emption. Now in the present case we have an entry which begins in the ordinary way in which one would expect the record of a custom to start. So far so good; but immediately after the words which, standing by themselves, appear to be a valid record of an existing custom, there follow special provisions as to the price at which the party claiming pre-emption is to be entitled to purchase or to take up a mortgage. Immediately after this comes a provision of a special and peculiar character, permitting other co-sharers under certain circumstances to redeem a mortgage in which they have no concern whatsoever, except that they are the co-sharers of the mortgagor. What strikes me most about the right recorded in favour of co-sharers in this clause is, that it offends against the very essence of a right of pre-emption. The co-sharer redeeming a mortgage under this clause does not acquire the proprietary title of the mortgagor. He does not, in any sense of the words, step into the shoes of the mortgagor. Neither does he step into the shoes of the mortgagee; for it is clearly not intended by the entry in the *wajib-ul-arz* that a co-sharer so redeeming shall acquire the right of foreclosure which the mortgagee held under his contract of mortgage. The effect of the transaction outlined in this clause of the *wajib-ul-arz*, assuming it to be carried out, would be to put the co-sharer exercising this right of redemption into possession as an ordinary usufructuary mortgagee, subject to a liability to be redeemed by the original mortgagor, presumably within the period of limitation prescribed by law for the redemption of the original mortgage. It does not seem to me that a right of this sort can possibly be created by custom. I therefore agree with Mr. Justice Lindsay in holding that the *wajib-ul-arz* which we are considering, in view of those entries inserted under the heading of "custom of pre-emption" to which I have referred, cannot be treated as the record of a custom existing at the time when it was drawn up, but must be regarded as the record of an agreement come to by the co-sharers amongst themselves at the time.

Sulaiman, J.:—I have come to the same conclusion. It is true that when there is an entry of a right of pre-emption in a *wajib-ul-arz* there is a *prima facie* presumption that it is an entry of custom. At the same time if that very clause which recites such a right contains other matters relating to the transfer or devolution of property which cannot possibly be a record of custom, then that presumption is negatived. It is open to the Courts then to say that the evidence produced by the plaintiff in support of the alleged custom is totally insufficient even to raise a presumption that custom exists. The question therefore which we have to consider in this case is whether there are any other matters contained in clause 13 of the *wajib-ul-arz* of 1872 which negative the idea that that entry was a record of custom. Two matters have been specially referred to by the learned Advocate for the defendant-appellant before us. The first is that that clause contains a recital that if in the case of a mortgage by conditional sale the mortgagor is unable to redeem and the property be on the point of foreclosure and a notice for foreclosure has been issued to the mortgagor, a co-sharer by virtue of his right of pre-emption would be entitled to pay off the mortgagee and to take possession of the property till he is himself redeemed by the mortgagor.

I concede at once that if a right is given which in any way overrides a statutory provision such a right cannot possibly be a record of custom. The question is whether this particular right was in any way in contraventionof Regulation XVII of 1806 which was in force at the time when this *wajib-ul-arz* was prepared. I am unable to say that such a right had necessarily the effect of overriding the provisions of that Regulation. Under that Regulation the mortgagee was bound to submit to the property being taken away from him and the foreclosure prevented, if the amount due on the mortgage was deposited within the year of grace by the mortgagor or his legal representatives. I do not think that a custom which gave the co-sharers a right to intervene and take the place of the mortgagor and prevent foreclosure can necessarily be said to be absurd, unreasonable or illegal. Under the present law, when property is transferred to a stranger under a registered document, the vendee obtains absolute rights under the provisions of the Transfer of Property Act. Can it be said that the right of a pre-emptor who comes into Court to claim pre-emption necessarily implies

an overriding of the provisions of the Transfer of Property Act? All that the co-sharers would be entitled to do would be to obtain possession of the property and remain in possession of it as the mortgagee would have done if no proceedings for foreclosure had been taken.

In order therefore to see whether such a right could not possibly be the basis of a custom and could not possibly have been recognized by a Court of law, we have to see whether in earlier cases such a right was ever referred to or assumed. I may here point out that in the case of *Ashik Ali* v. *Mathura Kandu* (4), two learned Judges of this Court remarked that there might be a right under which co-sharers would be able to enforce pre-emption either immediately upon the execution of the mortgage, or by redemption during the year of grace after issue of the notice of foreclosure, or after the sale became absolute. The *wajib-ul-arz* which was before the Full Bench in the case of *Majidan* v. *Hayatan* (2) also clearly contained a similar provision for pre-mortgage or redemption during the year of grace. The learned Judges who disposed of that case certainly expressed the view that there was nothing in that clause which showed necessarily that the record was one of contract and not of custom, and they pointed out that the paragraph referred to a practice which prevailed as to the redemption of mortgages by the sharer or the co-sharers and as to pre-emption in the case of conditional sales. Then, again, in the case of *Gaya Bharthi* v. *Lakhnath Rai* (5), another Full Bench case, three learned Judges of this Court at least assumed that there was a right in co-sharers to claim pre-emption at two stages, *firstly*, when the mortgage by conditional sale was executed, and *secondly*, after a suit for foreclosure had been instituted but before a decree for foreclosure had been actually passed. I have no doubt in my mind that if one were to search the old reports many more cases may be found. When therefore we have an expression of opinion by at least six learned Judges of this Court, who were well familiar with the customary law of pre-emption, and find that they assumed if not recognized, the possibility of the enforcement of such a right, can it be said that such a right is so absurd or illegal as cannot possibly be the basis of a custom? If, therefore, there had been nothing further in the clause but only this provision, I would not have been prepared to hold that the record is necessarily one of contract.

There is, however, a further condition in the same clause under which the right of pre-emption can be enforced in favour of the co-sharers *at a fixed price*. Such a condition in my opinion is certainly absurd and cannot be the result of a growth of custom. If this condition were to be enforced the consequences would be startling. A co-sharer at all future times would be bound to offer for the property a fixed price, regardless of the market value of the property, to the other co-sharers. He would be forced to submit to transfer it to co-sharers at a very inadequate price although purchasers for higher value were available. It would also follow that even if a stranger did actually pay a fancy price or even the market price the co-sharers would be entitled to take the property from him on payment of not the price he paid, but a price calculated at the smaller fixed rate. This, in my opinion, would place an unreasonable restraint on a co-sharer's power of alienation, and could not be enforced by a Court of law. As this condition is inseparably connected with the alleged custom of pre-emption, I am of opinion, that there can be no presumption that the clause was a record of custom. I also would therefore allow this appeal, set aside the order of the lower appellate Court and restore that of the Court of first instance.

By the Court:—We allow this appeal, set aside the order of remand and restore the decree of the Court of first instance with costs to the defendant throughout.

Appeal allowed.

(4) (1883) 5 All. 187.
(5) (1898) 20 All. 103 (F.B.).

---

* **1924 Allahabad 324.**

(FULL BENCH.)

PIGGOTT, LINDSAY AND SULAIMAN, JJ.

Alkhu Rai and others—Appellants

v.

Lachhman Upadhiya—Respondent.

S. A. No. 1507 of 1921, decided on 17th December, 1923, from the decree of District Judge, Ghazipur, dated 25th May, 1921.

(a) *Deed—Construction of identical document under identical circumstances only is useful as guide.*

Any ruling as to the interpretation of a document can only be applied in its entirety to a document absolutely identical in language and in a case the general circumstances of which are substantially the same. Where these conditions are not satisfied a party relying upon previous rulings of the Court and putting them forward as guides to the correct interpretation of the particular document on which the case under appeal actually turns can do nothing more than ask the Court to take into consideration the general principles which have been applied by other Hon'ble Judges in similar cases and to derive from them whatever assistance it can towards arriving at a correct conclusion. [P. 325, C. 2.]

(b) Wajib-ul-arz — *Pre-emption—Foreclosure of mortgage is not sale.*

Where the record of the custom in the *wajib-ul-arz* is in the following terms :

"If one of the co-sharers desires to make a mortgage, or a mortgage by conditional sale or an out-and-out-sale, he must do so on the same adequate price as may be offered by other parties, in the first instance, to a near co-sharer in the same *patti* ; next to other co-sharers in the *patti* ; if they will not take, then to a near co-sharer in another *patti* ; next, to any co-sharer in the mahal and finally to a stranger." *Held*, the plaintiffs' cause of action accrued to them on the date of the mortgage and the subsequent foreclosure of that mortgage was not a transfer by a co-sharer by way of sale within the meaning of the custom as recorded in the *wajib-ul-arz*. The terms of the *wajib-ul-arz* contemplate a voluntary sale and not a transfer which is effected by compulsion of law. (3 All. 610, *Dist.*) [P. 325, C. 1 and P. 327, Cs. 1 and 2.]

M. L. Agarwala and *U. S. Bajpai*—for Appellants.

Haribans Sahai and *Iqbal Ahmad*—for Respondents.

Piggott, J. :—The facts out of which this appeal arises are sufficiently stated in the referring order. The essential point for determination is whether, under a custom described in the *wajib-ul-arz*, the plaintiffs-appellants have or have not a right of pre-emption in respect of a foreclosure decree which was made absolute on the 12th April 1919. The said decree was passed on a mortgage by conditional sale executed in the year 1861. The record of the custom in the *wajib-ul-arz* is in the following terms :—

"If one of the co-sharers desires to make a mortgage, or a mortgage by conditional sale, or an out-and-out-sale, he must do so on the same adequate price as may be offered by other parties, in the first instance to a near co-sharer in the same *patti*, next to other co-sharers in the *patti*, if they will not take, then to a near co-sharer in another *patti* : next to any co-sharer in the *mahal*, and finally to a stranger".

If we were called upon to interpret these words, apart altogether from any decisions which have been pronounced or reported in other cases, I cannot say that I should feel any serious difficulty as to their meaning. I understand them to mean that a right of pre-emption is violated, and a cause of action given to the persons possessing pre-emptive rights in the order specified above, in the event of an ordinary mortgage in favour of a stranger, or of a mortgage by conditional sale in favour of a stranger, or of an out-and-out sale to a stranger. In each of these cases the violation of the right would occur, and the cause of action would accrue, from the date of the ordinary mortgage, the mortgage by conditional sale and the out-and-out sale respectively. I cannot read anything into the provisions of the *wajib-ul-arz*, as quoted above, which would warrant the conclusion that, in the case of a mortgage by conditional sale, a pre-emptor whose rights were violated by the mortgage contract is entitled, either to claim to be placed at once in the shoes of the mortgagee, or to wait until proceedings are taken for foreclosure and then to prefer his claim to be placed, as owner of the property, in the shoes of the mortgagee, after the latter has enforced his rights to foreclosure by process of law.

It has, however, been contended that there is a great deal of case-law which requires to be considered before a correct interpretation can be placed upon the provisions of this *wajib-ul-arz*. With reference to this argument I would take this general point, that any ruling as to the interpretation of a document can only be applied in its entirety to a document absolutely identical in language, and in a case the general circumstances of which are substantially the same. Where these conditions are not satisfied, an appellant, or a respondent, relying upon previous rulings of the Court and putting them forward as guides to the correct interpretation of the particular document on which the case under appeal actually turns, can do nothing more than ask the Court to take into consideration the general principles which have been applied by other Hon'ble Judges in similar cases and to derive from them whatever assistance it can, towards arriving at a correct conclusion.

Looking at the matter from this point of view, I think that, of all the cases which have been cited to us, the one most

immediately in point is that of *Sundar Kaur* v. *Ram Ghulam* (1). The learned Judges who decided that case were dealing with a *wajib-ul-arz* the terms of which were so far analogous to those of the document we are seeking to interpret, in that a right of pre-emption was given in respect of transfers either by mortgage or by sale. Furthermore, in the decision of that case, reference is made to the previous Full Bench ruling of this Court which has been most strongly relied upon by the plaintiff in appeal before us. This is the case of *Alu Prasad* v. *Sukhan* (2). The point taken by Richards, C. J., in discussing this older ruling is, in substance, the one which I have myself ventured to make. He treats the question as being essentially one of the interpretation of a document, and he holds that he is not bound to put a particular interpretation upon a particular document because observations made by the learned Judges of the Court, in a case in which the general circumstances were not the same, and the document to be interpreted was not in identical terms, serve to suggest that, if the said Judges had to decide the case then before the Court, they might have interpreted the document under consideration in a particular way. The decision actually arrived at in *Sundar Kuar* v. *Ram Ghulam* and others supports the view that I should myself be disposed to take of the *wajib-ul-arz* now before us

It has been admitted in argument that this view in accordance, generally, with the principles of interpretation applied to evidence of custom in cases which have come before this Court on appeal since the constitution of the pre-emption Bench. On behalf of the appellants reliance is placed on certain older cases of this Court, and in particular the argument is preferred that the pre-emption Bench has in effect overruled older Full Bench decisions and has applied to the decision of cases before it principles inconsistent with those affirmed by their Lordships of the Privy Council in *Batul Begam* v. *Mansur Ali Khan* (3). The point of their Lordships' decision in that case is to be found in the remarks at the close of the judgment, wherein they approved of the decision of this Court in *Ali Abbas* v. *Kalka* (4). Now, with regard to this case, as also to the one which went before the Privy Council, it seems to me important to notice that these were cases in which a claim for pre-emption was dismissed, and was dismissed upon a finding of limitation. The actual decision therefore in each case amounted to no more than this, that a cause of action had accrued to the pre-emptor at least from the date on which something had happened amounting to the foreclosure of a mortgage by conditional sale. The question whether any cause of action had or had not accrued before that date was one which it was no concern of either party in the cases then before the Court to argue. The decisions in themselves are not authority for anything more than what was actually decided. The real difficulty, so far as there is any, arises out of the older case *Alu Prasad* v. *Sukhan* (2). It is to be noted that this case was decided by a Full Bench of five Judges and that there was very considerable difference of opinion. The case was one in which there had been a transfer by way of mortgage by conditional sale, and this had been followed by foreclosure proceedings under the old Regulation in force before the passing of the Transfer of Property Act, No. IV of 1882. According to the head-note, the five Judges who heard the appeal were divided into three distinct categories of opinion. Pearson, J., held that a cause of action for a pre-emption suit had arisen from the date of the mortgage by conditional sale, and that no subsequent cause of action arose out of the foreclosure proceedings. Stuart, C. J., held that no cause of action accrued to the plaintiff on the date of the mortgage, but that he had a cause of action from the date of the foreclosure proceedings. The remaining three Judges constituting the Bench were of opinion that causes of action accrued to the plaintiff pre-emptor on both dates, but that he had a right to bring a suit on the strength of the later of the two causes of action, even though he had ignored the first. Personally, after examining the judgment delivered by Straight, J., in detail, I should feel disposed to question the correctness of the head-note. I very much doubt if Straight, J., did not intend to hold that on the terms of the particular custom which the Court held to be proved in that case, the plaintiff pre-emptor could not have brought a claim to pre-empt on the mortgage,

(1) (1918) 40 All. 626.
(2) (1881) 3 All. 610 (F.B.).
(3) (1902) 24 All. 17 (P.C.).
(4) (1892) 14 All. 405 (F.B.).

and if so, he was in agreement with the Chief Justice on this point. At any rate, the learned Judges were very much divided, as has above been shown. They were dealing with a record-of-rights the wording of which was certainly not identical with that of the *wajib-ul-arz* which we are considering. Moreover, they were dealing with foreclosure proceedings which had taken place under the old Regulation. In my opinion, therefore, the ruling in this case cannot be quoted as in itself determining any specific point of law in such a manner as to bind subsequent decisions. If we are asked to consider the opinions expressed by the learned Judges who then constituted the Full Bench of this Court, we are certainly bound to receive with all due respect the views upon questions of law expressed by those Judges; but so far as I am personally concerned, I can only say the line of reasoning followed by Pearson, J., in his dissentient judgment appeals more strongly to my mind than anything else which I can find in the report of the case.

To conclude, therefore, I am of opinion that, if the question now before us is to be determined apart altogether from previous authorities of the Court, then this appeal ought to fail, because upon a plain and straightforward construction of the terms of the *wajib-ul-arz* the plaintiffs' cause of action accrued to them on the date of the mortgage, and the subsequent foreclosure of that mortgage was not a transfer by a co-sharer by way of sale within the meaning of the custom as recorded in the *wajib-ul-arz*. On the question of authority, it seems to me that the balance of authority is also on the whole in favour of the same view, and that the decision of the Full Bench in *Alu Prasad* v. *Sukhan* (2) may fairly be distinguished, and should not be regarded as binding us to put upon the *wajib-ul-arz* in this particular case the interpretation contended for by the appellants. I would therefore dismiss this appeal with costs, including fees on the higher scale.

Lindsay, J.:—I agree.

Sulaiman, J.:—I agree that every case of pre-emption must be judged on its own merits. In such a case it is not sufficient for the plaintiff pre-emptor merely to prove that there is a general custom of pre-emption prevailing in the village. It is incumbent on him to establish such particulars of that custom as would entitle him to a decree. In the present case the plaintiffs came into Court on the allegation that there was a custom in the village under which, if a mortgage by conditional sale was foreclosed by a decree of the Civil Court, the co-sharers had a right to intervene and take the property by pre-emption from the succeseful plaintiff. In order to establish such a custom the sole evidence produced consisted of an entry in an old *wajib-ul-arz* which has been recited in full by my learned brother. Independently of all authorities, I would agree that the only interpretation which can be put on the terms of that *wajib-ul-arz* would be to hold that that cannot apply to a case like the present. The plaintiffs claimed that they had a cause of action to bring the suit for pre-emption on the date when the foreclosure decree was passed. It cannot be said that on that date the defendant-vendor was wishing to make a mortgage by conditional sale or an absolute sale in favour of the old mortgagee. I am of opinion that the terms of the *wajib ul-arz* as they stand contemplate a voluntary sale and not a transfer which is effected by compulsion of law.

The learned Vakil for the plaintiffs has relied on a number of earlier cases of this Court including those of *Alu Prasad* v. *Sukhan* (1), *Ali Abbas* v. *Kalka Prasad* (4), and *Batul Begam* v. *Mansur Ali Khan* (5), all of which were Full Bench cases, and also, on the Privy Council case of *Batul Begam* v. *Mansur Ali Khan* (3). The argument before us has been that in view of the expression of opinion in these Full Bench cases the word "sale" in the *wajib-ul-arz* should be given a wide meaning so as to include the extinguishment of the right of the mortgagor by foreclosure. The learned Vakil does not say that the present *wajib-ul-arz* should be interpreted in the light of the interpretation put upon the *wajib-ul-arz* in the earlier cases. What he has really contended is that the word "sale" should be taken in its general and wider meaning and not in its narrow meaning as defined by the Transfer of Property Act.

If the present case had arisen under the old Regulations and had been governed

(5) (1898) 20 All. 315 (F.B.).

by those Regulations, I am bound to say that on the authorities cited before us I would have felt compelled to hold that the word "sale" must be taken in its general meaning so as to include the extinguishment of the right of redemption on foreclosure. That, however, is not the case. It is well known that before the Regulations came into force a mortgage by conditional sale used to become absolute on the expiry of the period fixed. The object of the Regulations was somewhat to protect the rights of redemption of a mortgagor, and to give him a further period of grace. It was however held by their Lordships of the Privy Council in *Alexander John Forbes* v. *Ameeroonnissa Begam* (6), that the proceedings following an application under section 7 of the old Regulations up to the order passed under section 8 of those Regulations were purely a ministerial act and not a judicial act. It was on this ground that the majority of the learned Judges in 3 All. 610 above referred to came to the conclusion that the foreclosure was the consequence of the mortgagor's failure to redeem the mortgage; that it was really the result of his own act and not on account of any intervention by the Court. Under the present law, however, suits for foreclosure are governed by the Code of Civil Procedure. The proceedings taken with regard to the foreclosure of a mortgage are proceedings in Court and the equity of redemption is extinguished by a decree of the Court. It cannot therefore be said that the right of redemption is extinguished by any act of the mortgagor himself. I am therefore of opinion that even accepting the view which was laid down in the earlier Full Bench cases, the soundness of the opinion in one of which, namely, 14 All. 405, appealed to their Lordships of the Privy Council in the case reported in 24 All. 17, those cases are distinguishable on the main ground that suits for foreclosure are now governed by statute. I am fortified in this view by the opinion expressed by the Full Bench in the case of *Gaya Bharthi* v. *Lakhnath Rai* (7) that a claim for pre-emption could not be enforced after the order absolute for foreclosure under the Transfer of Property Act had been passed.

I also would therefore dismiss the appeal.

(6) 10 Moore's Indian Appeals, page 340.
(7) (1898) 20 All. 103 (F.B.).

By the Court:—The order of the Court is that this appeal is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

---

* * **1924 Allahabad 328.**

(FULL BENCH.)

WALSH, RYVES AND MUKERJI, JJ.

Mubarak Hussain—Applicant

v.

Ahmad and others—Opposite party.

E.S.A. No. 627 of 1923, decided on 22nd February, 1924, from the decree of Sub-Judge, Muzaffarnagar.

(a) *Interpretation of statutes—Comparison with old law is permitted in case of doubt.*

Per Mookerjee, J.—Though reference to the old law is not a valid mode of interpreting new law yet in cases of doubt, old law may be referred to. [P. 335, C. 2.]

(b) *Interpretation of statutes—Purpose of enactment.*

Per Walsh, J.—Where a section or an Act is capable of two interpretations the purpose of the enactment must be looked into. [P. 336, C. 2.]

(c) *Civ. Pro. Code, S. 60.*

An agriculturist can make a valid mortgage of his house in execution of a decree in which the house may be sold. If the agriculturist fails to raise the point in the suit itself he cannot raise it in the execution.

Per Ryves, J.—A house mortgaged by the agriculturists cannot be sold in execution of a decree though the judgment-debtor may have failed to raise the point in the course of the suit.

Per Walsh, J.—A sale in execution of any decree and in enforcement of a mortgage decree are mutually exclusive and a sale under a mortgage decree is not in execution of the decree but merely in satisfaction of the decree. The word 'such' in the proviso of S. 60 removes the distinction which the word 'or' would otherwise have in the expression 'attachment or sale' which must therefore mean attachment or sale in execution of decree. S. 60 does not apply to a sale under a mortgage decree.

S. 60 applies to all decrees. Therefore it forbids the sale of a mortgaged house of an agriculturist.

Per Mookerjee, J.—S. 60 deals with sales in execution of decrees in which a previous attachment is necessary, *i.e.*, sales in execution of money decrees.

N. C. Vaish—for Appellant.

Ryves, J.:—This is a decree-holder's second appeal in execution.

The judgment-debtor mortgaged two houses to the decree-holder. In a suit on the mortgage the decree-holder obtained an *ex parte* decree under Order 34, rule 4, Civil Procedure Code, and that was made absolute under rule 6 of the same Order. The judgment-debtor so far raised no

defence. When, however, the decree-holder applied for the sale of the houses, he took objection *inter alia* that "he was a cultivator by occupation and the houses sought to be sold by auction in this case were used by him as such. The implements of husbandry were kept in it. The cattle were also tethered in it. They were not used by the objector as dwelling houses. Therefore, they should not be sold by auction according to law." This objection was disallowed by the Court executing the decree. On appeal the lower appellate Court found as follows :—

"It is clear from the evidence adduced by the appellant, and which has not been rebutted by the decree-holder-respondent, that the objector is an agriculturist and occupies both the houses as such. The finding of the lower Court that these houses are not appurtenant to the land he cultivates is clearly wrong. The irresistable conclusion from the evidence on the record is that the houses in dispute belong to an agriculturist."

Having come to this finding which, of course, is binding on us, he decided that under section 60 of Civil Procedure Code, following the ruling in 51 Indian Cases, page 553, to which I shall refer later, the houses could not be sold in execution of the mortgage decree.

The decree-holder comes here in second appeal.

In view of the fact that there are two reported decisions of this Court which are directly in conflict, the case has been referred to a Bench of three Judges.

The question before us is shortly whether section 60 (1) (*c*) of the Civil Procedure Code bars the sale in this case.

It is argued on behalf of the appellant that it does not for two reasons :—

(1) That the executing Court cannot go behind the decree which it has to execute and (2) that section 60 of the Civil Procedure Code, together with the provisos contained in it, only applies to the execution of simple money decrees.

It is a truism to say that a Court executing a decree cannot go behind it, but I think this only means that the Court executing the decree cannot vary it, but must take it as it stands. But I think it is open to the Legislature to say that certain kinds of property shall not, in any circumstances, even if so ordered, be sold in execution proceedings.

As an example, section 20 of the Agra Tenancy Act (No. II of 1901) enacts that the interest of an occupancy tenant is not transferable in execution of a decree of a Civil or Revenue Court; and it has been held by a Full Bench of this Court (of which I was a member) in *Katwari* v. *Sita Ram* (1), that an occupancy holding cannot be sold in execution of a decree even when the decree specifically directed its sale.

If the Legislature can forbid a Court to execute a decree in one instance, it seems to me it can do so in other cases; and the question which remains to be answered here is whether, as a matter of law, the Legislature has chosen to prevent an executing Court from selling the houses in this case which the decree directed to be sold.

I think myself that the ruling which I have just quoted, although it is based on the mandatory probibition set out in section 20 of the Arga Tenancy Act, in principle, covers this case also, unless, perhaps, it can be held that section 60 only refers to simple money decrees. Leaving this question aside for the present, the proviso to section 60 (1) is as follows :—

"The following particulars shall not be liable to such attachment or sale, namely :—

(*c*) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him."

It seems to me that on the findings of the lower appellate Court these two houses which the decree ordered to be sold come within the clause just quoted.

On the second question it has been argued that section 60 only applies to simple money decrees. It is said that provision is made for mortgage decrees in Order 34. This argument is based on two grounds :—

(1) Section 60 comes in that part of the Code which deals with "attachment"; and attachment is not necessary in mortgage decrees. Before property can be sold in execution of a money decree, the Court must first attach it so as to bring it within its jurisdiction, and then sell it. In a mortgage decree, the decree itself specifically directs the sale of the mortgaged property.

(1) (1921) 43 All. 547.

It seems to me, apart from all authority, that the proviso to the section is perfectly general and applies to all decrees. I think so, *firstly*, because, if it was meant to apply only to smiple money decrees, it would have been very easy for the Legislature to have said so; and in the *second* place, reading the exceptions, I think that the Legislature from motives of public policy or for other reasons which seemed good to it, but which it is unnecessary for us even to speculate about, has thought fit to prevent a Court executing a decree from selling off any of the various particulars detailed in the section.

Another argument on this point is that if clause (*c*) was held to apply to houses of an agriculturist which he has mortgaged it would be tantamount to holding that the mortgage of such houses was illegal and it would be open to the mortgagor in the suit on the mortgage to raise this objection. I do not think the mortgagor could be heard to raise any such objection; but the question is whether, if a decree is passed for the sale of such a house, the Court in execution can or cannot sell it. This question, it seems to me, "does not fall to arise" (to adopt a dictum in a recent ruling of the Privy Council) until execution proceedings have been taken.

As a matter of fact, in these provinces an agriculturist, that is to say, a cultivator in an agricultural village who cultivates plots of land within the "mauza" under a lease from the zamindar is given a house, then unoccupied, or a site in that part of the "mauza" which is set apart for the tenants and other members of the village community to reside in, (called the *abadi*) and if no house is available on these sites, he is allowed to build houses for himself to reside in, and for his cattle employed in cultivation, and for storing his implements of agriculture. As a general rule, (except in exceptional cases, where a custom to the contrary prevails) such a tenant cannot transfer such houses at all. All that he can transfer is the materials with which they are built. The site is not his to transfer; it belongs to the zamindar. If such an agriculturist mortgaged his houses and the mortgagee obtains a decree for the sale of the house, even if the mortgagor was estopped from objecting to the sale after a decree for its sale had been passed, the zamindar certainly could intervene and prevent the site of the house being sold. It seems to me that the Legislature has gone further and has chosen to forbid the sale of such houses or their materials in execution even of a mortgage decree.

Clause (*b*) of the same section prevents the tools of an artizan being sold in execution of a dcree. This does not mean that an artizan cannot raise money on the security or pledge of his tools. It simply means, I think, that if the creditor has to sue and gets a decree against an artizan, he cannot in execution of that decree get such tools sold by the Court, even if the decree ordered the sale of the tools. I am fortified in this view, (namely, that the bar in execution in no way affects the validity or legality of the contract), by section 61, which immediately follows and is in the same division of the Act as section 60. By that section the Local Government with the previous sanction of the Governor-General in Council may declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purposes mentioned therein shall be exempted from liability to attachment or sale in execution of a decree. It is a common practice in these provinces for agriculturists to borrow money for the purposes of agriculture on the security of the crop about to be raised. These contracts have always been held, so far as I know, to be perfectly legal, and in execution of a decree, the crop can be attached and sold; but under this section, at any time the Local Government may prevent by notification, the sale of such a crop in execution of a decree. This must happen after the contract had been made. It obviously does not make the contract illegal. All it does is to prevent the decree-holder when he gets his decree, from enforcing it by the sale of the crop hypothecated. He may enforce it otherwise if he can. It seems to me, therefore, that there is no force in this argument and I think, reading the Act as it stands, that the decision of the Court below was right and that the houses mortgaged in this suit cannot be sold in execution of the mortgage decree, not because the mortgage of the houses was illegal or that the mortgagor could have pleaded that no decree for sale should be passed, but because the Legislature forbids absolutely such houses to be sold by a Court in execution.

I now come to discuss the authorities. The first case on the point is, *Bhagwandas* v. *Hathibhai* (2). It was held in that case that section 266 of the old Code of Civil Procedure, then in force, which is similar to the present Code, does not prohibit the sale of property specifically mortgaged albeit that the property be materials of a house belonging to or occupied by an agriculturist. The judgment is a very short one and the only reason given for the decision is contained in these words:—

"We are of opinion that the sale of the house, under these circumstances (namely, that the decree directed that the debt should be recovered from the mortgaged property) should be made, for we cannot suppose that it was the intention of section 266 of Act X of 1877 to prohibit the sale of property specifically mortgaged."

That decision was reported in 1879 and, so far as I can find, it has never been referred to since in any reported decision, except in the case of *Tota Ram* v. *Chain Sukh* (3). In that case, Edge, C. J., said, distinguishing this ruling, "It will be time enough to consider that case when I am compelled to do so." And Mahmood, J., expressed his concurrence. I do not think this case is very helpful.

The next case which I have been able to discover is *Janki Das* v. *Sandal* (4). That case was similar to the case before us in its facts. There too, houses of an agriculturist were mortgaged and no exception was taken by the mortgagor in the suit on the mortgage that the houses were not capable of transfer. It was only when the decree was put into execution that the judgment-debtor urged, for the first time, that he, being an agriculturist, the houses were not liable to attachment and sale. The learned Judges (Sir George Knox and Mr. Justice Karamat Husain) held:

"We have been referred to no authority which lays down that houses of agriculturists are property which cannot by law be transferred. *Section* 60 *of the Code of Civil Procedure, upon which reliance is placed refers to houses of agriculturists and enacts that in execution of a money-decree such houses are as a rule not capable of attachment or sale.*" It seems to me that in this sentence which I have italicized the learned Judges begged the question before us when they say that section 60 enacts that in execution of a money decree such houses cannot be sold, and this is the *ratio decidendi* of the case.

The next case is *Ram Dial* v. *Narpat Singh* (5). In that case an occupancy tenant mortgaged a grove, which was on his occupancy holding, and a house appurtenant to such holding. It was there held by Sir John Stanley, C.J. and Banerji, J., that under section 20 (2) of the Agra Tenancy Act, 1901, and section 266 of the Code of Civil Procedure of 1882, respectively, neither the grove nor the house could be sold in execution of a decree on the mortgage.

The next case to which we need refer is the Full Bench case of *Bhola Nath* v. *Kishori* (6), where the same question again came up for decision. Sir Henry Richards, C. J. and Mr. Justice Tudball held that section 60 of the Code of Civil Procedure did not operate to bar the sale of a house belonging to an agriculturist in execution of a decree on a mortgage of the same if such house is not an appurtenance of the mortgagor's holding which he is prohibited by law from mortgaging or transferring. Mr. Justice Banerji dissented. I have some doubt how far this case really applies, having regard to the observations of the Chief Justice.

Sir Henry Richards says: "The argument on behalf of the respondents is that by virtue of the proviso (to section 60) the house of the defendants cannot be sold and that, inasmuch as the house cannot be sold in execution of the decree, no mortgage decree ought to be made. On the other hand the appellant argues that section 60 does not apply to mortgage decrees at all, that it deals entirely with attachment and sale in respect of simple money decrees."

He goes on to hold:

Prima facie a man is entitled to mortgage his property if he pleases; and if he can make a valid mortgage, the mortgagee is entitled to a mortgage decree entitling him to sell the property.

With great respect it seems to me that this argument does not entirely meet the case. It does not answer the objection that in spite of a contract, the Legislature has ruled that the contract shall not be enforced by sale of the mortgaged house.

(2) (1879) 4 Bom. 95.
(3) (1888) A.W.N. 154.
(4) (1911) 9 I.C. 825.
(5) (1911) 33 All. 136.
(6) (1912) 34 All. 25.

I also cannot agree with the rest of the judgment in which it is held that section 60 applies only to the execution of simple money decrees. It seems to me that the dissentient judgment of Mr. Justice Banerji is unanswerable and I wish to adopt it in its entirety as the basis of my decision in this case. As he says when dealing with the point as to whether section 60 applies only to simple money decrees, "At the commencement of the section the word 'and' is used and in the proviso we find the word 'or'. The proviso, as I understand it, forbids both attachment and sale, that is to say, where an attachment must precede a sale, it forbids attachment as well as sale and where it is not necessary that an attachment should be a preliminary step to a sale, it forbids sale . . . . . The object of the legislature is manifest. That object is that certain classes of debtors should be protected against their own improvidence. There can be no doubt that in the case of a simple decree for money the dwelling house occupied by an agriculturist cannot be sold. The policy of the law is that he should not be deprived of his place of residence by a process of Court. I fail to see why, if an unsecured creditor of the agriculturist cannot proceed against the debtor's dwelling house, a secured creditor should be allowed to do so. The policy of the law equally applies to both the cases."

The last case to which reference need be made is the case of *Niadar Singh* v. *Sabit Khan* (7). This is the case on which the lower Court based its decision.

There the question was whether the house of an agriculturist, which has been found to be appurtenant to his agricultural holding, is liable to sale in execution of a decree obtained upon a mortgage of the house made by the agriculturist. The appeal came first before Sir George Knox sitting alone, and he remanded it for finding as to whether the house was in the occupation of an agriculturist and on the finding being returned in the affirmative, he dismissed the appeal holding that section 60 (*c*) barred the sale in execution. From that decision there was an appeal under the Letters Patent which was heard by Sir P. C. Banerji and Mr. Justice Rafique and they, after referring to the decision already quoted in *Bhola Nath* v. *Musammat Kishori* (6), held that the provisions of section 60 (*c*) applied and dismissed the appeal. It seems to me, therefore, that the weight of authority, in this Court at any rate, is in favour of the view taken by the Court below.

The provisions of section 60 (*c*) of the present Code were certainly in existence in 1877—before the Transfer of Property Act came into being: see Act X of 1877, section 266. All that was done when the present Code was passed was to transfer the rules governing suits on mortgages from the Transfer of Property Act to the Code; that is to say, the sections relating to suits on mortgages (where such suits were necessary, *i.e.*, subject to mortgages included in section 69) which were contained in section 85 and following sections, (being really rules of procedure), were cut out of the Transfer of Property Act, and were reproduced, with such modifications and amendments as seemed then necessary, and consolidated in Order 34. The law has not been materially altered, the only real alteration has been in the volume of the statute law, in which it is to be found, *i.e.*, in Act No. V of 1908, instead of in Act No. IV of 1882. It seems to me, therefore, that this reshuffling of the sections in the statutes does not help interpreting the meaning of the old section 266 of Act X of 1877 which is still in force.

I much regret I cannot agree with either of my learned brothers. I would, therefore, dismiss the appeal.

Mukerji, J.:—This case has been referred to a Bench of three Judges, because of a conflict of opinion existing between two cases, each decided by a Bench of two Judges. These cases are:—*Janki Das* v. *Sandal* (4) and *Niadar Singh* v. *Sabit Khan* (7). The question formulated for decision has not been put down in the form of a question. But it may be put down thus:—"Whether a judgment-debtor can raise the plea, in the execution department that he is an agriculturist and the houses occupied by him cannot be sold having regard to the provisions of section 60 of the Civil Procedure Code although the decree is one of mortgage and orders specifically the sale of such houses?"

In the referring order, there is an inaccuracy. It has been stated that the judgment-debtor also pleaded that his houses were appurtenant to his holding. As a matter of fact, he did not raise any such

(7) (1919) 51 I.C. 553.

plea in his objection. He was unsuccessful in the Court of first instance, and he filed an appeal. In the grounds of appeal too he did not say that the houses were an appurtenance to his holding. The expression, *viz.*, "the houses were appurtenant to the holding" appears in the judgments of the lower Courts and was probably due to a confusion of ideas. When a landholder sues a tenant for his ejectment from his dwelling house in the village in which he cultivates lands the tenant often takes the plea that the house is an appurtenance to the holding and, so long as he cultivates lands in the village, he cannot be ejected. In such cases alone, the question arises whether the house is or is not an appurtenance to the holding. It will be noticed that in section 60 of the Civil Procedure Code, clause (*c*), the property exempted is 'the houses and other buildings; . . . . . belonging to an agriculturist and occupied by him.' Nothing is said about the house or the building being an appurtenance of his holding.

Referring to the Tenancy Act, it will be seen that a holding is a parcel or parcels of land held for agricultural purposes. The prohibition is against the sale of such lands. A house or building is not land let for an agricultural purpose and cannot form a holding. Therefore, the question of its transferability or otherwise must be determined with reference only to section 60 of the Civil Procedure Code.

To go back to the question for decision. This question resolves itself into two portions. The *first* question is "whether, the Court executing the decree can go behind the express orders of the decree, by which the property has been ordered to be sold?" The *second* question is "whether, on a proper construction of section 60 of the Civil Procedure Code, the sale of an agriculturist's house (the expression is used for the sake of brevity), not in execution of a simple money decree, in which a previous attachment is necessary, but in execution of a mortgage decree, which has been passed on foot of a contract of mortgage specifically making the property a security for the debt, is prohibited?"

On the first question. The decree passed may be a right decree or it may be a wrong decree. A decree may be one that ignores the rules of law; yet, so long as it stands unreversed in appeal or revision, it is a good and binding decree between the parties, and the Court executing it cannot go behind its terms and say that the decree should not have been passed and the Court will not execute it as it stands. This decree may be one passed on contest or may have been passed *ex parte*, without the defendant appearing to show that the claim of the plaintiff was one that could not at all succeed. In the latter case, the defendant cannot come and say in the execution department that he will show that the decree is a wrong one. He will be estopped on foot of the judgment from raising any such contention and this will be so although the question sought to be raised in the execution department was never raised and decided before the decree was made. Take the case of a joint Hindu family. A father makes a mortgage without any legal necessity. In the suit against the father and the sons, the latter do not take any exception to the mortgage and a decree for sale is made *ex parte*. When the property is brought to sale in execution of the decree, the sons will not be allowed to show that the mortgage was unauthorised and could not be enforced against the property. Thus the facts which would vitiate the mortgage, although they may exist without any doubt, will not be allowed to be brought before the Court. Similarly, a suit may be on the face of the plaint barred by limitation. But if a Court overlooks this fact, and makes an *ex parte* decree, the defendant cannot, in the execution department, show that such was the case. That an *ex parte* decree may operate as *res judicata* was held in *Ganga Bishen* v. *Mehar Ilahi* (8). In the present case, the question whether the house ordered to be sold by the decree is or is not the property of an agriculturist is one of fact and has to be proved before the Court, by evidence, *before the Court can accept it.* Assuming that such a property is not saleable in execution of a decree, the facts necessary to be established were never alleged before the Court *making* the decree, much less were they proved. If those facts had been proved, the Court could have and ought to have (according to our assumption) said that the property could not be sold in execution of a decree and that it was not going to make a decree which could have no force in law. But these facts were never brought to the notice

(8) (1914) 12 A.L.J. 1011.

of the Court, the nature of the property was not established before it, and in ignorance of the facts it orders the property to be sold. Why should then, in this particular case, the judgment-debtor be allowed to show *by adducing evidence* that the nature of the property was such that it could not be sold in execution of a decree?

This question was specifically raised in this Court in the case of *Katwari* v. *Sitaram* (1) (which was a case under the Agra Tenancy Act and in which the fact involved, *i.e.*, the nature of the property to be sold was an admitted fact, being recorded in the sale-deed), and the answer given was that it was the duty of the Court to obey the law and follow its directions. But the law can be applied only when the proper facts are allowed to be brought before the Court. If in the case of a mortgage of a joint family property, (*in the case given as illustration*) the sons may not show the nature of the property in the execution department, the respondent too, in this case, cannot adduce evidence to show the nature of the property. I would, therefore, hold that, in the execution department, this objection cannot be raised, in the teeth of the mortgage decree.

Now on the second question. It must be conceded that there is no rule of law which declares that the transfer (otherwise than in execution of a decree, as is said to be embodied in the section under discussion) of an agriculturist's house to be illegal. Under section 6 of the Transfer of Property Act, all properties except those enumerated there and those the transfer of which is expressly prohibited by law are declared to be transferable. For example, if there be an agreement between an agriculturist and a third person for the sale of the former's house and if the latter should sue for the specific performance of the contract the Courts would be bound to recognise the contract and to enforce it. As the result of the enforcement of the contract, the promisee will get possession through the Court, for there is no rule of law which lays down that delivery of possession over an agriculturist's house in execution of a decree is prohibited. If then the sale by private contract be not prohibited and may be even specifically enforced in a Court of law, we have to find out if a lesser contract, *viz.*, that of mortgage, is prohibited and cannot be specifically enforced. For such a proposition of law, there must be a very clear authority and any rule of law that may only by implication be read as leading to this conclusion cannot be accepted as laying down such an anomaly.

The question then is: "Does section 60 of the Civil Procedure Code contain any such clear rule as would lead to the conclusion that a property otherwise transferable may not be subjected to a transfer even with the consent of the owner of the property simply because the agency of the Court has to be employed?"

Section 60 appears under the head "attachment." If we refer to section 51 of the Code, we shall see that several modes of execution are enumerated there. These are, briefly, (*a*) delivery of possession, (*b*) attachment and sale or sale without attachment, (*c*) arrest of the judgment-debtor and two other modes. Sections 55 to 64 come under the head "attachment" and sections 65 to 67 come under the head "sale". Thus section 60 comes under the head of attachment. It does not require the quoting of any authority to maintain the proposition that no property may be sold in execution of a simple money decree unless the same has been attached previously, so as to bring the same within the control as it were of the Court. In the case of a sale under a mortgage decree, no attachment is necessary for the decree, the order of the Court itself, having directed that that property is to be sold. In the execution of a decree for money every attachment is not followed by sale. For example, when a money decree is attached in the execution of another money decree, the attached decree is not sold, but the attached decree is executed and the money realised is applied to the satisfaction of the attaching decree. Similarly, when the pay of a Government servant is attached there is no sale. Only the officer charged with the disbursement of the pay is ordered to deduct a sum month by month and to pay the same towards the satisfaction of the decree. Thus a sale may or may not follow an attachment.

Bearing these rules in our mind, let us now read section 60 of the Code. I have already said it appears under the head 'attachment.' *There is another head bearing the title of 'sale.'* Under the circumstances, there is *no reason* to think that, in dealing with the subject of 'attachment' the writer had in his mind the cases of sales that *are not* preceded by attachment. Of course, if

the language employed should leave *no other alternative possible*, that is another matter. Section 60, in sub-section (1), lays down, in effect, that all properties over which the judgment-debtor has a disposing power will be liable to attachment *and* sale. I have already pointed out that all properties are not sold in execution of a decree although they may have been subjected to an attachment. The words 'attachment and sale,' therefore, can only mean, 'attachment and sale *where the sale is necessary after the attachment.*' Otherwise there will be no consistency in the rules. That this is the meaning to be attached to the words 'attachment and sale' is clear from the proviso that follows the sub-section (1). It provides against '*such* attachment or sale' in the case of certain 'particulars.' The use of the word 'such' is important. It, in my opinion, qualifies both the words 'attachment' and 'sale.' The proviso will thus read like this: "Provided that, the following particulars shall not be liable to such *attachment or, where necessary*, such sale *as has been mentioned above in the main section.*" To my mind it is impossible to read the word 'sale' in the proviso as meaning 'sale with or without previous attachment,' without doing violence to the language of the section. Something might have been said in support of this reading, if the word 'such' had not been there. There is no possible warrant for confining the adjective 'such' to the word 'attachment' alone, for both the words 'attachment' and 'sale' occur in the main section. Among the particulars mentioned in the proviso there are items which are never sold after attachment, see, for example, clause (*i*), dealing with the salary of a public officer. In this case, only an attachment is necessary and no sale. Hence in the proviso, the word 'or' has been rightly used. One essential difference in principle between a sale held after attachment and a sale held in pursuance of a contract for sale is this that, in the former case, the sale is held against the wishes of the debtor. The Court is asked to raise money by the best possible means, and it has been vested with the authority to say that it would not act heartlessly and, in order to make the debtor pay, it would not make him absolutely destitute. In the case of a mortgage or hypothecation the debtor *has agreed* that a particular property might be taken as the security; so, the execution of the decree is held *with his consent as it were*. There is, therefore, no reason to suppose that a rule of law that talks of attachment and sale in the same breath as it were was really intended to cover a case of a sale with the consent of the debtor.

It is not always a valid mode of reading the new law, to compare it with the old one. Still in cases of doubt the old rule may be looked into. In the old Code also, the language used is the same as in the new Code. The old section is 266 and it, like the new section 60, appears under the head of attachment. The head is "F.—Of attachment of property." Sections 266 to 285 deal with cases and modes of attachment. The next head is "G.—Of sale and delivery of property."—This head 'G' is divided into three sub-heads. Sub-head (*a*) deals with 'General rules' and consists of sections 286 to 295. Sub-head (*b*) deals with 'Rules as to moveable property' and consists of sections 296 to 303. Sub-head (*c*) deals with 'Rules as to immoveable property' and consists of sections 304 to 327. It will thus be seen that, under the old Code, the rules as to the sale of property, moveable and immoveable, were distinctly kept separate from the rules as to attachment and yet in the general section, about attachment (section 266) the same language was used as in the case of section 60 of the new Code. The new Code having been split up into two portions, fewer sections appear in the body of the Code under the heads "Attachment, etc," than in the older Code. The inference is then clear, *viz.*, the rules in section 60 deal with sales held in execution of decrees in which a previous attachment is necessay, *i.e.*, to sales held in execution of simple money decrees.

I will now consider the authorities. In *Bhagwandas* v. *Hathibhai* (2), it was held that the rule as to attachment and consequent sale did not apply to a sale held in pursuance of a mortgage decree. This was in 1879, but the language of the law was the same in the Code of 1877 as in the Code of 1882. In the case of *Ramdayal* v. *Narpat* (5), Stanley, C.J., and Banerji, J., took the view that even where a house of an agriculturist was mortgaged, it could not be ordered to be sold, in view of the provisions of section 269 of the old Code and section 60 of the new one. It will be noticed that one of the grounds for the actual decision of the case was that the mortgagor was a tenant and had mortgaged not only his

house but also his holding, and the house might be *looked upon as an appurtenance to the holding*. The decision cannot, therefore, be looked upon as given solely on a consideration of the law as contained in the Civil Procedure Code. There is one more point to be noticed. The point was decided in the suit itself, and it is no authority for the proposition that the point may be raised *even after a decree for sale had been made*.

In the case of *Bhola Nath* v. *Kishori* (6) Richards, C. J., and Tudball, J., held very clearly that section 60 of the Civil Procedure Code applied only to the case of an execution of a simple money decree. Banerji, J., dissented and did not think it necessary to change his opinion expressed in the case *Ram Dayal* v. *Narpat* (5). I have given my reasons for holding the opinion that I have expressed, and I do not propose discussing the opinion given by the learned Judges in the several cases. The arguments are clear on both sides. The only question is which arguments appeal to a particular Judge. I will draw attention to the fact that in this case also the question rose before the decree and not after it had been made.

In *Salamat* v. *Lukkhi* (9), it was held that although a right to an allowance might not be attachable in execution of a simple money decree, having regard to the provisions of section 266 of the Civil Procedure Code, it did not lie in the mouth of the judgment-debtor, who had mortgaged the same, to urge that it could not be sold.

I have not been able to lay my hand over any other cases bearing directly on the point under consideration. The two cases, which led to this reference took opposite views. The case of *Janki Dass* v. *Sandal* (4), was decided by Knox and Karamat Husain, JJ. The case of *Niadar* v. *Sabit*, (7) was decided by Banerji and Rafique, JJ., who upheld Knox, J. It will thus be seen that the opinion in this Court is very much divided. Stanley, C. J. and Benerji and Rafique, JJ., took the view opposed to mine, and Richards, C. J. and Tudball and Karamat Husain, JJ., took the same view as taken by me. Knox, J., did not always stick to his view. But all this is on the second point.

The case of *Katwari* v. *Sitaram* (1) already referred to was decided on an interpretation of section 20 of the Agra Tenancy Act and is not directly relevant on the question before us.

I am accordingly of opinion that an agriculturist may make a valid mortgage of his house, there being nothing in section 60 of the Civil Procedure Code to the contrary, and that after a decree for the sale of it has been made on foot of a mortgage, it may be sold in execution of the decree and the judgment-debtor is not entitled to raise the point in the execution department.

Walsh, J.:—Two questions are involved in this reference. The first is: Whethre the exemptions from attachment and sale in execution of a decree contained in the proviso to section 60 of the Code apply to a mortgagee's decree for sale.

I have had the advantage of studying the judgments of my two brothers. They fully cover the ground and it is not necessary to do so again. They differ fundamentally, and each judgment appears on the face of it to be unanswerable.

On the one hand, the section distinctly prohibits the sale of this property in execution of a decree. On the other hand, as Mr. Justice Mukerji's judgment shows, there is much in the section which is inappropriate to a mortgagee's decree for sale.

Where a section, or an Act, is capable of two renderings or is said to mean less, or more, than it says, it is a maxim of interpretation that one must look at the scope and object of the enactment. For this purpose, it is helpful to recall the history.

The rights of a mortgagor have always been the special care of Courts of equity. The equity of redemption was jealously guarded and could not be sold without an order of the Court and without the mortgagee in possession rendering an account. The codified law in India sought to give effect to the established principles of the English Courts for enforcing a mortgage security by the now repealed sections of the Transfer of Property Act. Great controversy having arisen as to the applicability of the provisions of the Code to the enforcement of a mortgagee's decree for sale, it was decided, when the Code was amended in 1908, that this part of the Transfer of Property Act relating to mortgagee's suits for sale, being a question of procedure, should be incorporated in the Code. This was effected by the present Order 34.

(9) (1884) 10 Cal. 521.

The mortgagee's right of sale is carefully hedged round by provisions which are familiar and which have no place in the execution of an ordinary money decree. For example, the preliminary decree still gives the mortgagor a period within which he may redeem. The Courts never allowed the sale of the bare equity of redemption under a judgment on the covenant. In other words, the mortgagee cannot have execution against the mortgaged property under a decree for the simple mortgage debt. This provision is preserved in Order 34, rule 14. The mortgagee is not to be allowed to bring the mortgaged property to sale, "otherwise than by instituting a suit for sale in enforcement of the mortgage." There is nothing illegal in a covenant for sale, as section 69 of the Transfer of Property Act shows. But the question before us relates to the enforcement by the Court. The change introduced into Order 34, rule 14, as opposed to section 99 of the Transfer of Property Act which it replaced, is significant. The mortgagee was under the old law prohibited from bringing the mortgaged property to sale, in satisfaction of a claim, "whether arising under the mortgage or not." But it was always competent for the mortgagee to purchase the equity by an agreement subsequent to, and independent of, the mortgage transaction. There was, therefore, no good reason why he should not be allowed to sell it in satisfaction of a claim unconnected with the mortgage. So the new Code dropped the old form of words, and reduced the prohibition to claims "arising under the mortgage." The important point is that the prohibition is found not in that part of the Code which relates generally to execution, but in that which deals particularly with the enforcement of mortgage decrees. All this shows that, by the scheme of the present Code, execution and the enforcement of mortgage decrees, are mutually exclusive, at any rate where inconsistent.

I am doubtful whether according to the strictly juristic view, the sale of mortgaged property under a mortgagee's decree for sale is really "execution" at all. It is satisfaction of the decree. When a creditor obtains a decree for a debt, and the debtor pays after the decree, the decree is satisfied, not executed. If the debtor does not pay, the law executes the decree, if it can, by realizing the amount out of any available property of the debtor which it attaches and sells. In the case of a mortgage decree, the property ordered to be sold is not something which is compulsorily substituted for the obligation contained in the contract, and carried forward into the decree. It is the obligation itself. The sale is the satisfaction of the contract and of the decree. Sir Comer Petheram took this view in the course of a judgment reported in I. L. R. 14 C. 668 (1887) where he spoke of the decree being one "for specific performance of the contract between the mortgagor and the mortgagee." The view, namely, that such a sale is not the execution of a decree derives support, though no authority, from the original intention of the jurists who framed the present Code, in dealing with the general provisions relating to execution which begin with section 36, to emphasise the dichotomy by defining the territorial jurisdictions of "the Court executing a decree," only to the extent which it was competent to pass a decree, and of "the Court which passed a decree for the enforcement of a mortgage," selling the mortgage property wherever situate.

I agree with Mr. Justice Lal Gopal Mukerji that the use of the word "such" removes the distributive force which the word "or" in "attachment or sale" would otherwise have. It must mean "attachment or sale in execution of a decree." And for the reasons given above, I have come to the conclusion that a sale under a mortgagee's decree is not a sale in execution of a decree and that, therefore, the proviso does not apply. This is not to say that the procedure is not, after decree, for the execution side. Any question which may arise relates to "the satisfaction of the decree," and is, therefore, within section 47.

I was throughout pressed by the contention that under the law thus interpreted a mortgagee can sell this property, whereas a simple decree-holder cannot, and that such a result is illogical, and against the policy of the Legislature. In other words, to quote the dissenting judgment of Mr. Justice Banerji in I. L. R. 34 A. 25, the object was "to protect people against their own improvidence." These speculations are dangerous, and are apt to attribute more consistency and foresight to the Legislature than is usually found in fact. But, in truth, there is no lack of justification for the law as I understand it. An unsecured creditor who chooses to give

credit to a poor man who has no credit, and no property beyond the bare instruments with which he ekes out his livelihood, has only himself to thank and cannot complain if the law steps in to prevent him from selling up his debtor completely for a debt in respect of which he took an obvious risk. But a creditor who has taken security is in a different position. It may be assumed that he would not have advanced the money at all unless he was given the security, and the debtor has voluntarily agreed to part with the property, with his eyes open and knowing the consequences.

It seems to follow from the reasons which I have given above on the first question, that I agree with Mr. Justice Ryves that the point is one which is properly taken in execution. I think it matters very little. The Court is often the same. I don't know how the point could be pleaded in defence to the mortgagee's suit. As Mr. Justice Mukerji points out, the mortgage is not prohibited or illegal. If raised in the suit, the Judge might well say that the objection was premature at that stage, and reserve it for the post decree proceedings. It is an objection to enforcement of the decree when made, the decree being unobjectionable. In a word, the objection presupposes a valid decree. If the mortgagor has no saleable interest that is a matter which concerns the purchaser, who acquires no greater interest than is saleable.

It is to be hoped that this view, although arrived at by a bare majority of the Court, will be accepted as final, as there has hitherto been great diversity of judicial decision.

Order of Courts :—The order is that the appeal is allowed, and the objection dismissed, and the order of first Court restored.

Appeal allowed.

---

* 1924 Allahabad 338.

(FULL BENCH.)

MEARS, C.J., LINDSAY AND RYVES, JJ.

Atma Ram—Applicant

v.

Emperor—Opposite Party.

* Crl. Rev. No. 681 of 1923, decided on 24-1-1924, against the Order of Sessions udge, Saharanpur, dated 27-9-1923.

Public Gambling Act, S. 3—Amendment Act I of 1917, S. 2—Balls of paper used in Satta betting being so manipulated as to leave no chance of loss to the owner are instruments of gaming and offence is committed.

Where by the use of balls of paper the accused so manipulated the conditions of the game that he could not possibly lose, *held*, that the offence of keeping a public gaming house was committed. The words "used for the benefit or gain of the person owning the house" require strict proof by the prosecution who must show that the owner or occupier takes a fixed commission irrespective of the result or so manipulates the conditions that he cannot possibly lose. [P. 340, C. 1.]

Nihal Chand—for Applicant.

Asst. Government Advocate—for Opposite Party.

Judgment :—Atma Ram was convicted by the District Magistrate of Debra Dun under section 3 of the Public Gambling Act (Act No. III of 1867) as amended by Act I of 1917 of the Local Legislature and sentenced to pay a fine. His appeal was dismissed by the learned Sessions Judge of Saharanpur. He then filed a revision in this Court on the ground that the conviction was untenable having regard to two recent decisions of this Court which will be referred to hereafter. The case has been referred to a Full Bench. The order of reference is as follows:—"Having regard to the very singular form in which "common gaming house" has been defined and to the decisions in *Lachhi Ram* v. *Emperor* (1) and *Durga Prasad* v. *Emperor* (2), I think it desirable to appoint a Full Bench to consider whether on a fair construction of the words "used for the profit or gain of the person owning", the acts done by Atma Ram are sufficient to support the conviction or whether the language of the definition is inapt and insufficient."

The judgment of the trial Court is somewhat involved and it is not easy to find from it what are the real facts of the case. After a careful examination of the judgment on appeal and the evidence on the record it is possible to arrive at a conclusion as to what the facts actually were. Once these facts are ascertained we have no hesitation in holding that the conviction was justified.

The law regulating public gambling in these provinces was Act No. III of 1867 and it proved for nearly 50 years to be

---

(1) 1922 All. 61.
(2) 1923 All. 192.

adequate. In 1910, however, a new form of gambling came into fashion and rapidly increased in popularity. This was known as *Satta* gambling. The public were invited to guess what would be the last two digits or the last digit or the average price of a chest of opium at the monthly sale in Calcutta.

In the town of Agra, and subsequently, in the neighbouring western districts, this form of gambling came into such a vogue as to dislocate the daily life of a large number of artizans and the poor classes and caused much misery in their families, and led to an increase of crime. A somewhat similar form of gambling was also introduced later into Saharanpur, Moradabad and neighbouring districts. Instead of the price of opium, the average price of cotton in Bombay as telegraphed by a broker, was used for the purpose of betting and bets were made on the last digit or the last two digits.

If such betting was carried out in "a public place" the Act as it stood would suffice; but it was felt that if this form of gambling was carried on in a house or other place which could not be characterised as a public place, the Act as it stood would not apply. Act No. I of 1917 of the Local Legislature was passed in order to meet this new form of gambling, and the definition of "common gambling house" as it stood in the old Act was modified. Under the new Act it was provided by section 2 that "Gaming" "includes wagering or betting, except wagering or betting upon a horse-race, when such wagering or betting takes place,

(*a*) on the day on which such race is to be run, and

(*b*) in an enclosure which the stewards controlling such race have, with the sanction of the Local Government, set apart for the purpose,

but does not include a lottery;

'Instruments of gaming' include any article used as a means or appurtenance of, or for the purpose of carrying on or facilitating, gaming;

'Common gaming-house' means any house, room, tent, or walled enclosure or space, or vehicle, or vessel, or any place whatsoever, in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, tent, enclosure, space, vehicle, vessel or place, whether by way of charge for the use of such house, room, tent, enclosure, space, vehicle, vessel, place or instruments or otherwise howsoever".

The difficulty in this case arises from the words "instruments of gaming kept or used for the profit or gain of the person owning, etc".

In these cases of *Satta* gambling often the only tangible evidence that gaming had been going on was the discovery of memoranda of bets made, whether these were kept in books or on loose pieces of paper.

The first case in this Court in which these words were considered, was *Raghunath* v. *Emperor* (3). That was a case of *Satta* gambling on the sale of opium. When the house was raided some slips of paper were found with writing on them which were supposed to be memoranda of bets made. There was some argument as to whether these memoranda really recorded bets. Mr. Justice Banerji however held as follows:—

"Having regard however to the nature of the papers, it may be assumed that they related to gambling. In order, however, to sustain the conviction of Raghunath for keeping a common gambling house, it was necessary for the prosecution to prove not only that he owned the house, or was the occupier of it, and that instruments of gambling were kept or used in it, but that they were kept or used for the profit or gain of Raghunath. There is not a particle of evidence to show that he made any profit or gain out of the transactions which might have taken place in his house. It is possible that he made some profit but in the absence of evidence to show that profit or gain was made he could not be convicted merely upon suspicion. Therefore in my opinion his conviction for keeping a common gaming house as defined in Act I of 1917 cannot be sustained."

That decision was given on the 23rd of May, 1918. The same point again came up before a single Judge of this Court on the 8th of February, 1922. There the facts were exactly similar to the facts in the last case. On this occasion on the search of the shop, a betting book was found in which the bets were recorded. The Judge was referred to the last case, but he had considerable doubts as to its correctness. He therefore referred it to a Bench of two

(3) (1918) 16 A.L.J. 760.

Judges for decision. In his order of reference after quoting Mr. Justice Banerji's decision he said :

"According to the case which I have already quoted, this fact would not in itself be enough (namely the finding of the betting book). There must be evidence to prove that Lachchi Ram kept this book for his profit or gain. It seems to me to be almost impossible to get any evidence *aliunde*. The presumption I should think was that he was not a philanthropist but was carrying on betting with at any rate the hope, if not for the purpose, of profit or gain."

The case was heard by a Bench of two Judges and their decision is reported in *Lachchi Ram* v. *Emperor* (1), and the view of Mr. Justice Banerji was reaffirmed. The learned Judges say :

"The definition of a common gaming house, in our opinion, is not materially different under the new Act from what it was under the old Act, with the exception that it is no longer necessary as an ingredient of the offence to establish playing by cards, dice, gaming tables or other articles of that nature. But the essential element remains. It must be established that the owner or occupier takes a fixed commission which is irrespective of the result of the gaming, or, at the outside, that he manipulates the conditions in such a manner that he cannot possibly lose."

It will thus be seen that although the views of all the Judges of this Court may not agree, three Judges have definitely ruled that the words "used for the profit or gain of the person owning the house" must be strictly proved by evidence.

This last case was recently considered by the High Court at Bombay in *Emperor* v. *Dattatraya Shankar* (4) and was dissented from. Sir Lallubhai Shah, Kt., Acting Chief Justice, who delivered the judgment of the Bench said—

"I do not think that on a proper construction of the definition the prosecution can be restricted, for the purpose of proving that a particular house, room or place is a common gaming house, to the two alternatives mentioned in the case of *Lachchi Ram* v. *Emperor* (1). It is sufficient if the house is one in which instruments of gaming are kept or used for the profit or gain of the person keeping or using such place, *i.e.*, where the person keeping or using the house knows that profit or gain will in all probability result from the use of the instruments of gaming. The profit or gain may not actually result from such use. But if profit or gain is the probable and expected result of the game itself and if that is the purpose of keeping or using the instruments, it would be sufficient, in my opinion, to bring the case within the scope of the definition. At the same time it is clear that the prosecution must establish that the purpose is profit or gain. This may be done either by showing that the owner was charging for use of the instruments of gaming or for the use of the house, room or place, or in any other manner that may be possible under the circumstances of the case, having regard to the nature of the game carried on in that house."

It seems to us that a very slight amendment in the wording of the section would remove all difficulties in future. The words now are "instruments of gaming are kept or used for the profit or gain of the person owning". If instead of the word "for" we substitute "with a view to" we think there can be no difficulty in arriving at a conclusion as to whether a given case falls within the section. The words would then be 'instruments of gaming are kept or used with a view to the profit or gain of the person owning."

The facts in the present case are as follows :—

Atma Ram wrote figures 1 to 100 on separate pieces of paper which he rolled up into a ball and placed in a jar which was then closed. At an appointed time in the afternoon, the jar was opened and three balls were taken out of it at random and the numbers found on them were added up. Persons who had correctly guessed the last digit received, it is said, nine times their stake, and those who correctly guessed the last two digits received 50 times. Bets were recorded up to the time of the opening of the jar. The three balls were then taken out, two of them were handed to the public and the third ball was retained by Atma Ram who read out the figure written on it. To take an example, the two balls given to the public bore figures 10 and 53. Atma Ram then having got before him a list of the bets chose such a figure as would best suit his "book." Thus in this case seeing that nobody had chosen 70 as the

(4) 1924 Bom. 184.

two last digits, he said that the number inscribed on the third piece of paper was seven making the total 70. He therefore won all the bets on the two figures and lost only on the single figure in the case of persons who had chosen zero. On this finding it is clear that the conviction of Atma Ram was right even under the restricted meaning given to the section in the case of Lachchi Ram.

But there is another aspect of the case which has not been noticed by the Courts below which is equally conclusive against Atma Ram. The Magistrate of the district had issued a warrant under the terms of section 5 of the Act and it was in accordance with that warrant that the premises were searched. When they were searched a jar containing these balls of paper was found. It is quite clear that these balls of paper were instruments of gaming. Without them the gaming could not possibly have been carried on. They are quite distinct from the slips of paper or books in which bets were entered Such slips were not necessary for the carrying on of the gaming but these balls of paper were. They were therefore implements of gaming found in a search duly authorised under the Act and therefore the provisions of section 6 apply. The finding of these balls in a jar in a house occupied by Atma Ram raises a presumption which he has not attempted to meet. On this ground alone the conviction would be justified.

We reject the application.

We direct that a copy of this judgment be transmitted to the Local Government for their consideration of the amendment of the Act suggested by us.

Application rejected.

---

* 1924 Allahabad 341.

(FULL BENCH).

LINDSAY, SULAIMAN AND KANHAIYA LAL, JJ.

Govind Ram—Applicant

v.

Kunj Behari Lal and others—Opposite Parties.

Ref. No. 281 of 1923, decided on 20th December, 1923, from the Deputy Secretary to the Government, U. P., dated 11th June, 1923.

(a) *Agra Tenancy Act (II of 1901). Ss. 193 (a), 167—Suit for profits against lambardar by transferee of co-sharer—Insolvency of co-sharer can be pleaded before transfer.*

On a suit to recover arrears of profits from the lambardar in the Revenue Court lambardar can question title in the co-sharer's transferee on the ground that his transferor had, at the date of the transfer, ceased to have any title to the profits by reason of his having been declared an insolvent.

Per Lindsay, J.—A plea based upon S. 28 of the Provincial Insolvency Act raises a question of substantive law and not merely of procedure. (Contra *Sulaiman, J.*). [P. 344, C. 1.]

Per Kanhaiya Lal, J.—A co-sharer whose name continues to be recorded in the revenue papers after his adjudication as an insolvent has a right to bring a suit to recover arrears of profits and can make a valid transfer of that right. By reason of S. 167 the profits recoverable by a co-sharer are not debts provable under the Insolvency Act and no Court other than a Revenue Court can take cognizance of a suit to recover the same. [P. 348, C. 1.]

(b) *Agra Tenancy Act (II of 1901), S. 173 (g)—In a suit under the Act defendant's unsatisfied decree against plaintiff's vendor can't be set off.*

In a suit under the Agra Tenancy Act the defendant cannot claim a set off in respect of a sum due on an unsatisfied decree held by him against the plaintiff's vendor. [P. 349, C. 2.]

M. L. Agarwala—for Applicant.

Kailas Nath Katju—for Opposite Parties.

Lindsay, J.:—This is a reference by the Local Government under rule 17 of the Rules and Orders relating to the Kumaun Division soliciting the opinion of the Court regarding two questions which were raised originally in a suit brought in the Court of the Assistant Collector, Kashipur, under the provisions of the Agra Tenancy Act.

The plaintiffs in that suit were Kunji Behari Lal and Har Kishen Das and the claim was for recovery of profits due in respect of a certain share in a mahal for the years 1324, 1325 and 1326 Fasli. According to the plaint the profits for these years became due on the 1st of August in each of the years 1917, 1918 and 1919. There were five defendants to the suit, the first of whom, Gobind Ram is the lambardar of the mahal. The fifth defendant was Gulab Singh one of the co-sharers.

The case for the plaintiffs, was that on the 26th July, 1920, they had taken from the 2nd, 3rd, 4th and 5th defendants an assignment of the profits for the years in suit. The fifth defendant Gulab Singh had assigned his right to the profits for all the three years; the second, third and fourth defendants had assigned the profits for 1325 and 1326 Fasli only.

The principal defendant was the lambardar (defendant No. 1) and among various pleas which he raised in defence we have to notice only two which have given rise to the two questions submitted to our decision. In para 8 of his written statement the lambardar alleged that on the date of the assignment in the plaintiffs favour, Gulab Singh, the 5th defendant was an insolvent and had no property or rights which he could transfer. It was pleaded therefore that the plaintiffs had no right to demand any share of profits on the basis of a transfer from Gulab Singh.

In the 17th para of the written statement the lambardar claimed a set off in virtue of decree for arrears of rent obtained by him against the 2nd, 3rd and 4th defendants.

With respect to the first of these pleas the Assistant Collector was of opinion that the defence taken was a good one and that by reason of the provisions of section 28 of the Provincial Insolvency Act of 1920, Gulab Singh, having been adjudicated insolvent was not competent to transfer any property or right to property to the plaintiffs.

The other plea, relating to the set off, was rejected by him. He stated in his judgment that he could find no law in support of the defendant's claim to a set off.

The case next came before the Deputy Commissioner sitting as District Judge in appeal. In his order of remand he decided that Gulab Singh, though insolvent, could, in a Revenue Court, maintain a suit for profits and could therefore transfer his right to sue for those profits. This opinion was based upon the Full Bench decision of this Court in *Kalka Das* v. *Gajju Singh*, (1). The judgment of the first Court upon issue was therefore overuled.

The Deputy Commissioner (District Judge) agreed with the first Court in holding that there was no legal sanction for the adjustment of the defendant's claim by way of set off.

The decision of the first appellate Court on these two points has been affirmed in second appeal by the Commissioner of Kumaun as the Judge of the High Court of Kumaun.

In the letter of reference received from the Local Government the first question raised concerns the application of the Provincial Insolvency Act of 1920 to suits and proceedings under the Tenancy Act. It is stated in para 2 of the Government's letter that the Government are advised that the ruling in 43 All. 510 was not directly applicable to the case inasmuch as it merely laid down that the Insolvency Act is no bar to a suit for arrears of rent brought by a zamindar pending proceedings in insolvency (*i.e.*, against the tenant).' It is pointed out that the plea in the present case was that the property of the insolvent, Gulab Singh, having vested in the Court or the Receiver he had no rights left which he could transfer to the plaintiffs. The argument before the Courts below was not that the provisions of the Insolvency Act barred the suit but that the plaintiffs had acquired no valid title to the share of profits due to the insolvent.

As regards this question I am of opinion for the reasons about to be given, that the view taken by both the lower appellate Courts is erroneous and that the correct view was taken by the Court of first instance. Before proceeding to discuss this matter I may observe that it is nowhere stated in the record on what date the order of adjudication was made against Gulab Singh. From certain oral evidence given at the trial it would appear that the order was made about five years before the suit came to hearing. This is what Gulab Singh said himself. However, it seems clear on all hands that the adjudication order had been made prior to the date of the assignment, that is, prior to the 26th July 1920.

Now there can be no dispute that Gulab Singh is a person amenable to the provisions of the Provincial Insolvency Act of 1920, and whether the adjudication order was made under that Act, or under the earlier Provincial Insolvency Act of 1907 the result was the same. All the property of the insolvent vested in the Court or the Receiver as soon as the order of adjudication was made (*cf.* section 28 (2) of the Act of 1920 and section 16 (2) of the Act of 1907). It follows therefore that from the date of the order Gulab Singh ceased to be a co-sharer. His share was taken away from him and became vested in the Court or the Receiver. The profits of his share which had already accrued due were similarly divested and any profits accruing due after the date of the order of adjudication also became vested

(1) (1921) 43 All. 510 (F.B.).

in the Court or in the receiver (*cf.* section 28 sub-section (4) of the Act of 1920 and section 16, sub-section (4) of the Act of 1907). It is clear therefore that on the date of the assignment of his share of the profits for the three years in suit the insolvent had no interest in these profits which he could in law transfer to the plaintiffs.

For what reason then is it suggested or argued that the Revenue Court was debarred from taking cognizance of the provisions of the Insolvency laws just mentioned? The argument is that the answer to this question is to be found in section 193, clause (*a*) of the Agra Tenancy Act which it is said, forbids the entertainment of any plea based upon anything contained in the Provincial Insolvency Act, and compels the Revenue Court to ignore the special provisions of that Act, quoted above, by which on the passing of the order of adjudication the property of the insolvent is divested and is transferred to the Court or the Receiver.

In my opinion this argument is not sustainable.

Section 193 of the Tenancy Act is to be found in Chapter XIII of the Act which is a chapter relating to procedure.

The section itself begins with the declaration that the provisions of the Code of Civil Procedure shall apply to the procedure in all suits and other proceedings under the Act so far as they are not inconsistent therewith and subject to certain modifications and additions which are then set out in the attached clauses (*a*) to (*m*).

We are concerned for the present with clause (*a*) only which enunciates that certain chapters and provisions of the Code of Civil Procedure as it then stood (Act XIV of 1882) shall not apply "to any such suit or proceeding."

Chapter XX of the Civil Procedure Code, as it then was, contained the law relating to proceedings in insolvency. It was subsequently repealed by the Provincial Insolvency Act of 1907 which in its turn, gave way to the similar enactment of 1920. It may be taken therefore that the reference in clause (*a*) of section 193 of the Tenancy Act must now be treated as a reference to the Provincial Insolvency Act of 1920, and that in consequence the procedure in all suits and proceedings under the Tenancy Act is not governed by the provisions of the Insolvency Act. But we are not dealing here with a question of pure procedure but with a question of substantive law.

The defendant Gobind Ram in raising the plea based upon section 28 of the Provincial Insolvency Act was not raising any question of procedure at all. He was not attacking the procedure of the plaintiffs in bringing or conducting the suit nor was he asking the Revenue Court to apply to the proceedings before it any rule of procedural law contained in the Insolvency Act. He was impugning the right of the plaintiffs to recover on the ground that they had taken nothing from Gulab Singh under his assignment in their favour and he based his plea on a provision of the Insolvency Act which enacts, not adjective but purely substantive law.

Indeed under the law of procedure which governs the conduct of business in the Revenue Courts Gobind Ram was under a legal obligation to raise this plea.

Order 8 of the Civil Procedure Code which relates to "Written Statement and set off" is in full force in the Revenue Courts except in so far as the provisions of rule 6 of that order are modified by clause (*g*) of the 193rd section of the Tenancy Act which imposes a restriction on the right of set off as allowed by rule 6. Rule 2 of Order 8 declares that the defendant must raise by his pleading all matters which show the suit not to be maintainable or that the transaction is either void or voidable in point of law.

Well, that is exactly what Gobind Ram was doing when he pleaded that the transaction upon which the plaintiffs were relying for their right of suit was a void transaction. He was pleading a rule of substantive law contained in section 28 of the Provincial Insolvency Act. He had every right to do so and indeed he was bound to do so and for myself I can discover no reason why, for anything contained in section 193, the Revenue Court was prohibited from entertaining and deciding the question so raised by him. To read the section as enforcing such a prohibition is to my mind sheer absurdity.

Section 193 of the Tenancy Act must be construed in the sense and for the purpose for which it was intended, namely the regulation of procedure in the Revenue Courts and it cannot in my opinion be extended so as to withdraw from the cognizance and determination of those Courts pleas which do not go to procedure but

to substantive legal rights. With regard to the Full Bench decision relied upon by both the appellate Courts below (43 All. 510) it is to be observed that the only point which arose for decision was one of pure procedural law. The question was whether a landlord could, without the leave of the Insolvency Court, sue for arrears of rent a tenant against whom an order of adjudication had been made. Under an earlier decision of the Court (34 All. 121) it had been held that such a suit could not be brought without the leave of the Insolvency Court. The Full Bench decided, and if I may say so, decided correctly that the view taken in the earlier case was wrong. Section 16 (2) of the Provincial Insolvency Act, 1907, which was the enactment then under consideration, and which corresponds with section 28 (2) of the present Act, laid down that no suit or other legal proceeding can be commenced by a creditor against the insolvent without the leave of the Court. That is a rule of pure procedure and must yield before the special provisions relating to procedure contained in section 193 of the Tenancy Act.

The question now before us, namely whether section 193 of that Act excludes the operation of substantive as well as adjective enactments in the insolvency law was not before the Full Bench and if there are any observations in the judgment which might be treated as supporting the view now contended for, namely that the law relating to the transfer of the property of the insolvent from the insolvent to the Court or the Receiver must be ignored by the Revenue Courts, then those observations were purely *obiter* and are not binding upon me.

My answer to the first of the questions propounded by the Local Government in this reference therefore is that the Full Bench ruling in I.L.R. 43 All. 510 was not applicable to the facts of this case; that Gobind Ram was entitled to raise the plea based upon section 28 (2) of the Provincial Insolvency Act, 1920; that the Revenue Court was competent to entertain the plea and to decide the issue raised upon it; and that the Court of first instance rightly decided that the plaintiffs could not succeed upon the basis of the fraudulent assignment made in their favour by the insolvent Gulab Singh.

The second question we have to answer relates to the first defendant's claim to a set off in respect of a certain decree for arrears of rent which he held against the 2nd, 3rd and 4th defendants.

There I think all the Courts were right though they give no reason for their opinion except by saying that they could find no legal sanction for the defendant's claim. For this part of the case we have to look to clause (*g*) of section 193 of the Tenancy Act which lays down that "no set off shall be allowed in any suit under this Act except a sum due to the defendant on an unsatisfied decree under this Act or under any enactment hereby repealed."

The clause does not say from whom the sum is due to the defendant, but presumably it is intended that it must be due from the plaintiff. It could hardly mean that the money was due from a third party.

The clause clearly cuts down the extent of the right of set off allowed in Order 8, rule 6 of the Code of Civil Procedure. In other words, the defendant in a suit in a Revenue Court cannot claim set-off "of any ascertained sum of money legally recoverable from the plaintiffs." He can only claim a set off in respect of a sum owing to him under an unsatisfied decree, obviously a decree obtained against the plaintiff. Now here, Gobind Ram, has no decree against the plaintiffs. He had never sued them at all. His decree had been got, not against the plaintiffs, but against three of the plaintiffs' assignors, namely the 2nd, 3rd and 4th defendants. He could not legally recover the amount of his decree from these plaintiffs who are merely the assignees of the rights of these defendants to recover a share of the profits for the years 1325 and 1326 F. It is quite clear therefore that under the law Gobind Ram was not entitled to the set off he claimed.

I answer the second question accordingly.

As it is, I understand the practice in these proceedings is to make a recommendation regarding the award of costs in this Court, I am of opinion that in view of the decision, at which I have arrived the parties should bear their own costs in this Court.

Sulaiman, J.:—This is a reference by the Local Government under rule 17 of the Rules and Orders relating to the Kumaun Division. The facts of this case are as follows:—

The plaintiffs Kunj Behari Lal and Har Kishen Das are usufructuary mortgagees

of a certain share in mahal Abi of mauza Babarkhera. They executed a lease of their mortgaged share in favour of Lal Singh ancestor of defendants Nos. 2, 3 and 4 and in favour of defendant No. 5, Gulab Singh. The lessees, not having paid their lease money and not having recovered their profits from the lambardar, executed two separate deeds of assignment of their shares of profits in July 1920. Under one deed the defendants 2, 3 and 4 transferred their profits for 1325 and 1326 fasli to the plaintiffs, and under the second deed the defendant No. 5, Gulab Singh, transferred his alleged share of profits for the years 1324, 1325 and 1326 fasli.

It is an admitted fact that before these deeds of assignment were executed Gulab Singh had been duly adjudicated an insolvent by the Civil Court. Unfortunately we have not been able to discover the exact date of the adjudication. Had it been the fact that Gulab Singh was adjudicated an insolvent before the profits for the years in dispute ever accured the case might have been simpler, but the arguments before us have proceeded on the assumption that Gulab Singh was adjudicated an insolvent after the profit had fallen due and before the deeds of assignment. And it is on this assumption that I propose to consider the questions involved in the reference.

The plaintiffs having obtained the deeds of assignment brought the suit, out of which this reference has arisen, for recovery of the profits for the years aforementioned as the assigns of the co-sharers, against the lambardar Govind Ram, defendant No. 1. The main pleas on behalf of the contesting defendant were: firstly that in view of Gulab Singh's adjudication the suit in part was not maintainable and secondly, that a certain decree for arrears of rent, which the lambardar held against the plaintiffs vendors and the defendants Nos. 2, 3 and 4, should be set off.

The Assistant Collector, Mr. Za Ullah Khan, as the Court of first instance, held that in view of Gulab Singh's insolvency the sale of profits by him conferred no rights upon the transferees. He also held that there was no justification for allowing the set-off claimed. He, therefore framed a decree on this basis. An appeal was preferred by the defendant to the District Judge and Deputy Commissioner of Kumaun who agreed with the first Court on the question of there being no legal sanction for allowing a set-off but came to a contrary conclusion on the other point, and held that the Provincial Insolvency Act did not and could not apply to the suit under the Tenancy Act, and that, therefore, Gulab Singh though an insolvent could maintain a suit for profits and so could his transferees. He accordingly sent down a certain issue for a finding to be returned within a fixed time although in his order he called it "remanding the suit". On the findings being returned the decree of the Court of first instance was modified. On a further appeal before the Judge, Kumaun High Court, the learned Judge agreed with the conclusions of the Deputy Commissioner holding that no set-off was allowable under the Tenancy Act and that the fact of insolvency cannot affect the provisions of the Tenancy Act and that therefore the assignment of profits was valid. The local Government not being satisfied with this decree have referred the case to the High Court for opinion.

At the time of the arguments it was not clearly known whether Gulab Singh or the lessees were recorded as co-sharers in the revenue papers for the years in suit. Accordingly no question was raised at the bar as to there being any absolute presumption under section 201 of the Agra Tenancy Act in favour of the proprietary right of Gulab Singh, nor was it argued that such a presumption can be extended in favour of his assigns.

Even assuming that Gulab Singh's name was recorded, but that the names of the present plaintiffs were not recorded, I fail to see how any absolute presumption under section 201 clause (3) of the Agra Tenancy Act can arise. The word used in that clause is "plaintiff" and not plaintiff's predecessors. When the plaintiffs themselves are not recorded as having the proprietary right entitling them to institute the suit, the defendant can ask the Court either to refer the plaintiffs to the Civil Court or to try the question of title itself.

Chapter XIII of the Agra Tenancy Act deals with procedure. Section 193 in that Chapter makes the provision of the Code of Civil Procedure applicable to the procedure in all suits and other proceedings under that Act so far as they are not inconsistent therewith subject to a few modifications and additions. Under sub-clause (a) it is provided that, Chapter XX of the old Code

of Civil Procedure, Act XIV of 1882, which dealt with insolvent judgment-debtors, shall not apply to any such suit or proceeding. But, as I shall show later on, even this exception is not of general application. Chapter XX of the old Code was repealed by Act III of 1907 and section 56 of the latter Act provided that where, in any enactment in force at the date of the commencement of the Act, reference is made to Chapter XX of the Code of 1877 or of 1882 or to any section of either of these Chapters such a reference shall, so far as may be practicable, be construed as applying to this Act or to the corresponding section thereof. When after this Act, the new Code of Civil Procedure (Act V of 1908) was enacted the provisions relating to the insolvent judgment-debtors were naturally omitted. Since then the new Provincial Insolvency Act (Act V of 1920) has come into force and section 83 contains a similar provision as section 56 of the previous Insolvency Act. The principal question in the present case therefore is as to how far the provisions of the Insolvency Act can, if at all, be applicable to cases arising under the Tenancy Act.

Section 28 (2) of Act V of 1920 which corresponds to section 16 (2) of Act III of 1907 provides that, on the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a Receiver as therein provided, and shall become divisible among the creditors. The learned advocate for the defendant contends that this provision is one of substantive law and not of a mere procedure, and that the Agra Tenancy Act does not prevent the applicability of a rule of substantive law. I am not prepared to say that the question can be disposed of on this short ground. Provisions regarding Insolvent judgment-debtors were contained in the Civil Procedure Codes of 1877 and of 1882, both of which ostensibly embody rules of procedure. After all the Insolvency Act merely regulates the method by which the claims of the creditors of an insolvent are to be satisfied. The object of the Act is to protect the insolvent from unnecessary harassment and imprisonment as well as to protect his creditors from being defrauded. It is true that property, by operation of law, vests in the Court or the Receiver, as the case may be, but it does only for the purpose of prescribing a mode by which the assets of the insolvent, are to be divided among the creditors, and the balance if any is to go to the insolvent on his discharge. Section 28, sub-clause (2), goes on to regulate the way in which creditors of the insolvent can pursue their remedy in respect of their debts. The rule contained in the latter portion of sub-clause (2) is obviously one of procedure. I am therefore not prepared to say that the first portion of sub-clause (2) contains a substantive law and the second portion an adjective law.

On the other hand the learned Advocate for the plaintiffs has relied strongly on the Full Bench case of this Court in *Kalka Das* v. *Gaju Singh* (1), and quoting remarks from page 512 has contended that "the Provincial Insolvency Act does not and cannot apply to any suit or proceeding under the Tenancy Act" and that "section 16 of the Insolvency Act cannot and does not apply to such suits". In the case before the Full Bench a suit for arrears of rent of an occupancy holding had been brought by the zamindar against the tenant. While the suit was pending the defendant was declared an insolvent. The plaintiff first impleaded the Receiver but on objection being raised by him his name was struck off. The defendant tenant however pleaded that the suit against him was not maintainable in view of the provisions of section 16, sub-clause (2) of Act III of 1907. The Courts below relying on the case of *Raghubir Singh* v. *Ram Chander* (2) acceded to that plea and dismissed the suit. The Full Bench held that the decision in *Raghubir Singh* v. *Ram Chander* (2) was incorrect and that the suit was maintainable. As the case had been disposed of on a preliminary ground it was remanded for disposal on the merits. Without laying down the broad proposition that the Provincial Insolvency Act does not and cannot apply to any suit or proceeding under the Tenancy Act the case could have been disposed of on the narrower ground that it was not open to the defendant to take shelter under section 16, sub-clause (2) of the Insolvency Act and plead that no creditor would have any remedy against him except with the leave of the Insolvency Court.

When a suit is brought by an insolvent plaintiff for arrears of profits it is certainly open to the defendant to plead that the plaintiff has no *locus standi*

(2) (1912) 34 All. 121.

to maintain the suit, as by reason of his insolvency he has lost all rights to the amount claimed. When such a plea is raised, the defendant is not asking the Court to apply the Insolvency Act to the "suit" but to take account of the factum of the insolvency which took place before the suit was instituted. In an analogous case of an assignment under a registered document, when the defendant pleads that the plaintiff had transferred away his rights, can it be said that he is asking the Revenue Court to apply the Transfer of Property Act to the suit? Similarly if the plaintiff is an assign of the insolvent, the Revenue Court in taking cognizance of the fact of insolvency is merely holding that the title-deed relied upon by the plaintiff was a mere nullity and passed no rights to him.

The present suit can be disposed of on even a simpler and clearer ground, though that was not pressed before us in argument. Section 193 (*a*) of the Tenancy Act laid down an exception to the applicability of the old Code of Civil Procedure, but that exception itself is inapplicable to the present case. The plaintiffs not being recorded proprietors and the defendant having pleaded that neither they nor their vendor had any proprietary right, it was the duty of the Revenue Court under section 201 (1) to proceed, *mutatis mutandis*, as directed in section 199, provided that the party to be referred to the Civil Court should be the plaintiffs. Under section 199, the Court may either refer the party to the Civil Court, or determine the question of title itself. If the Revenue Court decides to determine such question of title itself, it shall follow the procedure laid down in the Code of Civil Procedure for the trial of suits, and "*notwithstanding anything contained in section 193 of the Act*, all the provisions of the said Code shall apply to the trial of such question of title". It is therefore quite clear that before the Provincial Insolvency Act was enacted, Chap. XX of the old Code of Civil Procedure was not inapplicable to a suit under Chap. XI of the Tenancy Act, when the plaintiff was not a recorded proprietor and the defendant denied his right and when the Revenue Court decided to determine the question of title itself. It follows that the Provincial Insolvency Act would also not be inapplicable to such a case.

The second question raised in the reference is capable of being disposed of very briefly. Both the Revenue Courts have thought that the Tenancy Act itself disallows such a set-off. This is not quite accurate. Under section 193 (*g*) it is provided that no set-off shall be allowed in any suit under this Act except a sum due to the defendant on an unsatisfied decree under this Act or under any enactment hereby repealed. The defendant lambardar holds an unsatisfied decree and at first sight it looks as if his case comes within the exception. But sub-clause (*g*) is only prohibitive and restrictive. In spite of a claim being allowable under the Code of Civil Procedure, the sub-clause provides that it shall not be allowed except when it is on account of an unsatisfied decree. This sub-clause does not mean that in the case of every unsatisfied decree a set off is necessarily allowable. We have therefore to go back to the provisions of the Code of Civil Procedure and see whether the defendants' claim for the set-off could have been entertained. Under Order 8, rule 6 the defendant can claim to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him *from the plaintiff*. The defendant therefore cannot claim a set-off of a decree against the plaintiff's vendors. It has already been noted that the decree held by the lambardar for arrears of rents of which a set-off is claimed is against defendants 2, 3 and 4 only. Such a claim therefore could not have been entertained in the Revenue Court. The defendant's separate remedy is by way of execution of his decree against his judgment-debtors. I would therefore answer the first question in the affirmative and the second in the negative.

Kanhaiya Lal, J. :—There are two questions raised by this reference. One of them is whether a co-sharer who has been adjudicated an insolvent has any right to assign the arrears of profits, which may fall due after his adjudication as an insolvent or in other words whether the assignee of the profits can sue the lambardar for the recovery of the same after such adjudication.

The plaintiff is an assignee from Gulab Singh of the arrears of the profits due for 1324, 1325 and 1326 Fasli. The evidence of Gulab Singh and the replies to the interrogatories, issued by the lambardar show that Gulab Singh was declared an insolvent sometime in 1323 Fasli. By

virtue of section 16 (2) clause (*a*) of Act III of 1907, corresponding with section 28 of Act V of 1920, the property of Gulab Singh became vested in the Receiver or the Court when he was adjudicated an insolvent and but for section 201, clause (3) of the U. P. Tenancy Act, which permits a conclusive presumption of title to be raised in favour of the plaintiff, if his name is recorded in the Revenue papers, the insolvent would have had no rights left, which could entitle him to claim the subsequent profits or to assign the same to any person.

Section 164 of the U. P. Tenancy Act (II of 1901) lays down that a co-sharer may sue the lambardar for his share of the profits of a mahal or of any part thereof in the Revenue Court. Section 166 declares that the word co-sharer in the above section shall be deemed to include a legal representative and an assign of such person. The arrears of profits due by a lambardar to a co-sharer do not change their character as such arrears of profits by reason of the death of the co-sharer or of an assignment thereof; and section 167 forbids any Court other than a Court of Revenue from taking cognizance of any dispute or matter in respect of which a suit for profits might be brought in the Revenue Court. The arrears assigned cannot, therefore, be regarded as a debt recoverable in the Civil Court, and if in spite of the adjudication of insolvency, the effect of which was to divest the insolvent of his proprietary rights for the time being, the insolvent continued to be the recorded co-sharer, as the copy of the Jamabandi for 1324 Fasli filed shows, his status as a co-sharer and his right to sell the arrears as such co-sharer must be recognized.

It is obvious that had the suit been brought by Gulab Singh it could not have been contested by the Receiver, if any was appointed, for it is not suggested that he had obtained mutation of names in his favour. A co-sharer whose name continues to be recorded in the Revenue papers despite his adjudication as an insolvent has unquestionably a right to sue for the arrears of profits, due on account of his share; and if his right to sue and recover such arrears cannot be challenged by any person, he has also a right to sell the said arrears, for the right to sell is only a necessary corrollary of the right to sue. If an actionable claim is good and valid, it can be sold, unless it is in its nature non-transferable. If a right to sue subsists, a right to sell subsists too. Section 201, clause (3) of the N.W.P. Tenancy Act may in terms be inapplicable to the present plaintiff, but it can be used to determine the antecedent title of Gulab Singh or his right to sell the arrears due to him.

Section 193 of the U. P. Tenancy Act (II of 1901), moreover lays down that the procedure in all suits and other proceedings under that Act shall except as otherwise provided be regulated by the provisions of the Code of Civil Procedure excluding among other things Chapter XX and section 370 of Chapter XXI of the Code, which it declares, shall not apply to any such suit or proceeding. Chapter XX of the Civil Procedure Code then in force laid down the procedure regulating the adjudication of insolvency and the machinery to be employed for the realization of the assets of the insolvent for distribution among his creditors. That chapter was replaced by Act III of 1907, which has since been superseded by Act V of 1920. Section 370 of the old Code of Civil Procedure corresponded with Order 22, rule 8 of the new Code and empowered the Reciever to elect whether he would continue a suit filed by an insolvent before he was so adjudicated. By section 56, clause (27) of Act III of 1907 and section 83, clause (2) of Act V of 1920 it was provided that all references to the repealed provisions shall be deemed to have been made to the corresponding provisions of the Act, by which they were repealed. These provisions cannot therefore apply to suits and proceedings under the N.W.P. Tenancy Act except those referred to in section 199, clause (3) and section 201, clause (1) of that Act.

The law of Insolvency is mainly designed for the protection of creditors and the relief of debtors. The Receiver is only an officer appointed by the Court take charge of the assests of the insolvent for the time being and to hold the same for the benefit of the scheduled creditors till their debts are discharged. As in the case of any property attached by a Court in execution of a decree, the Court or the Receiver is a temporary custodian of the property of the insolvent for a specific purpose. Such rights as accrue to an attaching Court or to a Receiver are rights which the Court or Receiver acquires by operation of law in

enforcement of the procedure laid down for the sale of the property attached or available for sale.

By section 193 (*a*) of the U.P. Tenancy Act the whole of the Insolvency law embodied in the Code of Civil Procedure or the corresponding Acts of the Legislature, has, however, been declared to be inapplicable to suits and proceedings under the U.P. Tenancy Act other than those referred to in section 199 clause (3) and section 201 clause (1) of the Act; and a Receiver is not even allowed to elect whether he is to continue a suit or proceeding so instituted by an insolvent prior to his adjudication as such. The result is that he cannot claim to be substituted for an insolvent in such a pending suit or proceeding on a suit or proceeding of that kind which may be subsequently filed by or against the insolvent in the Revenue Court under that Act or oust him from the rights and status conceded to him by the Act except by getting his name substituted in the Revenue papers for the time being in the place of the person adjudicated an insolvent under the U.P. Land Revenue Act (III of 1901), where such a substitution is legally permissible.

In *Kalka Das* v. *Gajju Singh* (1) where an occupancy tenant was declared an insolvent and a suit was filed for arrears of rent in respect of that holding against him and the Reciever, it was held that an occupancy tenant being outside the provisions of the Provincial Insolveny Act, that Act was no bar to a suit for arrears of rent brought by the Zamindar pending proceedings in insolvency, and it was pointed out that under section 56, clause (2) read with section 193, clause (*a*) of the U.P. Tenancy Act, the Provincial Insovency Act did not apply to any suit or proceeding under the Tenancy Act. The previous decision in *Raghubir Singh* v. *Ramchandra* (2) was overruled. *In Parbati* v. *Raja Shiam Bakh* (3) a similar view was taken. The substitution of the Receiver for the insolvent co-sharer for the purpose of enabling the former to realize the assets and pay the debts is a part of the machinery provided to secure a discharge of his liabilities, and though the Receiver acquires the rights of the insolvent for the time being for a specific purpose, the devolution is only a part of the procedure designed for realizing the object in view. In excluding the law of Insolvency from application to the Revenue Courts in suits and proceedings under the U.P. Tenancy Act, the Legislature probably intended that the rents or profits due by or to a co-sharer shall be recovered in the manner laid down in the U.P. Tenancy Act and in no case in the manner laid down by the Insolvency Law, though the debtor liable for such rents or profits may have been declared an insolvent. It is also noteworthy that by reason of section 167 of the U.P. Tenancy Act, such rents or profits are not debts provable under the Provincial Insolvency Act and no Court other than a Court of Revenue can take cognizance of the same. No question of the plaintiff's proprietary title here arises. Owing to the continued entry of the name of Gulab Singh in the Revenue papers, the right of Gulab Singh to recover the profits subsists, and there is nothing to prevent its sale to the plaintiff.

On either ground, therefore, I am of opinion that the existence of the Receiver, whose name is not entered in the Revenne papers, cannot be treated as a bar to the entertainment of the suit.

On the other question, namely whether an unsatisfied decree for arrears of rent due to the lambardar by a co-sharer can be set off against the arrears of profits, assigned by the latter to a third person, I agree that such a set off is not permissible under section 173, clause (*g*) of the U.P. Tenancy Act, except where the decree sought to be set off is due to and the debt sought to be recovered is due by the same person.

In view of the circumstances I concur in the order proposed to be passed about the costs of this reference.

By the Court:—The opinion of the Court with regard to the first question raised in this letter of reference from the Local Government is that it was open to the defendant lambardar to raise the question of want of title in the plaintiffs on the basis of the Insolvency Act (Act V of 1920). With regard to the second question the opinion of the Court is that the defendant lambardar was not entitled to claim a set off in respect of his decree for arrears of rent obtained against the defendants Nos. 2, 3 and 4. We are further of opinion that the parties should bear their own costs in this Court.

(3) (1922) All. 74.

* * **1924 Allahabad 350.**

LINDSAY AND KANHAIYA LAL, JJ.

Jawahir Lal—Appellant

v.

Jarau Lal and others—Respondents.

F. A. No. 331 of 1920, decided on 29th November, 1923, from the decision of Sub-Judge, Aligarh, dated 27th July, 1920.

(a) *Hindu Law—Migration—Does not alter law unless it is renounced.*

Where a family migrated from one territory to another and preserved its ancient ceremonies and practices, the presumption is that it also preserved its personal law of succession unless there is proof of the renunciation of the original law for that of the place migrated to. [P. 551, C. 2.]

(b) *Hindu Law—Migration.*

The commentaries on Hindu Law are only commentaries; they do not enact, they explain and are evidence of the congeries of customs which form the law. (47 I.A. 213 at p. 227; 24 All., p. 278, *Foll.*)

(c) *Hindu Law—Succession—Vadnagar Nagar Brahmans are governed by Mayukha.*

Among Vadnagar Nagar Brahmans the daughters inherit an absolute estate and on the death of one of the daughters her share does not go by survivorship but devolves on her own issue.

K. N. Katju, P. L. Banerj, G. L. Agarwalla and *Panna Lal*—for Appellant.

O'Coner, M. L. Agarwala and *S. N. Sen*—for Respondents.

Judgment:—This appeal arises out of a suit brought by the plaintiff-appellant for the recovery of possession of certain property and for an account of the profits thereof on the allegation that the said property belonged to Balmukund, that he was succeeded by his two daughters, Mt. Godavari and Mt. Gopi and that on the death of Mt. Gopi, the entire property devolved on Mt. Godavari, the mother of the plaintiff. On the death of Balmukand mutation of names was effected in respect of the property left by him, in favour of Mt. Godavari and Mt. Gopi. Mt. Gopi died in Sambat 1935, leaving a son, Moti Lal, who died three years later. The defendant Jarau Lal is the son of Moti Lal; and the other defendants, Panna Lal and Hira Lal, are his grandsons.

On the 31st December, 1899, a partition is said to have been effected between Mt. Godavari and her sons, Jawahir Lal and Ganeshi Lal on the one hand, and Jarau Lal the grandson of Mt. Gopi on the other, and a deed of partition was executed and registered at Aligarh in evidence of the same.

Ganeshi Lal died childless in Sambat 1961. The allegation of the plaintiff was that after the death of Mt. Gopi Mt. Godavari became entitled according to the Mitakshara law to the entire estate left by her father; that her grandson Jarau Lal was brought up by Mt. Godavari, who treated him with great affection, and that the above deed of partition was obtained by Jarau Lal from Mt. Godavari by misrepresentation of facts and concealment from her of her real rights. It was also stated that the deed in question was not explained to her; that she had no independent advice, and that the plaintiff and his brother Ganeshi Lal were kept ignorant of their rights and of the arrangement then being made. It was further alleged that at the instigation of Jarau Lal, the plaintiff and his brother Ganeshi Lal were compelled by Mt. Godavari to sign the deed, and that the deed was without consideration and invalid and unenforceable.

The defence was that the parties were governed by the Mayukha Law, which prevailed in Gujarat, their original home; that Mt. Gopi got an absolute estate in the property inherited by her from her father and that the defendants were entitled to that property in succession to Mt. Gopi and her son Moti Lal. It was also urged that the deed of partition of the 31st December, 1899, was executed by Mt. Godavari and the plaintiff and his brother by their free consent, without any misrepresentation or undue influence; that the said partition had been acted upon since 1899 and that the plaintiff was estopped from questioning its validity. It was further pleaded that the claim was barred by limitation. It is not necessary to go into the other pleas raised in the suit.

The court below found that although no authentic history of the migration of this family from Gujarat was traceable, it was more than probable that it left Gujerat after the advent of Nil-Kanth in the 16th century; that the family came and settled in Aligarh about 150 years ago and continued to observe its original custom and practices, and that it was governed by Mayukha law, according to which a daughter was entitled to take an absolute estate in the property inherited by her from her

father. It further found that Mt. Godavari and the plaintiff and his brother executed a deed of partition after fully understanding its terms, and in doing so acted after mature deliberation and in accordance with the advice of old men of their caste and their relations and friends, and that the deed operated as a family settlement and was valid and binding on the parties. It also held that the plaintiff was estopped by his conduct and acts, and that the claim was barred by limitation.

The main question for consideration is whether the family is governed by the Mitakshara law or by the law which prevailed in Gujerat before the family migrated to these Provinces, or in other words whether, according to the law applicable to the family, a daughter is entitled to an absolute estate.

The parties are Nagar Brahmans, whose original home was in Vadnagar, a large town in the Baroda State. From Vadnagar a section of the Nagar Brahmans proceeded to Idar and settled there and that section thereafter came to be called Idaria Nagars. From Idar they subsequently migrated to different places but at what period of time it is not possible to say. There is some evidence to show that the family to which the parties belong lived at one time in Banswara, Bundi and Kotah in Rajputana, and that Dina Nath, the earliest known ancestor of the family, moved from Muthra to Amroha and from Amroha to Aligarh, where a grove was planted by him, which is still in existence. The grove is said to be about 150 years old and goes by the name of Dinanath's grove. The family can therefore be said to have settled in these Provinces sometime about or before that period, that is, about 150 and 200 years ago.

It is practically admitted by the witnesses of both the parties that after the family migrated from Gujerat and settled in these Provinces, it continued to observe its original customs and practices in the matters of births, marriages and deaths. At home the Gujerati language is used; and marriages are celebrated outside the *gotra* even within 4 or 5 degrees. The ceremonies and ritual observed on occasions of births, marriages and deaths are those which used to be observed in their original home in Gujerat. There is nothing to show that they departed in any way from their old practices or custom or adopted the law which prevails in these Provinces after they settled here. It is well settled that the law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question. *Prima facie* any person governed by the Hindu law is held to be subject to the particular doctrines of the Hindu law recognized in the province in which he is residing. That law becomes the personal law and part of the status of every family residing in it. Consequently where any such family migrates to another province governed by another law, it carried its own law with it (Mayne's Hindu Law, paragraph 48).

In *Parbati Kumari* v. *Debi Jagdish Chander* (1) and *Balwant Rao* v. *Baji Rao* (2) their Lordships of the Privy Council held that where a family migrated from one territory to another and preserved its ancient ceremonies and practices, the presumption was that it also preserved its personal law of succession, unless there was a proof of the renunciation of the original law for that of the place migrated to. The reason for the rule is that the Hindus being notoriously conservative in the matter of religious observances and rights, it is extremely improbable that the family which migrates would change its personal law, with which its religion is intimately connected.

It is important, therefore, to enquire what the law governing the Nagar Brahmans was in their original home in Gujerat and whether the same has been followed after they migrated to and settled in these Provinces.

The Vyavahar Mayukha is considered to be a work of paramount authority in Gujerat. It was written by Nil-Kanth, a Mahratta Brahmin, residing in Benares sometime in the 17th century and forms a part of a larger treatise called Bhagwant Bhaskara which was written under the direction of King Bhagwant Varman of the Sangar dynasty who flourished in Bundelkhand and whose capital was situated in Bhareha at the confluence of the Chambal and the Jamna. The Bhagwant Bhaskara is divided into 12 books, one of which deals with *Vyavahar* or recognized law and usage. A branch of the family of Nil-Kanth was settled in Poona. The work soon obtained considerable celebrity in the Mahratta country

(1) (1902) 29 Cal. 433 (P.C.).
(2) (1921) 48 Cal. 30 (P.C.).

and some of the adjoining territories, and was early recognized as a standard work of authority on the subjects, with which it dealt (Sarvadhicari's Hindu Law of Inheritance, second edition, p. 311). The quotations frequently made by the *Shastris* attached to the Courts in Bombay and Gujerat in their Vyavasthas or opinions show that it was considered by them as an authentic source of the written law on the matter (West and Buhler's Hindu Law, fourth edition, p. 12). Indeed, as observed by their Lordships of the Privy Council in *Bai Kesar Bai* v. *Hansraj* (3), where the Mitakshara and the Mayukha do not harmonise, the latter takes precedence of the former.

The Mayukha does not specifically discuss whether a daughter takes a mere life estate or an absolute estate in the property inherited by her from her husband. All that it says is :—

"In default of her (the wife), the daughter succeeds ; for says Manu (Chap. 9, 130) ' The son of man is even as himself and the daughter equal to the son. How then can one inherit (his wealth) but she, who stands as it were himself ? If there are more daughters than one, they should divide the wealth and take shares" (Mandlik's Vyavahar Mayukha, p. 79).

Nilkanth allows a similar division in the case of co-widows, so that the right to divide carries by itself no particular significance. The citation from Manu that "the son of a man is even as himself and the daughter is equal to the son" has been taken to mean that like a son, a daughter takes an absolute estate. But the citation is not followed by any comments by the author himself as to the nature of the estate inherited by a daughter, and while it is remarkable that what Manu said was, judging by the contest, said with reference to a *putrika* or appointed daughter (Buhler's Laws of Manu, p. 352) ; both the authors of the Dayabhaga and the Vyavahar Mayukha utilize it for the purpose of strengthening their contention that a daughter was entitled to inherit in the absence of sons in preference to the more distant relations. Probably the practice of killing daughters at the time of their birth or of excluding them from inheritance was at that time coming into fashion and attracting attention.

Anyhow, whatever the intention of the author of the *Vyavahar Mayukha* in citing that passage from Manu was, from as far back as 1859, if not earlier, the view attributed to the *Vyavahar Mayukha*, namely, that a daughter is entitled to an absolute estate has been accepted and enforced in Gujerat.

In one of the earliest cases the old Supreme Court of Bombay, after describing Manu, the Mitakshara and the Vyavahar Mayukha as the books of chief authority in that part of India, observed :

"Now according to all the authorities the daughters take next after the widow ; what then is the nature of the estate they take ? Here again there are differences of opinion ; but dealing with the question according to the three books I have mentioned it appears to me that the daughters take an absolute estate. We find quoted in the Mayukha a passage from Manu. ' The son of a man is even as himself and the daughter is equal to the son, how then can any other inherit property, but a daughter, who is, as it were himself ? ' With reference to this point also I consulted the Shastris both here and at Puna and enquired whether daughters could alienate any, and what portion of the property inherited from a father, who died separate. The answer was that, daughters, who so obtained, could alienate it at their will and pleasure ; and in this the Shastris of both places agree, both also referring to the above text in the Mayukha as their authority for that position" *Pranjiwan Das* v. *Deo Kuar Bai* (4).

In *Hari Bhat* v. *Damodar Bhat* (5) and other cases the same view was adopted, and it has recently been affirmed by their Lordships of the Privy Council in *Balwant Rao* v. *Baji Rao* (2).

An attempt has been made on behalf of the plaintiff to establish that the family migrated from Gujerat long before the *Vyavahar Mayukha* was written, that is about 800 years ago but the oral evidence produced on the point and that is the only evidence here produced is not worth serious consideration. Even if adequate materials had existed, it may be well to remember what Lord Dunedin pointed out, that the commentaries are only commentaries, they do not enact, they

(3) (1906) 30 Bom. 431 (P.C.).

(4) 1 B.H.C. 130.
(5) (1878) 3 Bom. 171.

explain and are evidence of the congeries or customs which from the law (*Balwant Rao* v. *Baji Rao* (2).)

In a case relating to a family of Ahban Thakurs, who had originally come from Gujerat and settled in Oudh many centuries ago their Lordships of the Privy Council similarly said :—

"Although the migration may have taken place before the Mayukha was written, it may well be that the rule was in force in earlier times and that on this point the Mayukha only embodied and defined a pre-existing custom (*Chandika* v. *Manni* (6).)

In any event it is important for the purposes of this case to enquire what the practice among the Nagar Brahmins in Gujerat was and has been during the last century in regard to the right of survivorship between the daughters of the last male holder in the case of the death of any of them with or without issue. A large number of instances have been cited on behalf of the defendants, extending from the time of Dina Nath, the common ancestor of the parties.

Dina Nath had two daughters Mt. Tej Kuar and Mt. Sahaj Kuar. He left a grove which was divided on the death of Mt. Tej Kuar between her son Lajja Shankar and Mt. Sahaj Kuar. Mt. Sahaj Kuar transferred her share of the grove to Kesho Ram, from whom it passed by successive transfers to Ganga Bishun, who is now in possession. The statement of the plaintiff was that the grove had been divided between Mt. Tej Kuar and Mt. Sahaj Kuar in their lifetime. But in the sale-deed executed by Kesho Ram in favour of Mt. Gaura on the 14th November, 1886, a half share of the grove in question was described as having fallen on the death of Dina Nath to the share of Mt. Sahaj Kuar and the other half to the share of Lajja Shankar and the private partition effected between them was also referred to (Ex. KKK).

The land of the grove was held by Dina Nath under a *Muafi* grant. In 1839 the land was resumed but was exempted from the payment of Government revenue so long as the trees existed; and a copy of the order granting the exemption, was given to the agent of Mt. Sahaj Kuar and Lajja Shankar, who held the grove at the time (Ex. R-R).

Kameshwarji of Kotah had two daughters Mt. Dhan Kuar and Mt. Gulab Kuar. The estate of Gulab Kuar devolved on her son Ganpat Lal and that of Dhan Kuar on her son Nathu Lal. The plaintiff states that on the death of Gulab Kuar her share devolved on Mt. Dhan Kuar, but that statement is refuted by the evidence of Ganpat Lal, the son of the former. [The judgment then dealt with specific instances of following mayukha and proceeded.]

There are thus in all about 30 instances showing that among Vadnagar Nagar Brahmans the daughters inherit an absolute estate and that on the death of one of the daughters, her share does not go by survivorship but devolves on her own issue.

There is no proof of any cogent instance to the contrary. Most of the witnesses adduced by the plaintiff are persons belonging to other castes, who could not have possessed any accurate knowledge as to the customs and practices prevailing in the Nagar Brahman community. Most of those who belong to that community, merely make vague and general statements without citing any specific instances in proof of what they assert. The only witness, who has made an attempt to cite some instances, is Jani Itchashankar of Aligarh. He states that Nagar Brahmans of the United Provinces and Rajputana do not write the names of their fathers after their names and that unlike what they do in Gujerat the ladies of their families observe *pardah*; but he forgets that the difference of surroundings is often responsible for a change of habits of that kind. There are for instance many people, who, following the English method, describe themselves by their surnames and their full or real names are often unknown to the outside world. He states that the daughters of Kameshwarji of Kotah were Mt. Dhan Kuar and Mt. Phul Kuar and on the death of the former, the other got the whole of his estate; but he is refuted on that point by Naunidh Lal, a descendant of Kameshwarji, and many other witnesses.

Naunidh Lal explains that Kameshwarji was a jagirdar of Kotah, and he adopted Nathu Lal, the son of one of his daughters, in order that the Jagir might continue in

(6) (1902) 24 All. 273 (P.C.).

the family, inasmuch as no ladies were allowed by the State to get the Jagir. The adoption, if made did not, however, affect the devolution of the other property, which as stated by Naunidh Lal devolved on the daughters of Kameshwarji and on their descendants in succession. He admits that Jhamman Lal Jha of Benares had three daughters, Mt. Jamna Kuar Mt. Jugli Kuar and Mt. Manni Kuar and that on the death of the first-named, her sons got her property. He suggests that Jhamman Lal Jha left no money or ornaments and lived in a house on rent; but he goes on to say that when Mt. Manni Kuar and her daughter died, he wanted that her mother, Mt. Jugli Kuar, should get all the property, but he took no steps to enforce his claim. He also mentions that Jagan Nath Jha of Baneres left three daughters, Mt. Chameli, Mt. Manki and Mt. Jamna Kuar, and that when the last-named died childless, her sisters got her property. He however admits that she had no other relative alive and that on the death of Mt. Chameli, her sons got her share.

There can be no stronger instance the other way than that of the daughters of Dina Nath, already referred to for on the death of one of the daughters of Dina Nath the ancestor of the parties, the grove left by Dina Nath was divided between her son Lajja Shankar and his surviving daughter. There are 19 instances of similar succession from Ahmedabad, six from the Banswara State, one from Aterbhind, and the rest from Rajputana and the United Provinces.

On behalf of the plaintiff some stress has been laid on the decision in *Lakshmi Ram Jani* v. *Hari Ram Dube* (7); but in that case the question related to the right of succession to a *Stridhan*; and though the family was found to have migrated from Gujerat to Jaipur and from Jaipur to Benares about 100 or 150 years ago, no instances of succession under the Mayukha Law had been deposed to by any of the witnesses examined in the case; and that was treated as a fact of some significance, for the family was a big one and instances might have been expected to be forthcoming if the Mayukha Law had applied. Here an instance from the very family, to which the parties belong, has been proved and established beyond the possibility of doubt by the oral and documentary evidence adduced; and corroborated as it is by a large volume of evidence, coming from Gujerat and Rajputana, the presumption that the family brought its personal law when it migrated from Gujerat to these provinces, stands affirmed; and the claim of the plaintiff to the property, which Mt. Gopi had inherited from her father, must therefore fail.

The subsequent conduct of Mt. Godavari and her sons Jawahir Lal and Ganashi Lal, in agreeing to a partition of the property, left by Balmukand and Jarau Lal, the son of Mt. Gopi, further supports the same conclusion. There is evidence to show that Mt. Godavari thoroughly understood what she was doing when she executed the deed of partition of the 31st December, 1899. The deed was written after the plaintiff had an opportunity of consulting a pleader who is dead and could not be produced. After the death of Onkar Lal, the husband of Mt. Gopi, the plaintiff, claimed the entire property belonging to Balmukand, relying on the Mitakshara Law in support of his claim. A dispute arose and the parties sought the intervention of some members of the caste at Aligarh. They settled that Mt. Godavari and the present defendant should divide the property half and half and got the latter to pay Rs. 7,000 to the plaintiff in order that all possibility of litigation might be obviated and the matter finally closed. In accordance with that settlement a deed of partition was drawn up with the full consent of the plaintiff and his brother Ganeshi Lal. The Sub-Registrar went over to the house of Mt. Godavari; and there he read and explained the deed to her, and there can be no doubt that neither the plaintiff nor Mt. Godavari were under any misapprehension as to the effect of the transaction into which they were entering. The learned Subordinate Judge rightly characterised the evidence produced by the plaintiff as unreliable. The demeanour of the plaintiff in the witness-box was found to be unsatisfactory; and as the learned Subordinate Judge points out, he went on saying anything on the spur of the moment to fit in with his case. There was clearly a *bona fide* dispute between the parties as to the nature of their rights. That dispute was amicably

(7) (1919) 52 I. C. 25.

settled and a large amount was paid by the defendant Jarau Lal to the plaintiff and his mother to set the matter at rest.

Section 6 of the Transfer of Property Act has no application because, as pointed out by their Lordships of the Privy Council in *Kanhai Lal* v. *Brij Lal* (8) there is no question here of any conveyance of or of an agreement to convey any future right or expectancy or of an agreement to relinquish any such right or expectancy. Mt. Gopi had an absolute interest in the share, which she had inherited from her father. The claim laid by Mt. Godavari and the plaintiff to that share was set at rest in the manner settled by the parties and entered in the deed of partition aforesaid. That partition has since been acted upon, mutation of names was effected in accordance therewith and the parties have enjoyed their respective shares in accordance with the allotment then made. The claim is now barred by limitation. The other pleas have not been pressed.

This appeal therefore fails and is dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

(8) (1918) 40 All. 487 (P.C).

* * **1924 Allahabad 355.**

KANHAIYA LAL AND MUKHERJI, JJ.

Kanhiya Lal—Defendant-Appellant

v.

Ashraf Khan and others—Plaintiffs and Defendants-Respondents.

S. A. No 379 of 1920, decided on 22nd January, 1924, against the decree of District Judge, Allahabad, dated 28th January, 1920.

Civ. Pro. Code, S. 11—Different capacities render section inapplicable, though cause of action is the same.

Where the title set up in a previous suit was a title based upon the property in suit being treated as *waqf* property in which plaintiff was interested like others in offering prayers, *held*, a suit claiming personal title as the heir of a certain person is not barred, capacity being different in the two suits. The fact of the identity of the causes of action in the two suits is immaterial. [P. 356, C. 1.]

N. P. Asthana—for Appellant.

Panna Lal—for Respondents.

Kanhaiya Lal, J.:—The dispute in this appeal relates to a house which was mortgaged along with another house by Najabat Khan in favour of the defendant-appellant and his brother Madho Prasad in 1892. On the death of Madho Prasad his interest devolved on the defendant-appellant. The defendant-appellant brought a suit to enforce his mortgage and got a decree for sale against the present defendants Nos. 2 to 6 as the heirs of Najabat Khan and in execution thereof he got the two houses aforesaid put up to sale.

A suit was then brought by the present plaintiffs-respondents other than Mt. Umda Bibi for a declaration that the house now in dispute was used as an *Imambara* and was *waqf* property, that the other house was his exclusive property by inheritance from Fateh Khan and that neither of those houses was liable to sale in execution of the above decree. That suit was dismissed in regard to the house now in dispute on a finding that it was not proved to be *waqf* property, but decreed in regard to a share in the other house which was found to be the property of Fateh Khan, the common ancestor of the then plaintiffs and the mortgagor.

The present suit has been filed by the same plaintiffs and a lady named Mt. Umda Bibi for the protection of their interests in the house, which was previously described as *waqf* property, from the impending sale. The courts below decreed the claim.

The first question for consideration is whether the omission of the plaintiffs other than Mt. Umda Bibi to set up the title, now sought to be enforced in the previous suit, operates as a bar to the present claim. In the previous suit the then plaintiffs sought to protect the entire house in question on the ground that it was *waqf* property. They had asserted a right to offer prayers and to perform religious rites therein in their personal capacity as beneficiaries; but the object of the suit was not to protect their personal rights alone but to protect the entire house which they had described as *waqf* property. In the present suit they seek to enforce their personal interests in the said house as the heirs of Fateh Khan. They had not excluded the present house from their claim in the previous suit. In fact they were claiming one of the houses mortgaged in their personal rights and seeking to protect the other house now in dispute on the ground that it was a *waqf*

property. Having asserted that the latter was a *waqf* property, they could not have consistently claimed the same property as their personal property except possibly in an alternative form. They were, however, not under an obligation to adopt the latter course. Section 11 of the Code of Civil Procedure requires that the decision in a previous suit would not be a bar to a decision in a subsequent suit unless the matter in issue was directly and substantially in issue in the previous suit between the same parties or between parties under whom they or any of them claim, litigating under the same title. The title set up in the previous suit was a title based on the property in dispute being treated as *waqf* property, in which the plaintiffs were interested as much as other persons entitled to offer prayers therein. In the present suit they are claiming a personal title in themselves as the heirs of Fateh Khan. Explanation 4 of that section provides that any matter which might and ought to have been made a ground of defence or attack in a former suit should be deemed to have been a matter directly and substantially in issue in such suit, but it is not obligatory on a party seeking to protect certain property as *waqf* property from an impending sale to assert in the same suit any personal right thereto, to which he may afterwards find himself entitled in case the property in question is not found to be *waqf* property. It is immaterial whether they could have joined in the previous suit an alternative claim for the protection of the personal share they are now seeking. There was no obligation to join the two claims and their omission to set up the present title in the previous suit does not therefore bar the decision of that matter in the present litigation. As observed in *Ali Moidin Ravuthan* v. *Elayachanidathil Kombi* (1) the identity of the cause of action in immaterial. The right in which the relief was claimed in the previous suit was not the same in which the relief is claimed in the present one. The former suit was brought for the protection of what was described as public property. The present suit has been brought for the protection of personal or private rights. So far as the house in dispute went, the capacity in which the plaintiffs sued was not the capacity in which they are now suing; and section 11 of the Code of Civil Procedure has therefore no application.

The second point for consideration is whether the claim was barred by adverse possession. It is stated that in 1865 a suit for partition was brought by one Rahmat Ali Khan the predecessor in title of two of the plaintiffs against Najaf Khan and Najabat Khan for partition of his share in the house in question and a decree was obtained in respect of which no steps were taken to obtain execution. The finding of the Courts below, however, is that in spite of that omission the plaintiffs have been in possession of the disputed property and that the mortgagor or his heirs have not been in adverse possession of the same. In the face of that finding the above contention is without any force.

The other pleas taken in the memorandum of appeal have not been pressed.

The appeal must therefore fail and is dismissed with costs including in this Court fees on the higher scale.

Mukerji, J.:—Assuming that the present claim might have been made as a claim in the alternative in the former suit, it is perfectly clear to my mind that it ought not to have been so added. The result of combining the two claims would have been this. In the same breath, the plaintiffs would have been under the obligation to adduce evidence that the property had been dedicated and belonged to the Almighty and in the same breath it would have been obligatory on them to adduce evidence to show that it was nobody else's property but theirs. In claiming the property as their own they would have been obliged to trace how the property descended and what share was theirs. Thus, contradictory issues would have arisen and the trial would have been immensely complicated. It was never therefore desirable that the two claims should be combined. This is enough to discredit the plea of *res judicata*. I agree in the rest of the judgment of my learned brother and in the order proposed.

Appeal dismissed.

(1) (1882) 5 Mad. 239.

* 1924 Allahabad 357.

LINDSAY and KANHAIYA LAL, JJ.

Sarab Sukh Das and others—Defendants-Appellants

v.

Ram Prosad—Plaintiff-Respondent.

F. A. No. 15 of 1920, decided on 15th November, 1923, from a decree of Additional Sub-Judge, Moradabad, dated 21st November, 1919.

Hindu Law—Religious endowment—Dedication—A valid dedication can occur without the idol's being installed in a temple or even in the absence of a temple.

A certain village was purchased in the name of a deity and the income of the village was applied for worship and other charitable purposes by the Hindu family. But the idols were kept for some years in an ordinary house and not installed in a temple. In fact no temple was ever built but at the date of the suit it was found that the family intended to build one for the purposes of installing the Gods therein; *held*, that the village was validly dedicated as the building of a temple is not an absolutely necessary requisite.

S. N. Sen and *Panna Lal*—for Appellants.

Narain Prosad Asthana and *Badri Narain*—for Respondent.

Judgment:—The suit which has given rise to this appeal was instituted by the plaintiff-respondent for the partition of a one-third share of certain property, comprising landed property, houses and moveables. The parties are descended from one Sewa Ram, who died about 40 or 45 years ago, leaving two sons, Bhagwan Das and Gobardhan Das. The plaintiff is the grandson of Bhagwan Das. His father, Dharam Das, died in 1904, while Bhagwan Das was alive. One of the defendants was Gobardhan Das, who died during the pendency of the suit. The other defendants were the descendants of Bhagwan Das.

The allegation of the plaintiff was that the property in dispute was joint family property and that the defendants were refusing to make a partition. The defendants pleaded that the village Ram Dandi and *gher* No. 5 mentioned in the schedule attached to the plaint, were *waqf* property, endowed for the purpose of a temple to be constructed in the latter and that, excepting house No. 10, the rest of the property was their separate property. They further pleaded that Bhagwan Das had separated from Gobardhan Das about 40 years ago and that Dharam Das, the father of the plaintiff, had similarly separated from his father, Bhagwan Das, about 20 years later.

The court below found that the family lived jointly till about 4 or 5 years before the institution of the suit; that there had been no partition and that the entire property in dispute excepting the moveables, the existence of which was not proved, was property divisible between the parties.

The first question for consideration in this appeal is, whether the property in dispute was joint family property, and whether there had been any partition in the family at or about the time alleged by the defendants.

The evidence produced by the defendants on the latter point is, as the learned Subordinate Judge points out, very unsatisfactory. On the other hand several respectable witnesses have been examined on behalf of the plaintiff to prove that the family was joint. One of them, Mohar Lal, is an Honorary Magistrate who pays Rs. 2,000 as revenue and Rs. 1,800 as income-tax. He states that Bhagwan Das and his sons formed a joint family and had a joint business, and he supports his statement by producing the entries in his account books which go to show that there were money dealings between him and the firm styled Bhagwan Das Gobardhan Das, which belonged to the parties. He also states that at times Ram Prasad, the plaintiff, and Makhan Lal and others used to come to get money from the firm and to repay the same. He further states that to his knowledge there was never a partition in the family and that when the sister of the plaintiff was married, the entire arrangement in connection with the marriage was made and the expenditure connected therewith met by Gobardhan Das and the other members of the family.

Another witness, Tika Ram, who pays Rs. 26 as income tax states that Bhagwan Das and Gobardhan Das were joint; that the plaintiff Ram Prasad used to get expenses from the family shop, which was managed by Gobardhan Das, and that some of the defendants and their sons used to work in that shop.

Another witness Ramji Mal, a physician, similarly deposes that Bhagwan Das and Gobardhan Das formed a joint Hindu family and that whenever he went on a professional visit, Gobardhan Das and Sarab Sukh Das paid his fee for his attendance.

The statements of these witnesses are corroborated by certain documentary evidence produced in the case. There is, for instance, a copy of a plaint in a suit filed by Gobardhan Das in 1907 for the recovery of money due by certain debtors of the firm. After the institution of that suit an application was made by Bhagwan Das and his two sons, who were then alive, and by the present plaintiff under the guardianship of Bhagwan Das, stating that they were living jointly with Gobardhan Das and that they should be added as co-plaintiffs. This application was allowed, and Bhagwan Das and his sons Daulat Ram and Sarab Sukh Das and his grandson, the present plaintiff, were brought on the record. This could not evidently have been done without the consent of the then plaintiff Gobardhan Das. Again, in 1916 the sister of the plaintiff was married and an application was made by Gobardhan Das for permission to take a procession through the streets and for the use of fire-works in connection therewith. In that application he described the sister of the plaintiff as "his daughter." It is not possible to attach much significance to the use of the words "his daughter" in that petition, but from the fact that the application was made by Gobardhan Das, there is reason to think that he was taking an active and leading part in the affair, or in other words, such a part as would ordinarily be taken by the head or manager of a family in connection with the celebration of a marriage in it. Further, an extract from the income-tax register for 1916-17 has been produced, showing that the present plaintiff and Sarab Sukh Das, Daulat Ram and Gobardhan Das were jointly assessed to income-tax with reference to the income derived from the sugarcane press and houses held by the family.

There is also the evidence of Mohan Lal showing that the firm of Bhagwan Das, Gobardhan Das used to take moneys from time to time from him.

There is further on the record a decree which was jointly obtained by Gobardhan Das, Sarab Sukh Das and Daulat Ram against a certain debtor in 1915. The plaintiff was not a party to that decree; but from the fact that the other members of the family were co-plaintiffs with Gobardhan Das there can be no room for doubt that the entire family continued to work jointly till at least 1916.

On behalf of the defendants reliance has been placed on a written statement filed by Sarab Sukh Das and others in 1919 in which they stated that Bhagwan Das and Gobardhan Das were proprietors of the firm styled Bhagwan Das and that they had no concern with the firm. But the object of their disclaiming any connection with that firm obviously was to disavow any responsibility for any liability incurred by the firm and much weight cannot therefore be attached to that statement. In connection with the same suit Gobardhan Das was examined and in the statement which he then made he said that Bhagwan Das was his *sharik* and brother. That statement is inconclusive and does not necessarily support the defence. On a consideration of the entire evidence we are of opinion that the Court below has come to a right conclusion in holding that the plaintiff was living jointly with the other members of the family, including Gobardhan Das. In fact, the father of the plaintiff had died while the plaintiff was still a minor. He was brought up by his grandfather. The family carried on a joint business in which he took some part in getting money from and making payments to other firms; and the statement of the defendants that a partition had taken place, that Dharam Das had separated 20 years ago from his father, and that Bhagwan Das had separated from Gobardhan Das, cannot be trusted.

As regards the property in dispute, some of the purchases were made in the name of one member of the family and others in the name of another member of the family, but, as the family was joint at the time the purchases were made, the presumption is that they were made with joint family funds. No reliable evidence has been adduced on behalf of the defendants to establish that the purchases made in the names of the different members of the family were made out of their separate earnings; and in the absence of any evidence, the entire property so purchased must be treated as joint family property.

The case of the village Ram Dandi, however, stands on a different footing. It was purchased on the 30th of June, 1906, in the name of Sri Lachmi Narainji, an idol, said to have been installed in a temple situated in one of the houses at Chandausi. The purchase was made for a sum of Rs. 5,000 and the greater portion of the consideration was applied to the payment

of a debt due to Sarab Sukh Das and of certain other debts due to certain other persons by the vendor. There is no evidence to show when the debts were paid; but as the sale-deed stands in favour of, and in the name of Sri Thakurji, known as Sri Lachmi Narainji Maharaj, the presumption that any purchase made in the name of any member of the joint family would be deemed to have been made with joint family funds, would not be applicable. A purchase made in the name of a stranger is *prima facie* a purchase made by him for his own use. There is evidence to show that in 1895 three idols had been obtained through an official attached to the Rangaji temple of Brindaban and that the expenses of the purchase of those idols were met by the firm of Bhagwan Das, Gobardhan Das. The idols were made of copper and weighed two maunds, sixteen seers. They were, according to the evidence of Mohan Lal, placed in a certain shop, from which they were removed about 18 or 19 years ago to house No. 3, where they still exist. The intention of the family evidently was to build a separate temple for the installation of those idols; but no temple appears to have been built for the purpose. During the pendency of the suit Gobardhan Das executed a *tamliknama*, by which he disposed of the greater portion of his property in favour of Sarab Sukh Das, and a deed of *waqf*, by which he dedicated one-fourth of the house, entered as No. 5 in the plaint, and a one-fourth share of the income of the village Kulaha; the former for the construction of the temple there and the latter for the expenses of its upkeep. In the deed of *waqf* he stated that an oral dedication had already been made of the *gher* previously by him and his brother Bhagwan Das. But no evidence has been produced in support of that statement. The effect of the present suit was to create a separation in the family and thereby to give power to Gobardhan Das to dispose of his share in the family property in any way he thought proper. The *waqf* cannot therefore operate except as regards his share of *gher* No. 5 and of the village Kulaha. As regards the village Ram Dandi, the defendants have produced certain account books beginning from the 26th of September, 1906, and ending with the 8th of August, 1918, wherein the income of the village and the xpenses incurred in connection with the emple are detailed. The account books purport to be in the handwriting of Sarab Sukh, who was not produced; but the evidence of Mohan Lal proves that they were maintained in the ordinary course of business by Sarab Sukh who was in charge of the endowed property. The account books show that the entire income derived from the village Ram Dandi was applied to the maintenance of the worship of the idols installed in the house and to charitable relief. They further go to show that the village Ram Dandi had all along been treated as *waqf* property and that neither Bhagwan Das nor any of his descendants ever objected to the use of the income for the purposes aforesaid. If the village Ram Dandi had been joint family property, it is obvious that the income derived from that village would have been brought into the family hotchpot and used for family purposes. That was not, however, the case. That village must, therefore, be treated as *waqf* property purchased for the benefit of Sri Lachmi Narainji Maharaj, that is, the deity who was to be subsequently installed in a temple to be constructed for his use.

It is contended on behalf of the plaintiff that there could be no valid and effective *waqf*, because no temple was actually built and no idols were set up. But as has already been pointed out, the family had obtained idols to set up bearing the name borne in the sale-deed, and the income which was derived from the village purchased in his name was used for the purposes of worship and other charitable purposes. In fact, the actual installation of idols or the construction of a temple is not absolutely necessary for validating a deed of *waqf* made for such a purpose. In *Chatarbhuj* v. *Chaterjit* (1), where by a deed of gift certain zamindari property was expressed to be given to an idol, which was not at the time of execution in existence, and possession of the property was made over to a certain person as *pujari*, it was held that the deed was valid and created a trust in favour of the idol. In *Bhupati Nath Smrititirtha* v. *Ram Maitra* (2), it was similarly held that the principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image

(1) (1911) 33 All. 259.
(2) (1909) 37 Cal. 128 (F.B.).

and the worship of a Hindu deity after the testator's death, nor does it make such a bequest void. The name given to a deity is only a sacred convention. The deity is supposed or believed to exist from eternity. The idol is virtually treated as a visible symbol of the deity in whose favour the dedication is made or by whom the purchase is to be effected; and the mere fact that the installation takes place afterwards, does not affect the validity of the dedication or of the purpose for which the purchase is made.

It only remains to consider how far the properties entered in the deed of *waqf* executed by Gobardhan Das on the 18th of September, 1918, were partible. Both the *gher* and the village Kulaha must be treated as joint family property because they were purchased in the name of some member of the family or another when the family was joint. The family purchased an old ancestral house and carried on a certain sugarcane pressing business. It possessed the nucleus round which the acquisitions could grow; and in the absence of any evidence to show that these purchases were made by any member or members of the family out of separate funds, they must necessarily be treated as joint family property. But the effect of the institution of the present suit for partition was to create a separation between Ram Prasad and the other members of the family, and Gobardhan Das had therefore a right under the Hindu Law to dispose of his share of the property. The *waqf* is therefore valid so far as his half share of the said property is concerned.

In the plaint originally filed, the plaintiff had claimed a one-sixth share, but on the death of Gobardhan Das, he amended the plaint and claimed to own a one-third share in the entire property. The Court below has rightly awarded a one-sixth share to him. The claim of the plaintiff ought therefore to be allowed in respect of the said one-sixth share except in regard to the village Ram Dandi and a half share of the village Kulaha and *gher*, No. 5 comprised in the *waqf* of the 18th of September, 1918.

The appeal is allowed in so far that the decree for partition granted by the Court below will be confined to the property other than the village Ram Dandi and a half share of *gher* No. 5 and of the village Kulaha mentioned in the deed aforesaid. It will be open to the defendants when a partition is effected to remove the idols lying in house No. 3 to such place as may be constructed for their reception either in that portion of *gher* No. 5 which may be allotted to them or in such other place as they think proper. Subject to these reservations the decree of the Court below will be confirmed. The plaintiff shall get 5/6th of his costs and the defendants 1/6th of their costs throughout.

Decree modified.

---

* * **1924 Allahabad 360.**

MEARS, C.J. AND PIGGOTT, J.

Hira Lal--Appellant

v.

Khairati Lal—Respondent.

F. A. No. 173 of 1921, decided on 5th December, 1923, from the decree of Sub-Judge, Aligarh, dated the 6th January, 1921.

Specific performance—If valuer through fraud or mistake undervalues property agreed to be sold at his valuation no decree can be passed.

Where the contract refers the price to a valuer for him to ascertain between the parties, this fact does not of itself preclude the Court from inquiring into the adequacy of the consideration and this inadequacy of consideration would, of course, be strengthened as a defence if any circumstances arose which threw a doubt on the accuracy with which the valuation was made. If the undervalue were such as to convince the Court that the valuers had acted under fraud or mistake the contract would be incapable of enforcement in equity; but it is otherwise if the undervalue did not so convince the Court. [P. 361, C. 2 and P. 362, C. 1.]

S. N. Sen—for Appellant.

K. N. Katju and *B. E. O'Conor*—for Respondents.

Mears, C. J.:—This is an appeal from the judgment of the Subordinate Judge of Aligarh. The action was one brought by Hira Lal for specific performance of an agreement, Khairati Lal being the defendant. The plaintiff and defendant each had a certain share in a house in *mohalla* Dhusaran in Aligarh. They had frequent quarrels and those quarrels brought them to the criminal courts, and it appears that when the Deputy Collector was investigating or about to investigate one of those criminal complaints it was suggested that as these parties could not live pleasantly in close proximity to each other it would be a very good thing if one sold his share of the house to the other and removed

himself to a distance. That view seemed in the circumstances to both of them to be a wise thing to do, and on the 4th of September, 1919, when the parties were before a Magistrate of the second class they agreed that one Sohan Lal, a pleader, should act in preparing an estimate of the price of the share in the house owned and possessed by Hira Lal. Eight days later, on the 12th of September there was a formal agreement which gave Sohan Lal the power to determine what was the value of the house and for what amount the share should be sold, and it was agreed that Khairati Lal would purchase the share that Hira Lal possessed in the house for the amount that Babu Sohan Lal might determine to be. There was nothing whatever said about the method of procedure that Sohan Lal should adopt except that he was to determine the value of the house after inspecting it. That was all he had to do. He did inspect the house, of that there is no doubt, and on the 29th of September he valued the share of Hira Lal in the house at Rs. 5,500. That amount came as a considerable shock to Khairati Lal, and on the 8th of October he in fact offered to sell his share at a price which would show a considerably less value than Rs. 5,500 as Hira Lal's share in the house. Again, in the written statement in paragraph 19 he offered to sell his share in the house for Rs. 1,500 and put his share twice as much as Hira Lal's. On that basis therefore he was expressing his willingness to part with his share in the house at a price very very far below the estimated value put upon Hira Lal's share by Sohan Lal. When the case came to trial somehow or other Sohan Lal was got into the box and he gave evidence. When he gave evidence it became perfectly clear that he had acted in a thoroughly careless manner. He appeared to have no idea whatever of the proper way of discharging the duty which he had undertaken and we are greatly astonished that a pleader of mature age and presumably some legal experience should have conducted himself in the way that he did. On his own admission he did not ask the advice of anybody as to the rates and prices which were prevailing in the *mohalla*. We do not say that it was necessary for him to do that, because he might in his own experience already have got a fair general idea. It would however have been a prudent thing for him to do this and it might have saved him from giving an estimate which we regard as completely extravagant. We now know the basis of that estimate, and he says that having had the rooms counted he prepared an estimate of the price by guess. What in fact he did is clear from an answer he made to the Court. He took what he believed to be the price of materials and the price of labour prevailing in the year 1919, and he worked out a figure of what he believed would have cost if somebody started to build on that site a portion of the house such as he was called upon to value. He was aware that he was dealing with a house at least 40 years old as regards, at all events, the principal structure, and it never occurred to him at all that he was proceeding upon a completely unfair basis. What he ought to have done would have been to have asked himself what was the value of the house after allowing for the fact that it was a house 40 years of age. The proper question for him to put to himself was what would a willing purchaser be likely to give to a seller according to the original structure of the house, its present condition and location. When questions directed to show that his value was over-estimated were put to him he dropped down to a sum of Rs. 3,000 as being the value of the house as it stands to-day. There is no doubt that Mr. Ali Ausat took a strong view with regard to Mr. Sohan Lal's incompetence and carelessness. We take the same view and we consider that he is deserving of censure and reprobation.

Now comes the appellant who says that he is entitled to a decree for specific performance, that is to say, that this Court in the exercise of its discretion must decree that Khairati Lal shall pay Rs. 5,500, for a property manifestly worth not more than Rs. 3,000. We decline to do it, and it so happens that this type of case has been considered in some of the English decisions. In the sixth edition of Fry on Specific Performance, page 215, the law is summarised in this way " where the contract refers the price to a valuer for him to ascertain between the parties, this fact does not of itself preclude the Court from inquiring into the adequacy of the consideration, and this inadequacy of consideration would, of course, be strengthened as a defence if any circumstances

arose which threw a doubt on the accuracy with which the valuation was made. The effect of an undervaluing by the valuers is a question which has however been but little discussed in our Courts : it has been debated with the usual diversity of opinion by the writers on civil law. It is conceived that, if the under-value were such as to convince the Court that the valuers had acted under fraud or mistake, the contract would be incapable of enforcement in Equity; otherwise, if the under-value did not so convince the Court". We are of opinion here that the valuer arrived at his finding by applying a wholly mistaken standard. We therefore, approve the decision of the Subordinate Judge and dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

---

* * **1924 Allahabad 362.**

LINDSAY AND SULAIMAN, JJ.

Mt. Aisha Bibi—Appellant

v.

Mt. Mahfuz-un-nissa Bibi and others—Respondents.

F. A. No. 201 of 1921, decided on 9th January, 1924, from the decree of Sub-Judge, Meerut, dated 5th March, 1921.

** (a) *Pardanashin Lady—Evidence of execution by.*

Where the language used by the Registering Officer indicated that the document had been read out to the lady but there was nothing expressly indicating that he explained the document to the lady *held* there was no satisfactory evidence of explanation and understanding which the law requires.

*(b) *Transfer of Property Act, S. 43—Scope.*

Where the husband executed a mortgage on behalf of his wife but the authority was not proved. *Held* that a decree can be passed against the estate that he got as heir to his wife.

Iqbal Ahmad—for Appellant.

B. E. O'Conor—for Respondents.

Lindsay, J. :—This appeal has arisen out of a suit for sale on a mortgage.

The mortgage was executed on the 11th of January, 1909, in favour of Sheikh Shahab-ud-din, the husband of the plaintiff, since deceased.

This mortgage was executed by one Muhamad Aizaz Ali Khan, the second defendant in the case. He purported to execute this deed as the general attorney of his wife Mt. Mahfuz-un-nissa who was impleaded as the first defendant.

The sum borrowed under the mortgage was Rs. 3,000. There was a personal covenant to pay and a further covenant that in the event of failure to pay, the mortgaged property might be brought to sale. The property, it may be remarked was the property of Mt. Mahfuz-un-nissa.

The two defendants Mahfuz-un-nissa and Muhammad Aizaz Ali Khan set up separate defences. The lady took the line of defence that she was no party to the mortgage-deed. She did not deny that her husband had executed the mortgage in question, although we find a statement to this effect in the judgment of the learned Subordinate Judge, a statement which on our reading of the pleadings appears to be erroneous.

The lady really sought to protect herself against the claim of the plaintiff by saying that her husband, defendant No. 2, had no authority to execute the mortgage-deed which was being sued upon. She stated that the power of attonery which was held by her husband had not been explained to her and was therefore not binding upon her.

The husband, defendant No. 2, did not deny the execution of the mortgage. He put forward a variety of pleas in order to show that the suit was not maintainable.

The learned Judge of the Court below dismissed the claim. He was of opinion in the first place that the plaintiff had failed to give due proof of the execution of the mortgage-deed in suit.

In the next place, he held that the plaintiff had failed to prove that the power of attorney under colour of which the mortgage-deed had been executed was a document binding on the lady. The Subordinate Judge states that there was no satisfactory proof for the purpose of showing that the document had been duly explained to the lady and that she was in a position to fully appreciate the legal consequences of her act when she executed the document.

The plaintiff in the Court below also claimed to be entitled to a personal decree on the strength of a certain acknowledgment contained in the letter which was written by the second defendant on the 6th of April 1914. The

learned Subordinate Judge, however, was of opinion that this acknowledgment could not affect either of the defendants and consequently he refused to order any personal decree.

The plaintiff now comes up in appeal and a variety of grounds are put forward upon which the judgment of the court below is challenged. Before we proceed to discuss the question which arises for determination here it is important to notice that since the appeal has been filed the first defendant, Mt. Mahfus-un-nissa has died, her heirs have now been made parties to the record and one of these heirs is her own husband the second defendant, Muhammad Aizaz Ali Khan, who, under the Muhammadan law, has become entitled as one of his wife's heirs to a one-fourth share of the mortgaged property. That fact will have to be borne in mind later on when we come to announce our decision regarding the liability of Aizaz Ali Khan.

We begin with the finding of the court below that execution of the document was not duly proved. Here, we have to record our disagreement with the view taken by the learned Judge of the court below. It was never contended that Mt. Mahfuz-un-nissa herself had executed this deed of mortgage. The case for the plaintiff was that the deed was executed by her husband who was her duly constituted attorney. The husband never denied the execution of the deed and in the circumstances it seems to us that execution was duly proved and the plaintiff discharged all the onus which lay upon her in this respect. We refer in this connection to section 70 of the Indian Evidence Act. We pass on therefore to what is really the important question in the case, namely, whether the mortgage sued upon could be deemed to be binding upon the first defendant, Mahfuz-un-nissa.

It can only be so if we are satisfied that at the time the document was executed her husband had full authority to act on her behalf. This takes us back to the power of attorney from which that authority is said to be derived and that document is a document, dated the 12th November 1898.

It is a fact that the original power of attorney was not produced in the court below. Obviously it was in the possession either of Mahfuz-un-nissa or of her husband. Notices were issued to them to produce it but it was not produced.

In order therefore, to prove that such a document had been executed it became necessary to call the Sub-Registrar in whose office the power of attorney had been registered. It was not possible for the plaintiff to produce a certified copy of the power of attorney for, according to the evidence of the Sub-Registrar and according to the rules on the subject, no stranger is entitled to obtain from the registration department certified copy of a document of this nature.

The Sub-Registrar of Moradabad was called and brought with him the registration volume in which this power of attorney had been copied.

It may be noted that the Sub-Registrar who gave evidence was not the same Sub-Registrar who had registered the deed in the year 1898.

There can be no doubt from the entry in the register which was produced before the learned Subordinate Judge that, a power of attorney was executed on the 12th of November, 1898, by Mt. Mahfuz-un-nissa in favour of her husband.

The contents of this power of attorney were read out in Court by the Sub-Registrar who quoted from the entries in this register. It appears that amongst other things the power of attorney gave the husband authority to borrow money for household and court expenses, to pledge or hypothecate his wife's property in any way or to mortgage, sell the whole or any part of his wife's property, or to make a gift of his wife's property or a *waqf*, or to make an exchange of it.

It is thus obvious that the power of attorney which the lady executed in her husband's favour was couched in very wide language and gave him practically unlimited powers of disposal over his wife's estate.

This being so, it becomes necessary to consider whether the requirements of the law with respect to deeds of this kind executed by *pardanashin* ladies have been met in this case. It has been laid down as the law by a string of rulings that where a person relies on a document of this nature and is making a claim against a *pardanashin* woman, based upon a document of this kind, it is incumbent upon him to give satisfactory evidence that the document has been explained to and understood by the lady. We may refer to the following

cases in this connection:—*Sudisht Lal* v. *Mt. Sheobarat Koer* (1), *Shambati Koeri* v. *Jago Bibi* (2), and *Sajjad Husain* v. *Abid Hussain Khan* (3).

The doctrine is well understood. The only difficulty which arises is as to its application to particular cases. No uniform standard of evidence which will satisfy the court can be laid down, and each case must be decided on its own facts.

Turning to the evidence in this case all we have is what was read out in court by the Sub-Registrar from the volume of the register which he produced before the Subordinate Judge.

This register contains copies of the endorsements which were made upon the power of attorney at the time of its registration. We refer to the following endorsements which contain the only evidence regarding the question as to whether the document was duly explained to the lady and understood by her.

We begin with the following:—

"To-day I went in person to the executant of this general power of attorney at 5 p.m. and satisfied myself that Mt. Mahfuz-un-nissa executed this power of attorney of her own free-will and accord. The abovenamed executant affixed her signature to the power of attorney in my presence and she was identified by Ehsan Ali Khan and Muhammad Sarfaraz Ali Khan".

This endorsement therefore can be relied upon for the purpose of showing that as a matter of fact the lady executed a document in the presence of the Registering Officer and that he was satisfied that this execution had been made of her own free-will and accord.

A further endorsement in the following language is also proved to have been recorded on the power of attorney:—

"Mt. Mahfuz-un-nissa . . . . . after hearing all the contents of the document admitted it in a loud voice from behind the door at her dwelling house."

We observe here that the translation of this passage in the paper book is not quite correct.

This is the whole of the evidence upon which we are asked to find that the document was read to the lady and explained to her so that she was thoroughly aware of the consequences which would follow in law from her act of execution.

It has been argued before us that the declaration made by the Sub-Registrar and embodied in the endorsement on the deed is sufficient proof that the document was read and explained to the lady.

It is to be noted however that while the language used by the Registering Officer would indicate that the document had been read out to the lady there is nothing expressly indicating that he explained the document to the lady; in other words, that he explained to the lady what the results of her actions would be. We have been referred to the registration rules which were issued in the year 1896 and which were therefore in force at the time this document was registered. Under rule 185, Registering Officers were directed in the case of documents executed by *pardanashin* ladies, to obtain the admission of execution from the executant's own lips. The rule further lays down the necessity for having the lady properly identified and a further direction is given that the terms of the document should be explained to the executant and if, while admitting execution she objects to any of the terms, a note of such objection should be made.

We are asked to presume that the Sub-Registrar must have carried out the rule to which we have just referred and that consequently we ought to hold that the document was duly explained to the lady so as to be thoroughly understood by her.

The case is no doubt a somewhat difficult one and it has been rendered more difficult by reason of both the lady and her husband keeping out of the witness-box. That is a circumstance which has to be weighed. But making allowance for everything, we have in the end to decide whether there is before us that satisfactory evidence of explanation and understanding which the law requires.

All we can say is, that after giving the case our most careful consideration we are not satisfied that the plaintiff has discharged the duty which the law cast upon her, and so, as regards this part of the case we cannot disagree with the finding of the Court below.

There remains only one other question and that is with respect to the liability of the husband.

(1) (1881) 7 Cal. 245 (P.C.)
(2) (1902) 29 Cal. 749 (P.C.)
(3) (1912) 34 All. 455.

We have already referred to the fact that the husband admitted the execution of this document although his statement was that the property which was being mortgaged was not his property.

That was a true statement of course, at the time it was made. But we have it now that a one-fourth share in the mortgaged property has come to the husband by inheritance and we have therefore to deal with the question of his liability as things now stand.

Mr. Iqbal Ahmad has, in this connection, relied upon the provisions of section 43 of the Transfer of Property Act and we think that plea is well taken. It is at the option of the plaintiff under this section to seek a remedy against the property which has come into the possession of Aizaz Ali Khan, and therefore, if there is a debt owing from Aizaz Ali Khan in respect of the mortgage-deed in suit that debt may be enforced against this one-fourth share which has now become his property.

As regards the question of the indebtedness of Aizaz Ali Khan we think there can be no reasonable doubt. It is proved beyond all question that the money which was borrowed under the mortgage was delivered into his hands. Furthermore, in a letter which is on the record (Ex. 2, printed at page 29 of the record) Aizaz Ali Khan, on the 6th of April, 1914, admitted that he took this money to meet his own expenses, and he further, in paragraph 4 of that letter, made a statement clearly indicating that at that date, the debt was still subsisting. This being so, and the acknowledgment having been within six years of the date of the mortgage and also within six years of the date of the suit, we think Aizaz Ali Khan is clearly bound and that as against him a decree can be passed by which the debt incurred under the document in suit can be enforced against a one-fourth share of the mortgaged property now belonging to Aizaz Ali Khan since the time of his wife's death.

We therefore give a decree for the full amount of the mortgage against Aizaz Ali Khan and we also give a decree for sale directing the sale of the one-fourth share of the mortgaged property which he has inherited from his wife. The usual decree for sale will be prepared. The plaintiff will be entitled to recover costs from Aizaz Ali Khan both in this Court and in the Court below. The costs in this Court will include fees on the higher scale.

As regards the respondents Nos. 1 to 6 the suit against them fails and is dismissed with costs in both Courts including in this Court fees on the higher scale.

Appeal dismissed as regards respondents 1 to 6 and allowed as regards other respondents.

---

* * **1924 Allahabad 365.**

LINDSAY AND SULAIMAN, JJ.

Meghraj and others—Appellants

v.

Krishna Chandra Bhattacharji and others—Respondents.

F.A. No. 334 of 1921, decided on 18th December, 1923, from the decree of Sub-Judge, Meerut, dated 7th May, 1921.

(a) *Executor—Probate does not create title but from death title vests in executor.*

Every executor derives his title from the will and not from the probate. The probate is indeed the only proper evidence of the executor's appointment but notwithstanding this it is clear that the executor represents the estate of the testator from the time of his death. (14 C.W.N. 256, *Diss.*)

• • (b) *Transfer of Property Act, S. 3 (c)—Machinery.*

Unless machinery was attached to the building for the permanent beneficial enjoyment of the building itself it is not immoveable property, especially where the building is really put up for the purpose of sheltering the machinery and protecting it from the weather.

Nehal Chand and *K. N. Katju*—for Appellants.

P.L. Banerji and *Saila Nath Mukherji*—for Respondents.

Lindsay, J.:—These two cases are connected together. The earlier one F. A No. 334 of 1921 ought strictly speaking to be decided first, but in view of the facts we are about to set out we consider it expedient to dispose of first F. A. No. 86 of 1923. The record in that case has not been printed. We were of opinion that it was unnecessary to have this done in view of the decision at which we are about to arrive.

Before we proceed to deal with the questions which arise for determination before us it is necessary to set out a number of facts which will have to be referred to hereafter.

We are concerned in these two cases with certain items of property which belonged to a Bengali gentleman named Kailash Chandar Bhattacharji.

This gentleman on the 16th August, 1910, in order to raise a loan of Rs. 25,000 mortgaged three items of property to a mortgagee named Lala Ram Das.

Those items of property were as follows:—

1. Mauza Sherpur.
2. Mauza Lalpur.
3. The Christy Cotton Baling Press.

The Bank of Upper India, Limited, Meerut, which afterwards went into liquidation had obtained in the year 1910 a simple money decree against Kailash Chandra Bhattacharji and in execution of this decree the Bank got Mauza Sherpur brought to sale and it was purchased on the 20th January, 1913, by one Benarsi Das.

That sale was held subject to the mortgage which had been executed by Kailash Chandar in the month of August, 1910.

In the month of June, 1913, Banarsi Das, the auction-purchaser of Sherpur, redeemed the mortgage of the 16th August, 1910, by paying a sum of Rs. 2,885 to the mortgagee Lala Ram Das.

Kailash Chandar died on the 16th September 1912. He left a will bearing date the 10th August, 1911, and made bequests in favour of his widow and his four children.

One of these children was B. Krishna Chandar Bhattacharji who was appointed executor under the will.

Krishna Chandar Bhattacharji took out probate of the will on the 13th December 1913.

These are practically all the facts we have got to deal with in deciding the present cases.

To return to F. A. No. 86 of 1923. This appeal arose out of a suit brought by two sons and a daughter of the deceased Kailash Chandar in order to avoid the sale which took place in execution of the simple money decree obtained by the Bank of Upper India against their father Kailash Chandar.

The ground upon which these plaintiffs sought to avoid that sale was that the execution proceedings had been taken behind their backs and at the time the order for sale was made they had not been parties to the record.

The substantial defence which was set up by the defendants in that case, who included the liquidators of the Bank of Upper India, was that the sale was perfectly valid and could not be set aside. It was pleaded that execution of the simple money decree against Kailash Chandar had begun in the latter's lifetime and it was pointed out that after his death his son Krishna Chandar was made a party to the execution proceedings in place of his deceased father.

It was claimed that Krishna Chandar being the executor of his father's estate completely represented that estate in the execution proceedings and that consequently there was no ground whatever upon which these plaintiffs were entitled to have the sale declared void.

The Subordinate Judge, who dealt with this suit, Mr. Abdul Halim, dismissed the plaintiffs' suit. He was of opinion that in no way could the execution sale at which Banarsi Das purchased the property be deemed to be void. He was of opinion that in the execution proceedings leading up to the sale the estate of the deceased Kailash Chandar was fully represented by the executor.

The same question was in issue in the other suit out of which F.A. No. 334 of 1921 has arisen. That suit with which we shall have to deal presently was a suit brought to enforce certain rights under the mortgage executed in the month of August 1910.

The sons and daughter of Kailash Chandar, who were the plaintiffs in the suit which we have just been discussing, were impleaded as defendants in this mortgage suit and they raised the plea that Banarsi Das, whose interest is now vested in all the plaintiffs in the mortgage suit, could take no title under the purchase which he made in execution of the Bank's decree.

The Subordinate Judge, who decided this particular case, Mr. P. K. Ray, repelled the contention that Krishna Chandar fully represented the estate in the execution proceedings. Mr. Ray was of opinion that although Krishna Chandar was without doubt the executor of his father's estate at the time these execution proceedings were going on, he had not taken out probate and for that reason Mr. Ray seems to have thought that he did not fully represent the estate.

On the other hand Mr. Ray was of opinion that notwithstanding this circumstance it could not be declared that the sale in execution of the decree was void. It was pointed out that at any rate one of the legal representatives of the deceased judgment-debtor

party to those proceedings, namely, Krishna Chandar, and that the failure to cite as parties to the proceedings the other representatives of Kailash Chandar amounted at most only to an irregularity whereby the sale in execution could not be treated as being void, but at the best, voidable only.

In deciding this matter the learned Subordinate Judge relied upon the principles laid down in the Privy Council ruling in *Malkarjun* v. *Narhari* (1).

We are quite satisfied that both Courts were right in holding that this execution sale could not in any way be treated as a void sale. We prefer to follow the reasons given by Mr. Abdul Halim in his judgment and we have no hesitation in saying that in the execution proceeedings anterior to the sale of the property the estate of the deceased judgment-debtor was fully represented. It seems to us nothing to the point to say that Krishna Chandar, who undoubtedly was his father's executor, could not fully represent the estate at the time these execution proceedings were going on because he had not at that time obtained probate of the will. It is to be pointed out that every executor derives his title from the will and not from the probate. The probate is indeed the only proper evidence of the executor's appointment, but notwithstanding this it is clear that the executor represents the estate of the testator from the time of his death. There is clear provision to this effect in section 179 of the Indian Succession Act which declares that the executor is the legal representative of the deceased *for all purposes*, and all the property of the deceased person vests in him as such.

It is an admitted fact that probate of the will was subsequently taken out and that being so we, who are dealing with the case now, must take it that Krishna Chandar has conclusively been proved to be the executor of his father's estate, and that the estate of his father vested in him from the date of his father's death. The probate which was subsequently taken out establishes the will from the date of the testator's death and is conclusive proof of the appointment of the executor; and further it is provided by law, that once probate is taken out by the executor all intermediate acts which he has done in connection with the estate of the testator are validated.

It seems to us therefore to be impossible to say that the estate of the deceased judgment-debtor was not fully represented in these execution proceedings.

We may say here that we are not able to follow the view taken by a Bench of the Calcutta High Court in *Doya Narain Tiwari* v. *The Secretary of State for India in Council* reported in 14 C.W.N. 256.

At the same time we recognise that the judgment of the other Subordinate Judge, Mr. Ray, also proceeds upon a correct principle and that even had our opinion regarding the nature of the executor's position been other than it is, we should have agreed with Mr. Ray's decision that the case ought to be dealt with upon the principles laid down in the Privy Council ruling to which we have referred. We take it therefore as being clear on all hands that the suit brought by the sons and daughter of Kailas Chandar for the purpose of having this sale set aside was bound to fail, and we hold definitely that the sale was not void but was a perfectly valid sale in favour of Banarsi Das.

As held by the learned Subordinate Judge, Mr. Ray even if we were disposed to hold that the sale was voidable the suit brought by the sons and daughter was barred by limitation. The period of limitation to set aside a sale of this nature is one year and that period expired long ago.

This finding therefore disposes of F. A. No. 86 of 1923 which we must dismiss with costs to the respondent including in this Court fees on the higher scale, if any.

We have now to come to the other case, namely F. A. No. 334 of 1921.

We have already mentioned the fact that the plaintiffs in this case are said to represent the interest of Benarsi Das who purchased one of the items of the mortgaged property in the year 1913.

We have also mentioned the fact that on the 3rd June, 1913, Banarsi Das redeemed the mortgage which had been executed by Kailash Chandar on the 16th August, 1910.

The object of the present suit is to obtain the balance of this mortgage money against the persons who have become subsequent transferees of the properties mortgaged other than the item of Sherpur which has come into the hands of the plaintiffs.

(1) (1901) 25 Bom. 337 (P.C.).

The village of Lalpur which was one of the items of property mortgaged was sold to one Kishori Lal who is now represented by the defendants Nos. 6, 7, 8 and 9 in this suit.

The other item of the mortgaged property, namely, the Christy Cotton Baling Press was sold to the defendant No. 5.

The plaintiffs are claiming as representatives of the original mortgagee to recover out of the items mortgaged the sums which they are liable to contribute under the mortgage.

One of the pleas which was raised on behalf of the 5th defendant, the present owner of that item of property known as the Christy Cotton Baling Press, was that the suit was time-barred. The validity of that plea depended upon the question whether this Baling Press was to be treated as moveable or immoveable property.

In the mortgage-deed which was executed by the deceased Kailash Chandar he described this particular item of property in the following words :—

"*Ek manzil karkhana wa imarat mausuma* Christy Cotton Baling Press, Meerut *mai jami saman mutaliqa uske.*"

So far as we understand the case the 5th defendant who has been impleaded, purchased the Baling Press, *i.e.*, the machinery which goes to make up the Press and has removed it to some place in the Punjab.

The learned Judge of the Court below was opinion that the machinery of this Baling Press had undoubtedly been mortgaged under the document in suit. But he was of opinion that the machinery was moveable property and that consequently the second schedule of article 120 of the Limitation Act would apply.

It is now argued before us that the decision of the Court below on this point was wrong and that the item of property described in the mortgage-deed in the language to which we have just referred ought to be treated as immoveable property and not moveable property. After full consideration of the arguments we are unable to entertain this contention.

We would say in the first place that there is practically no evidence on the record which gives us any accurate idea as to how this Baling Press was set up at Meerut.

There is no doubt a reference in the mortgage-deed to a building or "*imarat*" but if we look to the evidence in the case all we can find is this. One of the plaintiffs' witnesses, Wasiyat Ali, says "I saw the Christy Cotton Press for the first time at the end of 1913. The machinery was kept in the enclosure of Ganga General Mills."

The only other witness who speaks about this property is one Mr. Damodar Das, Vakil. This gentleman is the Director of the Ganga General Mills. He has deposed that the Mills held on lease the land on which their buildings were erected and it was stated by Mr. Damodar Das that his company gave B. Kailash Chandar Bhattacharji a plot of land to keep his Cotton Baling Press on. Witness did not know the terms on which the ground had been given to Bhattacharji. He says he was treated as a sub-tenent. In cross-examination the witness said that K. C. Bhattacharji had erected some building but that this building had not been completed.

We are left therefore in doubt as to how this Press, which was set up in Meerut was located and on such evidence as we have we do not see how we could possibly come to the conclusion that this Baling Press was immoveable property.

We have been referred to the definition of the expression "immoveable property" contained in the General Clauses Act of 1897. This definition has to be read along with the interpretation section of the Transfer of Property Act (section 3) and in particular we have to pay attention to the words in this latter section "attached to earth."

We have mentioned already that there was no clear evidence before us that any building intended to shelter the machinery of this Baling Press was ever completed. But even if we assume that there was such a building it would be difficult for us, in view of this definition, to hold that the machinery which has now been removed to the Punjab and which has been sought to be sold in order to satisfy the claim of these plaintiffs was in any sense immoveable property.

We cannot decide this question on the English law relating to fixtures. We have to pay attention to the definitions in the Indian Statutes.

If there was a building in existence inside which this machinery was sheltered it cannot be said that this machinery was attached to the building for the permanent beneficial enjoyment of the building itself, as is contemplated in clause (*c*) of the

definition in section 3 of the Transfer of Property Act.

It would be difficult in a case of this kind to speak of machinery being attached to a building embedded in the earth for the beneficial enjoyment of the building. On the other hand it would seem more natural to suppose that the building is really put up for the purpose of sheltering the machinery and protecting it from the weather.

Nor again with reference to the definition of immoveable property contained in the General Clauses Act it is possible to say that this machinery was permanently fastened to anything attached to the earth.

Having regard to this definition and to the state of the evidence in the case we have no hesitation in saying that the learned Subordinate Judge was quite correct.

It follows therefore that we cannot interfere with that portion of the decree which declares that the claim in so far as it related to this machinery was beyond time being barred by the six years' rule of limitation.

We come then to the other part of the case. We have it that some of the defendants are the transferees of another item of the mortgaged property named Lalpur.

The Subordinate Judge was of opinion that these plaintiffs could only sell up Lalpur to the extent to which that item was liable under the terms of the mortgage. In other words the Subordinate Judge in accordance with the provisions of section 82 of the Transfer of Property Act distributed the liability of the three items of property as they stood at the time of the mortgage. He was of opinion that the value of Sherpur which the plaintiffs purchased was represented by the figure Rs. 6,000. Lalpur he found was of the value of Rs. 5,000 while the Christy Cotton Baling Press was of the value of Rs. 25,000.

Acting on this principle he has given plaintiffs a decree for a certain sum as principal and a further amount as interest and directed that this amount be realised by the sale of the portion of the village of Lalpur sufficiently to satisfy the decretal amount.

In appeal before us however the argument has been that the plaintiffs are entitled to throw the whole of the mortgage-debt upon *mauza* Lalpur minus the share to which Sherpur is liable.

The suit in substance is a suit for contribution and the section which regulates the rights of the parties is section 82 of the Transfer of Property Act which lays down that where several properties, whether of one or several owners, are mortgaged to secure one debt such properties are in the absence of a contract to the contrary liable to contribute rateably to the debt secured by the mortgage after deducting from the value of each property the amount of any other encumbrance to which it is subject at the date of the mortgage.

There is in this case no question of a contract to the contrary and consequently applying the principle laid down in section 82 it is evident that the three items of property which were mortgaged under the mortgage of 1910 were liable each to satisfy a rateable proportion of the mortgage debt, the ratio being in proportion to their respective values. We have already indicated the values of these properties as they stood at the time of the mortgage. Sherpur was of the value of Rs. 6,000. Lalpur was of the value of Rs. 5,000, and the Christy Cotton Baling Press was of the value of Rs. 25,000.

It is, therefore, on the basis of the ratio so indicated that the claim of the plaintiffs must be decided. A case in which this principle was laid down is reported in I.L.R., 36 All., 272 (*Bhagwan Singh* v. *Mazhar Ali Khan*).

The learned Subordinate Judge has held that the plaintiffs are entitled to recover from the present owners of Lalpur a share of the mortgage debt calculated in accordance with the respective liabilities of the three items of property as defined in section 82 of the Transfer of Property Act. In our opinion this decision of the learned Subordinate Judge is perfectly correct and ought not to be disturbed. The only other ground which is mentioned in the grounds of appeal is one with regard to future interest. We imagine this plea has been taken under some misapprehension. It seems to us that the decree of the court below provides for subsequent interest and subsequent costs in the manner which is usual in the case of decrees for sale under Order 34, rule 4 of the Code of Civil Procedure. The cross-objection which was filed in this case relates to the point which we have already decided in connection with F. A. No. 86 of 1923.

For the reasons already given the cross-objection fails and is dismissed with costs.

This appeal fails too and is dismissed with costs including in this Court fees on the higher scale.

Appeal and cross-objection dismissed.

---

* * 1924 Allahabad 370.

KANHAIYA LAL AND MUKERJI, JJ.

Mt. Mulani—Appellant.

v.

Maula Baksh—Respondent.

S.A. No. 513 of 1922, decided on 20th December, 1923, from the decree of District Judge, Mainpuri, dated 9th February, 1923.

(a) *Muhammedan Law—Gift—Without delivery of possession gift is void* ab initio *and there is no limitation to set it aside but limitation starts when possession is got by donee—Limitation Act, Art. 91.*

Where a deed of gift is executed by a person governed by the Muhammedan law and the possession of the property comprised in the gift has not been delivered the gift would be void *ab initio* and no question of limitation will arise in such circumstances. The right of the plaintiff to impeach such a gift can only accrue from the moment when by receipt of possession the gift becomes operative by law. (6 All. 207, *Foll.*) [P. 371, C. 1.]

(b) *Limitation Act, Art. 91—Starting point.*

Art. 91 of the Indian Limitation Act provides a period of three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. (28 Mad. 349, *Foll.*) [P. 371, C. 1.]

Baleshwari Prasad—for Appellant.

A. P. Dube—for Respondent.

Kanhaiya Lal, J.:—The plaintiff seeks to set aside a deed of gift purporting to have been executed by her in favour of the defendant on the 11th of February, 1914. Her allegation was that the defendant practised fraud on the plaintiff and caused her to execute the deed of gift by the exercise of undue influence over her. The precise nature of the fraud was not specified but it was alleged that certain misrepresentations had been made by the defendant to obtain her consent. It was further alleged that in spite of the deed of gift the plaintiff had continued in possession of the house comprised in the gift.

The defendant denied that any fraud, undue influence or misrepresentation had been committed. He pleaded that he had been in possession of the house from the date of the gift and spent Rs. 150 in making improvements of the house in question and paid Rs. 150 to Balaqi Das who had purchased the rights of Mt. Aliman the daughter of the plaintiff, who was found to be the joint owner of the said house with the plaintiff. There was a further defence that the deed in suit was really a sale for consideration cloaked in the form of a gift to defeat a claim for pre-emption.

The trial court found that the deed in question was nothing more than a gift without consideration and that it was executed under a misapprehension arising out of false promises made by the defendant and gentle persuasion exercised by him and was not consequently binding on the plaintiff. In the course of its judgment it observed that the plaintiff might be said to have been duped or misled but she could not be said to have been put under undue influence, and that the plaintiff had given preference to the defendant who was a very distant relation of her husband in disregard of the claim of her own brother, because the latter had been neglecting her and the former had been attending to her wants and comforts in her old age. In regard to the question of possession the trial court came to the conclusion that the rent of the house in dispute used to be paid to the plaintiff till very recently and that as long as the defendant paid the rent realised from the house to her she was quite pleased with the arrangement she had made, but when the defendant began to neglect her and stopped the payment of the rent to her, her eyes were opened and she sought the help of her brother in getting rid of the transaction. With reference to the other pleas raised by the defendant, the finding of the trial court was that Rs. 150 had actually been spent in improvements and a similar sum in acquiring the rights of Balaqi Das who had purchased the rights of Mt. Aliman, the daughter of the plaintiff. A decree was accordingly passed in favour of the plaintiff for the cancellation of the deed of gift and for the recovery of possession of her share of the house on condition of the plaintiff's paying Rs. 150 to the defendant on account of the improvements effected by the latter and Rs. 150 which the defendant had paid to Balaqi Das for the share of her daughter Mt. Aliman.

The defendant appealed and the plaintiff filed certain cross objections. The whole

of the suit was in effect before the lower appellate Court for determination; but the Court confined itself to the question of limitation and without going into the various pleas raised on behalf of either side came to the conclusion that article 91 of the Indian Limitation Act (No. IX of 1908) barred the claim.

It is not possible, however, to determine the question of limitation without going into many of the questions of fact which arise in the suit. The plaintiff had, for instance, alleged that she had remained in possession of the house in dispute in spite of the deed of gift but that allegation was traversed by the defendant. The trial Court had recorded a finding on that point but the lower appellate Court left it undetermined. Where a deed of gift is executed by a person governed by the Muhammedan law and the possession of the property comprised in the gift has not been delivered, the gift would be void *ab initio*, and as held in *Serajul Haq* v. *Khadim Hussain* (1) and *Meda Bibi* v. *Imaman Bibi* (2) no question of limitation will arise in such circumstances. The right of the plaintiff to impeach such a gift can only accrue from the moment when by receipt of possession the gift becomes operative by law.

Article 91 of the Indian Limitation Act provides a period of three years from the date, when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. The lower appellate Court has not determined when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to her. In *Singarappa* v. *Talari Sanjivappa* (3) where the plaintiff executed a sham sale-deed in favour of the defendants, neither party intending that it should be acted upon and four years later the defendants began to set up a claim to ownership on the strength of the deed, it was held that the suit was not barred by article 91 of the Indian Limitation Act, having been brought within three years from the date when the plaintiff apprehended that the defendants had set up title under the instrument. In *Petherpermal Chetty* v. *Muniandy Servai* (4), their Lordships of the Privy Council similarly held that where a deed was inoperative it was unnecessary for the plaintiff to have it set aside as a preliminary to his obtaining possession of the property. The plaintiff stated in her deposition that the payment of the rent of the house in dispute was stopped at or about the time when the suit was filed. That fact must therefore be determined.

It has also been urged that the deed of gift was in its very nature revocable under the Muhammedan law, but that point also cannot be determined until the other questions raised in the appeal before the Court below are decided. The parties are sunnis and according to the Hanafi law a gift cannot be revoked after the subject of the gift has increased in value owing to some accession thereto made by the donee, which is inseparable from it.

The appeal is therefore allowed and the decree of the lower appellate Court set aside and the suit remanded to that Court with a direction to reinstate it under its original number and to dispose of it after determining the other points involved in the appeal and the cross-objections. The costs of this appeal will abide the event including fees in this Court on the higher scale.

Mukerji, J.:—I agree that the appeal before the lower appellate Court could not be decided merely on the point of limitation. The other points involved in the appeal require determination. I therefore agree with my learned brother that the appeal must be decreed and on terms stated by him.

Appeal allowed.

(1) (1884) A.W.N. 60.
(2) (1884) 6 All. 207 (F.B.).
(3) (1905) 28 Mad. 349.
(4) (1908) 35 Cal. 551 (P.C.).

---

* 1924 Allahabad 371.

LINDSAY and SULAIMAN, JJ.

Babban Panday—Appellant

v.

Lachhman Chaudhri and another—Respondents.

S.A. No. 1071 of 1922, decided on 30th November, 1923, from the decree of First Class Additional District Judge of Gorakhpur, dated 20th April, 1922.

(a) *Pre-emption*—Wajib-ul-arz.

Owing to special instructions given to settlement officers in the *wajib-ul-arzes* of 1885 in Basti and Gorakhpur Districts the record of custom of pre-emption raises a very strong presumption. [P. 372, C. 1.]

(b) *Pre-emption—Custom lapses if property vests in one individual only.*

It is not correct to say that if it is shown that certain property in the course of time becomes the exclusive property of an entire family any custom relating to pre-emption must necessarily lapse. The true doctrine is that if the custom of pre-emption exists and if it so happens that the property to which it relates eventually comes into the hands of a single individual proprietor the custom is there and then extinguished. [P. 373, C. 1.]

St. C. Thompson—for Appellant.

N. Upadhiya—for Respondents.

Lindsay, J.:—We cannot maintain the judgments of the Courts below in this case. We think that the plaintiff was entitled to succeed and that it was established that a custom of pre-emption exists.

The plaintiff brought into Court extracts from the *wajib-ul-arzes* of 1833, 1860 and 1885 and he also claimed to have in support of his case a decree in which the right of pre-emption had been recognized.

Clearly it lay heavily on the defendants to rebut this evidence led on behalf of the plaintiff.

We have had a number of these Basti cases before us recently and it seems to us that the position regarding these *wajib-ul-arzes* in Basti and Gorakhpur is not properly appreciated by the Courts there.

It was brought to the notice of the learned Judge of the Court below in this case that the *wajib-ul-arz* prior to the year 1885 was a document of special importance.

We have in other cases found it necessary to draw attention to the fact that in the Gorakhpur and Basti settlement rules relating to the settlements which were made about the year 1885 the Board of Revenue issued special instructions regarding the preparation of a record of a custom of pre-emption.

Settlement officers were directed to record a custom of pre-emption when the proprietors, being other than Muhammedan proprietors expressly demanded, that a note of the custom should be made and further, proved conclusively, that the custom exists. It seems to us therefore that when we find in a *wajib ul-arz* prepared under these instructions a statement that a custom exists it must be assumed that the necessary proof was forthcoming before the Settlement Officer before that record was made; in other words, that there was proof which conclusively satisfied the Settlement Officer of the existence of the custom.

It is in our opinion a mistake to treat these documents in the way in which the Courts below seem to treat them. We ought, in dealing with the question of the existence of custom, to begin with the last record. In this instance, the record was prepared in 1885. If it is proved that records of custom are set out in the earlier *wajib-ul-arzes* of 1860 and 1833, that is corroborative evidence. It is not proper to start with the *wajib-ul-arz* of 1833 to consider whether it was possible that a custom could have grown up by that time and then to proceed to consider subsequent *wajib-ul-arz*. The proper starting point is the last *waijb-ul-arz*.

We have it therefore that there is a very strong presumption here in favour of the existence of custom and it remains to be seen what evidence was forthcoming by way of rebuttal. We disagree entirely with the view of the evidence relating to the history of the village which has been taken by the Court below. It seems to be clear on all hands that this was one of those numerous villages in which there was a superior proprietor and a number of inferior proprietors called *birtyas*. It would seem that in the earlier short term settlements which were made before the first regular settlement came to be made under the Regulation of 1833, the revenue engagements were taken from the superior proprietor. A reference to the Gazetteer shows that in the earlier days of the British administration this was the policy of the Government. Later on however, that policy was changed and the practice sprang up of taking the revenue engagement from the inferior proprietor or *birtya* and providing for the rights of the superior proprietor by declaring that a certain amount of *malikana* shall be payable to him.

This is what has happened in the present case. It appears that in the year 1837 a certain petition was put in by a member of a family residing in this village. He represented that he himself and his co-sharers had been *birtyas* in this village and had been in possession since the time of the Nawab Wazir of Oudh, that is to say, since before the year 1800.

The object of this petition was to obtain the revenue engagement, the *birtyas* apparently desiring, that the settlement should be made with them and not as heretofore, with the superior proprietor. There is

nothing whatever in this petition to indicate that it was impossible in any way that a custom of pre-emption should have grown up by that time or subsequently. It is not correct to say that if it is shown that certain property in the course of time becomes the exclusive property of an entire family any custom relating to pre-emption must necessarily lapse. The true doctrine is that if the custom of pre-emption exists and if it so happens that the property to which it relates eventually comes into the hands of a single individual proprietor the custom is there and then extinguished. That however is not the case here for, as we have pointed out, in the application which was made in the year 1837 the applicant stated that there were other people who were co-sharers with himself.

On all hands therefore, it is clear that the very strong presumption in favour of the existence of custom which is to be based upon the *wajib-ul-arz* prepared in the year 1885 has not in any way been overturned by the evidence of the history of the village. The case to our mind is a perfectly clear one, and as we have said, we must hold that the existence of the custom should on this evidence, have been held to be established.

There remains the question of the consideration. It is stated in the sale-deed that the property was being sold for the sum of Rs. 2,999. The allegation of the plaintiff was that the true consideration was only Rs. 1,100.

The Court of first instance found on this issue that the genuine consideration for the sale was a sum of Rs. 1,647 only.

When the plaintiff went in appeal the question of consideration was raised again, but in view of the finding to which the learned Judge came regarding the existence of the custom, he did not consider it necessary to decide this issue. It will now be necessary for us to remit an issue to the learned District Judge asking him to find the true consideration for the sale now sought to be pre-empted. No further evidence will be taken. The finding of the learned Judge ought to be returned to us with as little delay as possible, and ten days from the date of the receipt of the learned Judge's finding will be allowed to the parties to file objections.

Case remitted.

* * 1924 Allahabad 373.

MUKERJI, J.

Bisal Singh and others—Defendants-Appellants

v.

Roshan Lal and another—Plaintiffs-Respondents.

S. A. No. 1000 of 1922, decided on 21st January, 1924, from a decree of District Judge, Allahabad.

Registration Act, S. 28—Non-existence of any property within the jurisdicton of the Sub-Registrar invalididates registration even in absence of fraud by mortgagee.

Where it was admitted that the registered deed included a house which in fact never existed and which alone gave jurisdiction to the Sub-Registrar to register it *held*, that the registration was invalid though the mortgagee was no party to the fraud committed on the law of registration and it was the mortgagor who was soley to be blamed in the matter. The mortgagee himself was indifferent as to the value or nature of the property. The property being non-existent within the jurdisdiction of the Sub-Registrar he had no jurisdiction to register the deed. [P. 374, C. 2.]

P. L. Bannerji—for Appellants.

Ramuda Prosad—for Respondents.

Mukerji, J.:—The facts which have given rise to this appeal are these. Two persons Someshwar and Drigbijai executed the mortgage on which the suit out of which this appeal has arisen was brought. The deed was executed on the 4th of June, 1907. Someshwar is dead and the mortgagee Kandhai Lal, is also dead. Kandhai Lal's sons sued Someshwar's sons and Drigbijai for recovery of money on foot of the bond. The defences taken, *inter alia*, were that the deed had not been properly attested and that it was not properly registered. The lower appellate Court found that the deed had been properly attested and as to the registration it found that the properties mortgaged included a house in village Ghauspur Khathola *pergana* Chail which never in fact existed. It is common ground that it was owing to the inclusion of this house into the mortgage-deed that the Sub-Registrar of Chail *alias* Allahabad had the jurisdiction to register it. The learned District Judge also found or purported to find that the mortgagee was no party to the fraud committed on the law of registration and that it was the mortgagors who were solely to blame in the matter.

In this Court it has been urged that the deed was not properly attested, that the property which was found to be fictitious was never intended to be security for the money and that, it must be inferred therefore that it was included simply for the sake of registration. Further, it is urged that, whatever the intention of the mortgagee may have been, the law has been infringed and the registration cannot be held to be good. One more point was taken in the grounds of appeal, namely, ground No. 5. But it has not been pressed.

As to the attestation it is clear the learned District Judge believed the marginal witness who swore that the executants signed the deed before him. The finding therefore of the Court below must be upheld.

On the question of registration it appears to me that it is difficult to hold with the Court below that the mortgagee was an entirely innocent person in the matter. It being an admitted fact that, the property did not exist, it follows that the mortgagee never had a look at the property in order to ascertain whether it should form an adequate security or it should form with the other properties mortgaged an adequate security for the money he was going to advance. So far therefore as he himself was concerned he was indifferent as to the value or nature of the property. In this state of things the only legitimate inference to be drawn is that the property was included for the purposes of registration and not for the purposes of security. It has been urged by the learned Counsel for the respondents that this is really going against the finding of fact by the lower appellate Court. But the so-called finding of the learned District Judge is really an inference to be drawn from the proved facts. There is no direct evidence referred to by the Court below that the mortgagee acted on a particular representation and what that representation was. The defendant Drigbijai Singh gave evidence to the effect that the mortgagee had requested that the property should be included in the mortgage, but that evidence was disbelieved by both the Courts below. The discarding of that evidence does not give the result that it was proved by any positive evidence that the mortgagee was unaware of the fact that the property did not eixist. As I have said, he was prefectly indifferent as to whether the property existed or not. If that was the case, the only object with which the property could have been included was the obtaining of registration in the office of Sub-Registrar of Allahabad. It may be (but there is no evidence to prove it) that the mortgagors said that they had a property within the jurisdiction of Sub-Registrar of Allahabad and if that was included the registration could be effected at Allahabad and further it may be the case that the mortgagee accepted those words and agreed that for the purposes of registration that property might be included. This is the utmost view that may be surmised in favour of the mortgagee. But the question is, does it absolve him from his responsibility in the matter?

It is conceded that if the mortgagee was aware of the fact that the property alleged to be in Chail did not exist, the registration would be void. Now, assuming that the mortgagee believed that the property really existed but he allowed it to be included with the other property in the deed, in order that the Sub-Registrar of Allahabad might have jurisdiction, the question would be whether the registration is valid. In my opinion the law on the point is very clearly stated in section 28 of the Registration Act and it simply says that to give the Sub-Registrar jurisdiction the property included in the deed or a part of it must be situated within the jurisdiction of that officer. No question of fraud by one party or the other enters into the language of the law. The question of fraud may be pleaded only to stop a party from raising a plea, but the jurisdiction of a registering officer cannot come into play simply because one of the parties to a transaction has been guilty of fraud. There was no property within the jurisdiction of the Sub-Registrar of Allahabad and in my opinion it follows as clearly as possible that he had no jurisdiction to register the deed. There is no case law which deals directly with the point. In every case that has been brought to my notice, the inference was that the mortgagee was more or less culpable. Such an inference is really irresistible and the case which I am asked to suppose is practically impossible to accept. I am however of opinion that assuming even that the mortgagee was absolutely innocent in the matter that fact would not give the Sub-Registrar of Allahabad jurisdiction to register the deed. The result must follow namely that the deed is inoperative. It may be that the mortgagors have laid

themselves open to prosecution or a suit for damages, but that is a different matter.

The result is that the appeal succeeds. I set aside the decrees of the Courts below and dismiss the suit of the plaintiffs respondents with costs throughout.

Appeal allowed.

1924 Allahabad 375.

LINDSAY AND SULAIMAN, JJ.

Maulvi Sharif Ahmad Alvee—Appellant

v.

Muhmmad and another—Respondents.

S. A. No. 898 of 1922, decided on 30th November, 1923, from the decree of Sub-Judge, Muzaffarnagar at Meerut, dated 20th March, 1922.

Words—Hissedaran shikmi.

Hissedaran shikmi means co-sharers in the same khata, the khata being a smaller sub-division of a patti. (5 A.L.J. 52, *Diss.*)

Nehal Chand—for Appellant.

Gulzari Lal—for Respondents.

Lindsay, J.:—This appeal raises a somewhat difficult question of interpretation in connection with the provisions of a certain *wajib-ul-arz* relating to pre-emption.

According to what is stated in the *wajib-ul-arz*, on the occasion of a transfer, the first right to take the property is given to a class which is defined in the *wajib-ul-arz* as "*shurkayan shikmi*". It is provided that in case the members of the first class decline to accept the offer of the property then the offer is to be made to the second class of persons who are described as "*digar malikan thok o mahal ke*". A great deal of controversy has arisen regarding the meaning to be attached to the words "*shurkayan shikmi*". We have been referred to a decision of a Bench of this Court in *Abdul Shakur* v. *Mundal* (1). In that case it was sought to attribute to the expression "*hissedaran shikmi*" a meaning derived from blood relationship. In other words the suggestion was that *hissedaran shikmi* were people who had issued from the same "*shikam*"; that is to say the expression was used in the same sense as the English expression "uterine brothers."

This interpretation was definitely rejected by both Judges in that case and on the interpretation of the *wajib-ul-arz* in that case it was held that "*hissedaran shikmi*" meant in that particular case co-sharers in the same *khata*, the *khata* being a smaller sub-division of a patti. A patti is in the ordinary acceptance of the term a smaller division than the thok.

On the other hand it was decided by another Bench of this Court in the case (*Bahal Singh* v. *Mubarak-un-nissa* (2) that the words "*shikmi shurkayan*" is intended to denote relatives by blood and not co-sharers in any sub-division of a mahal. We have, therefore, divergence of opinion regarding the matter now before us and it is open to us to take our own course. The interpretation put on this expression in the case in 5 A.L.J. 2 does not commend itself to us.

We cannot agree that in any circumstances the expression "*shikmi shurkayan*" was ever intended to apply to persons who are connected by blood relation.

We agree with the view which was taken in the earlier case and we therefore, hold that in the present case the words "*shurkayan shikmi*" should be interpreted in a similar sense.

It is indeed true that the language of the *wajib-ul-arz* with which we are now dealing is not identical with the language of the document which was before the earlier Bench but having regard to all the circumstances it seems to us that the only meaning of which the expression is susceptible here is the meaning which was given to it in the judgment of Sir Arthur Strachey and Mr. Justice Banerji.

If we look at the language of the *wajib-ul-arz* itself this construction appears to be the only reasonable one.

We have already stated that the second class of pre-emptors consists of "other proprietors of the *thok* and *mahal*".

It follows from the use of the word "*digar*" in the second category that the persons who are described in the first class as "*shurkayan shikmi*" must also be proprietors of the *thok* (*malikan thok*).

How then are we to distinguish between the proprietors of a *thok* who are specified in the second division? There must obviously be some basis of classification, and in our opinion that basis is to be found in the word "*shikmi*". And interpreting that

---

(1) (1901) 23 All. 260.

(2) (1908) 30 All. 77.

expression it seems to us that the only reasonable meaning which it can bear is that, the persons who are described as "*shurkayan shikmi*" are persons who, being proprietors in the *thok*, are brought into a closer relationship than proprietors of the *thok* by being included in a sub-division of the *thok* as in this instance, a *khata*. The principle of decision which was adopted in the earlier of the two reported cases applies here. We quote the following from the judgment of the learned Chief Justice in that case (see 23 All. 262) :—

"The primary idea as Mr. Justice "Banerji has said, is inclusion; that is to "say, the *hissedaran shikmi* must in some "way or other be connected with the "vendor by reference to inclusion in some-"thing which contains them both, such as, "in the case before us, in this *khata* in "which the shares of both are included".

Applying this interpretation to the *wajib-ul-arz* now before us, we must hold that the decision of the Court below is erroneous. The facts are these:—The sale sought to be pre-empted was made on the 2nd January, 1920, and looking at the sale-deed it appears that two items of property were sold, namely, items out of two distinct *khewats* or sub-divisions of the *thok*, namely, Nos. 265 and 269.

It is proved beyond all dispute that the plaintiff in this case and the vendor are co-sharers in one of these *khewats*, namely, No. 269.

At the time this transfer was made the purchaser was a stranger to the village but subsequently he acquired by a gift a share in *thok* Ansarayan in *khewat* No. 323.

It may be mentioned that *khewats* Nos. 265 and 269 are also in *thok* Ansarayan.

This property which the vendee has acquired has undoubtedly constituted him one of the proprietors of the *thok*, and unless the plaintiff has got a superior right the suit must fail.

For the reasons given we think that the plaintiff must be deemed to have a superior right with respect to the item of property comprised in *khewat* No. 269. The reason is that both the plaintiff and the vendor are linked more closely together by their being included in one *khewat* or *khata*. In our view of the case therefore the correct decision should be that the plaintiff is entitled to have his claim decreed regarding the item of property sold in *khewat* No. 269.

As regards the item comprised in *khewat* No. 265 he is in no better position than the vendee and the suit regarding that item should be dismissed.

The result is that the case must be sent back to the lower appellate Court for decision of the suit on this basis. The Court will now proceed to decide the other questions outstanding between the parties. Costs will abide the event.

Case remanded.

1924 Allahabad 376.

WALSH AND RYVES, JJ.

Kanhaiya—Applicant

v.

Kanhaiya Lal—Opposite Party.

Civ. Rev. No. 49 of 1923, decided on 12th February, 1924, from the Order of District Judge, Cawnpore.

Appeal—Conditional or provisional order.

An order which is either conditional or provisional and does not result in a final decree is not appealable. [P. 377, C. 2.]

Civ. Pro. Code, S. 141—Does not apply to Succession Certificate Act except so far as Ss. 19 and 26 make it applicable.

Civ. Pro. Code does not apply to proceedings under Succession Certificate Act which is not analogous to Guardians and Wards Act or Bengal Tenancy Act to which the Civ. Pro. Code has been held to apply. Therefore S. 141 does not apply except in so far as it is expressly introduced by S. 19 (3) and as a corollary by S. 26 (3) of the Succession Certificate Act. A Succession Certificate Court has no jurisdiction to appoint a Receiver. [P. 378, C. 1.]

K. N. Katju and *I. B. Bannerji*—for Applicant.

P. L. Bannerji—for Opposite party.

Walsh, J.:—This is a very pretty legislative knot. A dispute has arisen between two alleged members of a family over an apparently substantial estate left by Mt. Basanti the widow of Bansidhar deceased. Some portion of the property consists of uncollected rents, that is to say, arrears of rent, and also of rents accruing due from the occupiers of various tenancies held under the deceased. Mt. Basanti made a will, which, if it is a valid will, can, on proper proceedings being taken, be admitted to probate. The present applicant, in September 1922, applied for a succession certificate under the Succession Certificate Act, claiming to be the legal representative of the deceased lady, and that he was desirous of collecting the rent from the tenants,

who would be protected in paying their rents to him in the event of his obtaining a succession certificate from the Court. Nor could he obtain a decree in any suit against the tenants for rent due to the deceased's estate without producing a succession certificate in the trial Court. Unfortunately, as is too often the case, this comparatively simple piece of machinery for obtaining the necessary certificate in a kind of summary way, for which purpose the Succession Certificate Act of 1889 was elaborately devised, hung fire, and owing, either possibly to the Court below having more work to do than it could get through, or to its failure to recognise the urgency of summary applications of this kind, the month of February, 1923, arrived, five months having elapsed during which nothing whatever was done. One can understand the applicant after such delay looking round to see how best he could secure that which he really wanted. He complains in the application, with which we now have to deal, that these rents, or some of them, are being improperly withheld and are becoming time barred, or in danger of becoming time barred. It is a fact that the provisions of the law enable a person in such a position to protect himself if he is properly advised. The applicant could have brought suits within the period allowed by limitation against all the debtors, and could have either asked the Court to postpone granting decrees, if he was entitled to decrees, until he had obtained the necessary certificate or applied to the certificate Court, as an urgent matter, to expedite the proceedings which had been already pending, as we have said, five months. Unfortunately he seems to have been badly advised, or at any rate advised to take the novel procedure which has been accepted by the lower Court, and we have to deal with the matter as it stands. On the 23rd of February, 1923, he applied for the appointment of a Receiver to the Court in which the succession certificate matter was still pending. He made that application against the objector who was objecting to his obtaining a succession certificate, and each party filed a statement containing their views of the merits, and a perusal of these documents shows that the real dispute was between these two persons as to who was to collect the rent, and the applicant objected to the objector being allowed to collect rent unless he gave adequate security, he being a person in a Native State, and generally according to the applicant's allegation, not to be trusted and impecunious. On that footing the applicant was desirous to have the appointment of a Receiver, and the Court has acceded to that view of the matter, and without actually appointing a Receiver has given the objector the option of giving security. Nobody can doubt that if the application had been made in a pending suit, it was a reasonable application to make, and that on the merits it was both plausible and attractive. But we have to decide whether it was an application which the Court below had any right to entertain at all. The matter being novel and difficult, the objector has brought in before this Court both by way of appeal and by way of revision. With regard to the right of appeal, it seems to be established by a course of decisions in this Court that there is no such right where the order of the Court below is either conditional or provisional, and does not eventuate in a final order. The substantial matter therefore which we have to decide is whether we have jurisdiction to entertain the revision which challenges the jurisdiction of the lower Court to entertain this application. Taking for convenience sake the latter consideration first, it is argued by Mr. Pearey Lal Banerji in defence of the order, that Order 40, rule 1 of the Code of Civil Procedure which contains the whole of the law in India with reference to the appointment of Receivers, is not now under the Code of 1908, whatever it was before, confined only to cases in which a suit is pending. He cites in justification of that view the case of *Bai Jamnabhai, wife of Liladhar Khetsey* (1), in which it was held that a Receiver might be appointed in an application made under section 12 of the Guardians and Ward Act. Section 12 of the Guardians and Wards Act enables the Court under that Act to make orders for the protection of the property, and section 141 of the Code of Civil Procedure applies the provisions of the Code generally to all proceedings in any Court of civil jurisdiction, so far as they can be made applicable. A similar view has been taken in the case of *Asadali Chowdhury* v. *Mahomed Hossain Chowdhury* (2), with

(1) 13 Bom. L.R. 467.
(2) (1915) 43 Cal. 986.

regard to an application under section 93 of the Bengal Tenancy Act. These cases, however, do not cover the whole ground. It is necessary to consider the scope of the Succession Certificate Act in order to see whether the general provisions of the Civil Procedure Code can be worked or introduced into the machinery under the Succession Certificate Act, or in other words, whether section 141 of the Code of Civil Procedure can be made applicable. The Succession Certificate Act is a provision within a very small compass enacted for a specific purpose. The title describes it as "an act to facilitate the collection to debts on successions, and afford protection to parties paying debts to the representatives of deceased persons." Section 1 (4) provides that a certificate is not to be granted in respect of any debt in which a right can be established by probate under two Acts specifically mentioned. It so happens that neither of these cases apply to the will of Mt. Basanti, which is a will governed by the Probate and Administration Act, but undoubtedly Letters of Administration with a copy of the will annexed could be obtained of her will within the meaning of the latter part of section 1 (4). It is, therefore, doubtful whether it is a case in which the Court had any right to grant a certificate at all. The procedure appears to us to be very carefully prescribed and restricted. Where assistance from the Code is required, it is introduced by an express enactment, for example, in section 6 governing the verification of the application. The provision for service and so on is contained in section 7, and there is no further reference to the Code except in section 19 (3), which applies to section 141 (old section 647) only so far as it relates to the provisions for reference and review contained in old chapters 46 and 47 of the Code. We, therefore, come to the conclusion that we cannot treat this Act as analogous to the other Acts, like the Guardians and Wards Act and the Bengal Tenancy Act, to which the general provisions of the Civil Procedure Code, have been held to apply, and that we are unable to see that section 141 can be made applicable to the Succession Certificate Act except in so far as it is expressly introduced by section 19 (3) and also as corollary by section 26 (3). The result is that in our view it is not competent for a Court sitting as a Succession Certificate Court, working the provisions of the Succession Certificate Act, to entertain an application for the appointment of a Receiver, and that in doing so the Court below acted without jurisdiction.

Mr. Pearey Lal Banerji, however, as a last resort contended that if this was so, the logical result was that none of the provisions of the Code of Civil Procedure would be applicable at all, including section 115, known as the revision section, and that, therefore, we are prohibited by our own interpretation of the Succession Certificate Act from applying the machinery provided in section 115. The answer to this ingenious suggestion is in our opinion as follows:—We hold that the general provisions of the Code of Civil Procedure do not apply to the Court below sitting as a Court administering the Succession Certificate Act. But in our opinion they do apply to the High Court sitting as such which is vested with jurisdiction to send for the record in any case decided by an inferior Court, and if it has acted without jurisdiction, to set aside its order. Finally Mr. Pearey Lal Banerji, contended that there was no decision, although the Court granted in substance what he asked. We do not think it is necessary to go so far as to examine the ultimate decision of the lower Court in these proceedings. The difficulty arose at an earlier stage. The Court had no business to entertain this application at all. It ought to have thrown it out on the ground of absence of jurisdiction. It could not have entertained it without first deciding that it had jurisdiction to do so. It has so decided and in our view it has decided wrongly and therefore has exercised a jurisdiction which did not belong to it. On these grounds the revision must be allowed and the order quashed. Under the circumstances both parties will pay their own costs. Let the record be sent back to the lower Court with a copy of this judgment and a direction to such Court to proceed without delay to dispose of the application for a succession certificate. We are now in the year 1924 and this application which was started in September, 1922, is still pending. We would impress upon the lower Court and all lower Courts the importance of dealing with summary and urgent matters as expeditiously as possible. These continual delays, particularly in what may be called interlocutory machinery, are largely

responsible for the complaints which are made about the general delay of litigation in this province.

The appeal of course will be formally dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.
Revision allowed.

---

* * **1924 Allahabad 379.**

SULAIMAN AND RYVES, JJ.

Mahabir Prosad Misir—Decree-holder-Appellant

v.

Amla Prasad Rai and others—Judgment-debtors-Respondents.

Ex. S. A. No. 718 of 1923, decided on 8th February, 1924, from the decree of Second Additional Judge of Gorakhpore.

Hindu Law—Joint family—Family business—Manager can contract debts for business which is not ancestral but which is for the benefit of the family.

There is no difference between an ancestral and a non-ancestral business. The ordinary presumption is that money required for carrying on family business is for family necessity and that the business is carried with the consent and acquiescence of all the members of the family. Creditor therefore need not prove legal necessity or family benefit for each advance. The manager has the power to contract debts for the purpose of the family business. (34 All. 135, *Dist* ; 6 C.W.N. 429, *Expl.* and *Dist.*). [P. 380, C. 1].

N. P. Asthana—for Appellant.

Sankar Saran—for Respondents.

Sulaiman, J.:—This is an appeal by a decree holder arising out of certain execution proceedings. In 1907 the objectors' father Ram Piare Rai executed a mortgage-deed in favour of the decree-holder for a sum of Rs. 1,499. A suit was brought on the basis of this deed and a preliminary decree was passed on the 23rd of August, 1918. This was made absolute on the 27th of March, 1919. While an application for execution of this final decree was pending Ram Piare Rai, the mortgagor, died on the 2nd of May, 1919. His sons were brought on the record as his representatives and they raised the objection that the debt incurred by Ram Piare Rai had not been incurred for any family necessity and was not binding on them. Parties adduced evidence on the question raised and the Court of first instance came to the conclusion that the debt had been contracted in connection with the business for the purchase and sale of elephants, which Ram Piare Rai had been conducting. The learned Subordinate Judge was fully satisfied that "the money was borrowed for the elephant business which Ram Piare Rai did for the family benefit and not for the sake of his hobby." The objections were accordingly disallowed by him. On appeal by the judgment-debtors the lower appellate Court has allowed the objections. On the question of fact raised, it came to the conclusion that a business for the purchase and sale of elephants had been started by the objectors' father some 7 or 8 years before the mortgage in question, and that it was in connection with that business that the father borrowed the money. It was distinctly of opinion that the family must have benefited from any resultant profits out of the elephant trade assuming that there was any such profits. It, however, held that the business not having been an ancient family business or ancestral business the debt incurred by the agent would not be binding on the other members of the family.

The decree-holder has come up in appeal and the finding of the lower appellate Court on the question of law raised is challenged. The learned Additional District Judge has drawn a distinction between a simple debt and a mortgage-debt and has expressed the view that if it had been a case of a simple debt it would have been binding.

The point which we have to consider is whether the amount borrowed by the manager of a Hindu family in connection with a family business is such as is binding on the other members of the family. The decree-holder is not seeking to enforce the debt against the sons on the ground of any pious obligation of theirs. It is well understood that the manager of a Hindu family has power to contract debts for the purposes of a family business and this power is well recognised. It is not necessary that such business should necessarily be an ancestral one. So long as it is not a separate business of the managar himself and it is a family business carried on for the benefit of the family, the debts incurred for carrying it on would be binding on the whole family and it is by no means incumbent on the creditor to prove that the family actually benefited out of that transaction. On principle it would make no difference whether it is or it is not an ancestral business. The

ordinary presumption would be that the money required for the carrying on of the business is required for a family necessity and the business is carried on with the consent and acquiescence of all the members of the family. If the creditors were called upon to prove legal necessity or family benefit for each such advance it would practically be impossible for a Hindu family to carry on any business, as no one would ever give it credit.

We are fortified in this view by the observations contained in a number of cases to which we may briefly refer.

In the case of *Johurra Bibee* v. *Sreegopal Misser* (1) at page 475 the view taken in the case of *Ramlal Thakursidas* v. *Lakmichand* (2) was quoted with approval, that "persons carrying on a family business in the profits of which all the members of the family would participate must have authority to pledge the joint family property and credit for the ordinary purposes of the business, and therefore that debts honestly incurred in carrying on such business must override the rights of all members of the joint family in property acquired with funds derived from the joint business. In other words it seems to me that those who claim to participate in the benefits must also be subject to the liabilities of the joint business".

This case was approved of by a Bench of the same Court in the case of *Bemola Dossee* v. *Mohun Dossee* (3) which was also a case of a family business and not necessarily an ancestral business. Though it was a case under the Diabhaga Law it was pointed out that "adult members of an undivided Hindu family who have an interest in a family business carried on by the managing members of the family and who are maintained out of the profits of such business must, in the absence of evidence, be taken to possess the knowledge that the business might require financing and to have consented to such financing. Where, therefore, a managing member of such a family in carrying on the family business obtains an advance necessary for the purpose of the business by pledging the joint family property, the mortgage is binding on all the members of the partnership".

The same principle was laid down in the case of *Sakrabhai* v. *Maganlal* (4) which however was a case where a Hindu widow had contracted debts on the credit of the assets of the business to which she had succeeded as the heiress of her deceased husband.

In the case of *Ragunathji Tarachand* v. *The Bank of Bombay* (5) it was remarked that "in connection with the legal position of an ancestral firm in its dealings with the outside world of commerce, the test to be applied in such cases is rather the apparent authority of the manager than the actual necessity of the family. And that is a perfectly reasonable position, for while there is no absolute necessity for the family to trade at all, when once the family trade is admitted, all usual acts done in the normal course of carrying it on may be considered necessary to the trade. If this reason is right then one passes on from the ordinary Hindu Law as to a manager's power of alienation to the law of partnership".

The case of the Oudh Court reported as *Baba Din* v. *Bansraj* (6) is clearly in point. The learned Additional Judicial Commissioner following the Bombay case of *Raghunathji Tarchand* v. *The Bank of Bombay* (5) held that "where a joint Hindu family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to enquire into the finances of the business, as long as that business forms the purpose of the debts, in order to bind the whole family thereby, because the power to contract debts is incidental to the carrying on of the business, from which the family derives its means of subsistence and support". There too the business was not an ancestral or an ancient business but had been started only 9 or 10 years prior to the debt.

The learned Vakil for the respondents has strongly relied on two cases. The first one is the case of *D. McLaren Morrison* v. *S. Verschoyle* (7). That case however on the facts is clearly distinguishable. At page 437 it was remarked that "Bepin made use of the name of the firm for his own purpose after the year 1897, but the

(1) (1875) 1 Cal. 470.
(2) 1 B.H.C. App. 51.
(3) (1880) 5 Cal. 792.
(4) (1902) 26 Bom. 206.
(5) (1910) 34 Bom. 72.
(6) (1915) 18 O.C. 84.
(7) (1901-1902) 6 C.W.N 429.

business as a business undoubtedly was determined when the mill ceased to work and from that time forward there was no necessity to borrow money for the purchase of castor seed in connection with the mill". Again at page 458 it was clearly pointed out that this business was not the ancestral business but an entirely new business and the advances made by the plaintiffs to Bepin were not made in the course of the ordinary transactions of the ancestral business and were not made for the benefit of the joint family at all.

In the same way the case of *Ganpat Rai* v. *Munni Lal* (8) is distinguishable. The learned Judges in that case disagreed with the trial Court and held that the debts for the payment of which the mortgage-deed had been executed were gambling debts and could not therefore be regarded as debts contracted by the mortgagor in his capacity of a manager of a firm or family in the course of the ordinary business of the firm or family. All that was held was that there was no presumption that a debt contracted by the manager of a Hindu family or firm was contracted for the benefit of the family or firm. On the facts found in that case there can be no doubt that the sons were not bound by that debt.

On the findings arrived at by the learned Additional District Judge there can be no doubt that this amount had been borrowed by the father in order to carry on the family trade of purchase and sale of elephants, that this was not an isolated transaction but was in connection with the business which had been going on for some 7 or 8 years prior to the transaction and that this was the business from which the other members of the family were likely to benefit if there were any profits. On these findings we are of opinion that the mortgagors cannot escape their liability.

The result therefore is that this appeal is allowed, the decree of the Court below is set aside and that of the Court of first instance restored with costs including in this Court fees on the higher scale.

Appeal allowed.

(8) (1919) 34 All. 185.

* * **1924 Allahabad 381.**

WALSH AND RYVES, JJ.

King-Emperor—Appellant

v.

Banarsi—Accused.

Cr. App. No. 1040 of 1923, decided on 19th December, 1923, from the order of Magistrate, 1st Class, Allahabad, dated 31st August, 1923.

(a) *Evidence Act, S. 132—Compelled, meaning of.*

Compulsion under that section is a question of fact. It by no means follows that the witness is compelled to answer every question put by Counsel. [P. 383, C. 1].

(b) *U.P. Excise Act, S. 71.*

Transfer of key of a locked box to a friendly co-occupant does not divest the owner of his possession. [P. 384, C. 1.]

The Government Advocate—for Crown.

Kumuda Prasad—for Respondent.

Walsh, J.:—This is an appeal by Government against an order of acquittal by a first class Magistrate, dated the 31st of August, 1923. The whole case turns upon the question of unlawful possession of some cocaine found in a certain house in the city of Allahabad. There has been a previous prosecution and an acquittal. One Bishun, together with his sister Musammat Kishun Piari, and Ganesh, who is believed to be his maternal uncle, were charged with the wrongful possession of this cocaine. In that case the present defendant one Benarsi, who is said to be 60 years of age and is also believed to be related to Bishun although he strenuously denies it, gave evidence for the defence, and his statement on that occasion has been used against him in this case. In the order of acquittal, the Magistrate who tried the previous case directed that proceedings against Banarsi should be instituted. It was natural therefore, and right, that the case should be heard and disposed of by another Magistrate. In our view the appeal must succeed on the ground that the facts proved against the defendant are particularly conclusive, and that the Magistrate unfortunately instead of taking a broad common sense view of the facts, which could not be explained except upon the hypothesis of guilt, has cut up the case into small pieces which he has disposed of one by one by a series of technical fallacies.

The matter is perfectly simple. In this house No. 70, Sarai Mir Khan in the city of Allahabad resides from time to time a

varied assortment of individuals whose relationship to one another whether by blood or by matrimony or by contract of tenancy or otherwise, seems to be wrapped in some obscurity. A prominent person known in connection with this collection of people who frequent this house is the person Bishun who was acquitted. He is said to be a junior member of the family and the men who handles the wealth, and the evidence in this case of one of the occupants of the house is that Bishun was well-to-do. The City Excise Authorities had reason to suspect that the money was not unconnected with illicit traffic in cocaine and that the house No. 70 belonged to Bishun. As the Inspector very fairly said in this case when Banarsi was on trial, everthing pointed to the house being in the possession of Bishun. A raid was made upon the house and the result of the search was that in one room cocaine was found in a coat hanging up on a peg on the wall, and in another room was found a locked wooden box which in addition to containing other thinks contained a small tin box in which cocaine was also discovered. There were a pair of scales also in the room and an empty phial, both of which articles, innocent in themselves, might have had no connection with cocaine. But on the other hand there is no evidence of any legitimate trade going on, or of the existence of any material with reference to which either a phial or scales would be useful except this cocaine, and as this was a house in the crowded part of a crowded city, the reasonable presumption is that traffic in cocaine, that is to say in selling cocaine in small quantities, as we say by retail, was going on in that place to persons who wanted it in small quantities. That is to say the indications are in favour not of a store for safe keeping and removal to some other place on a large scale, but rather in favour of a small trade going on with retail customers. We attach great importance to that feature of the case, because to enable it to be done secretly and to evade any possible search, it would be necessary to have the stuff well hidden and yet in an accessible place. It has this further bearing upon the case that it follows that if that inference is correct, it was impossible for a trade of that kind to be going on from day to day without the knowledge of the occupants who had access to the room where the cocaine was discovered. It also follows that mere temporary absence for three or four days from the premises would by no means afford an answer, which it might otherwise do in the case of cocaine suddenly introduced into the building of a person charged with guilty possession.

The present accused gave evidence on the charge against Bishun. The learned Magistrate excluded that sworn statement of Banarsi's altogether as inadmissible, and he has made a terrible mess of the sections applicable. The evidence was not tendered as a confession or as an admission of guilt, but as a statement of fact by the accused himself amounting to an admission of a very relevant fact connected with the discovery, of the cocaine, namely, the occupation of the house and the possession of a locked box. The evidence was properly proved by bringing the previous statement on the record of this case, and also by the direct testimony of the Inspector, and the Magistrate entirely misunderstands both the purpose for which it was tendered, and the plain meaning of section 21 of the Evidence Act which made it admissible.

It is necessary to pause here to deal with an ingenious argument now raised for the first time by Banarsi's Counsel, namely that under section 132, the answers which Banarsi gave when he was examined in Bishun's case being such as he was not excused from giving, were answers which he was compelled to give, and therefore they could not he proved against him in a criminal proceeding. That argument undoubtedly raises a serious question. The proviso in this instance, as in most other cases, really depends upon the right meaning to be given to the word "compelled". It has been held that the word "compelled" involves the necessity of a formal objection to giving the answer, and an order made at the time to the witness compelling him to answer. We are of opinion that that is too narrow an interpretation. The matter has been recently discussed in two or three cases, particularly by a member of this Court in the case of *Emperor* v. *Ganga Sahai* (1), in which the judgment quotes with approval a sentence from Mr. Justice Piggott's judgment in the case of *Kallu* v. *Sital* (2) and we are of opinion that the

(1) (1920) 42 All. 267.
(2) (1918) 40 All. 271.

interpretation put upon the word "compelled" in the former case is right and ought to be followed. Subsequently Mr. Justice Tudball in the case of *Emperor* v. *Chatur Singh* (3) following the case of *Emperor* v. *Ganga Sahai* (1) and Mr. Justice Piggott's dictum in the case of *Kallu* v. *Sital* (2) held that it was impossible to deny that in the case of ordinary laymen unacquainted with the technical terms of this section, they were compelled to answer on oath questions put either by the Court or by the counsel, especially when the question is relevant to the case. Mr. Justice Tudball's view was that a common sense meaning should be given to the word "compelled". In our view this really means that compulsion under that section is a question of fact. It by no means follows that the witness is compelled to answer every question put by counsel, and Mr. Justice Tudball did not say so. But he may, of course, be compelled in particular cases to answer questions put by counsel, and in such cases the section is clearly applicable. We can only say that there is no evidence of any compulsion in this case at all. It is highly unlikely that Banarsi acted under any compulsion. The point was not taken until it was too late, but the probability is that whether Banarsi is the uncle, or whether he is not, he was a voluntary if not enthusiastic witness making statements which he thought, as they did, would satisfy the Court of Bishun's innocence. We are of opinion, therefore, that this statement is not excluded by section 132. What he says does not come to very much. Its importance is that it cannot be controverted. He said that the locked box was his, and he repeated the statement at this trial. He also said, which is even more important, that the house was in his occupation. That statement is also confirmed by the statement of Ganesh, who was an occupant of the house, and who was acquitted in the previous case. He gets out of the inference which would be otherwise drawn against a man in whose locked box cocaine is found, or in whose coat there are packets of cocaine, by alleging that the coat belongs to his son, and that the tin box in which cocaine actually was secreted, although found in the locked box of the accused, was not in fact his. Both these statements are very likely true, but they really do not carry the matter any further than the fact admitted by himself. He was away at the time and therefore not in physical possession either of the coat or of the locked box, but it is unlikely that, if he went away for four days, he did not leave the key of the locked box in the possession of somebody else so that access could be obtained to it. But the coat is said to belong to his son Kandhai, and unfortunately Kandhai was not so anxious, as Banarsi had been in the previous charge, to tell the Court his view of the possession of the coat and the cocaine that was found therein. Nor has Banarsi attempted to give any explanation, or to call any evidence to explain, how it was that in his unfortunate absence in Benares during these four days, people living in this house in apparent harmony, friendship, and to some extent at any rate close blood relationship with him, should have planted upon him by means of putting into his locked box a tin box containing cocaine, or in other words damning evidence of traffic in this illicit substance. Nor has he attempted to call any evidence to explain how and why any one did the same thing with the son's coat. It is not improbable that the persons in the house at the time of the arrival of the search party seized upon the coat pocket as the most convenient place for rapidly disposing of the substance which they had then in a saleable form.

It is because of the very difficulty which arises in a case of this kind, where you have a body of persons, most of whom are related to one another, living jointly, and jointly living on the big profits which are made out of this substance, that the Legislature has enacted the provisions which are relied upon by the prosecution in this case. It is only natural that in a case of this kind, whenever a charge is made, efforts should be made by other members of the joint concern to prove that the person charged is the one person in the whole concern who had nothing whatever to do with it. There is always danger in doing so as Banarsi has now discovered in his own case. But that his own statement, and the evidence in this case independently of his own statement, were sufficient to raise the presumption against him under this section, admits of no possible doubt. Section 71 provides that it shall be presumed until the contrary is proved that the accused person has

(3) (1921) 43 All. 92.

committed an offence, namely in this case possessing the excisable article, when possession of which he is unable to account satisfactorily is established against him. The Magistrate says that there is not an iota of evidence of the cocaine being in the possession of Banarsi. Can the possession, asked the Magistrate, at the time of the search be said to be his when all the evidence points to the contrary, and he relies upon the statement that the key of the box was in the possession of Bishun. The key of the box, if the locked box belonged to Banarsi and was in the house occupied by him, could only be in the possession of Bishun with the authority and consent of Banarsi, and it is a narrow and almost foolish view to take to hold that the transfer of the key has the effect of dispossessing the owner of the box. All of us have things in our possession, for example, kitchen utensils in the kitchen house, which we seldom see and never touch, but they are in the possession of our cooks as our agents. The result is, possession is established by both direct evidence and by the admissions of the accused, and no attempt has been made to account for it.

The appeal must be allowed and Banarsi must be convicted of being in unlawful possession of this cocaine in the box and in the coat of his son. Having made up our minds to this result we examined the Excise Inspector as to his knowledge of this household. Bishun has been acquitted of the particular offence charged against him arising out of these facts. But there is reason to believe from what we have heard in this case and from what the Inspector has added, that he is really the moving spirit of the concern and that this man, Banarsi although we are satisfied that he is implicated in it, probably only takes a subordinate part and lives with his family on the proceeds. But he has chosen, if in fact he is not the person principally responsible, to come into the witness box on oath in this case and to give evidence directed to establish the innocence of Bishun, one result of which, if true, was to increase the evidence against himself. It is impossible for us to decide whether his conduct was due to a desire to earn credit with Bishun and the other members of the family and to make himself a scapegoat for a person whom he knew to be guilty, or whether in fact what he said was literaly true. In the ordinary way one would be disposed to take a more lenient view of the conduct of a man who, in aiding and abetting the principal offender in a subordinate capacity has been caught, while the principal offender has escaped. But it is impossible to do so in this case as this man, we are satisfied, coldly and deliberately put himself forward for the express purpose of shielding the man who is probably the principal offender, and the sooner people understand that they will not by that course escape the just punishment of their own admissions, the better for them. Everybody knows that they are not really the principals but if they choose to take upon themselves that character, they will be dealt with, and ought to be dealt and punished as such, by the courts which have to deal with their cases. The only punishment which seems in these cases to have a deterrent effect is, as the Inspector tells us, a punishment of imprisonment, and if Banarsi has brought upon himself the punishment which is merited by somebody else, he has only himself to thank. We sentence Banarsi to six months' rigorous imprisonment and a fine of Rs. 500. In default of payment of fine he will serve another six months' rigorous imprisonment. He must surrender to his bail.

Appeal allowed, aquittal set aside.

---

* 1924 Allahabad 384.

LINDSAY AND KANHAIYA LAL, JJ.

Mubarak-un-nissa and another—Plaintiffs-Appellants

v.

Muhammad Raza Khan and others—Defendants-Respondents.

F. A. No. 128 of 1921, decided on 13th February, 1924, from a Decree of Sub-Judge, Baijnor.

Mahomedan Law—Succession.

One S.K, left three grandsons by a pre-deceased son who were defendants 1 to 3, two daughters and a brother M.K. *Held*, that the daughters got two-thirds share and defendants 1 to 3 got one-third share.

Mahomedan Law—Heirs—Limitation Act, Art. 144.

Heirs of a Mahomedan are co-sharers and unless express ouster is proved to the knowledge of the other party no limitation starts against the other party.

**Transfer of Property Act, S. 41—Certain heirs being recorded as full owners a transferee is entitled to presume that they are sole heirs.*

Where grandsons of a Mahomedan whose names were entered in the revenue papers as being the owners of the property mortgaged *held*, that the co-heirs of the grandsons had no claim as against the mortgagees except as owners of equity of redemption.

Abu Ali and *Raza Ali*—for Appellants.

S. N. Sen—for Respondents.

Kanhaiya Lal, J.:—The dispute in this appeal relates to the property of Sardar Khan, who died on the 24th of Septemper, 1907, leaving two daughters, Mt. Mubarak-un-nissa and Mt. Bismilla Begam, who are the plaintiffs, and three grandsons Mahammad Raza Khan, Maqsud Khan and Daud Khan by a predeceased son, who are the defendants Nos. 1, 2 and 3. He also left a brother Mahmud Khan and a nephew, Nazar Muhammad Khan, who was the son of one of his predeceased brothers. Mahmud Khan had two sons, Usman Khan and Chhidda Khan. The plaintiff Mt. Bismilla Begam was married to Usman Khan, who died in the lifetime of Mahmud Khan.

On the death of Sardar Khan his property was entered in the names of the defendants Nos. 1, 2 and 3. The plaintiffs took no steps to get their names entered in the revenue papers in regard to the share of the property, now claimed by them. Their case was that the property in dispute devolved on the death of Sardar Khan on the plaintiffs to the extent of a two-thirds share and on Mahmud Khan to the extent of the remaining one-third: that Mahmud Khan told them that he had got their names entered in the revenue papers is respect of their two-thirds share, and that they had been in receipt of the profits of their share from Mahmud Khan till 1324 Fasli. Their complaint was that the defendants Nos. 1, 2 and 3 had wrongfully made certain mortgages of the property in question in favour of the other defendants and that it was not until some of the latter defendants had obtained a decree for the sale of the properties mortgaged with them that they came to know that their names were not entered in the revenue papers. The present suit was accordingly filed by them for the recovery of possession of the two-thirds share of the properties in the villages of Patwari, Nagli Bilooh and Basantpur, and for mesne profits. A declaration was also claimed that the mortgages effected by the defendants Nos. 1, 2 and 3 in favour of the other defendants were not valid and binding on them.

The suit was principally contested by Narain Das and his sons, and Chhadammi Lal. Their defence was that the plaintiffs had never been in possession of any portion of the property in dispute and that the claim was barred by limitation and by section 115 of the Indian Evidence Act and section 41 of the Transfer of Property Act. It was further pleaded by some of the contesting defendants that the plaintiffs had relinquished their claim to a share in the property of their father and at the time when mutation of names was effected in favour of the defendants Nos. 1, 2 and 3.

It was admitted that Ibrahim Khan, the father of the defendants Nos. 1, 2 and 3, had died in the lifetime of Sardar Khan. The Court below found that the defendants Nos. 1, 2 and 3 were in possession of the property in dispute as trespassers; that the plaintiffs had never been in receipt of the profits of the property in question and that the claim was barred by limitation. It further found that the plaintiffs had relinquished their claim to a share in the property of their father and that the mortgagees had acted, after reasonable care and enquiry, in taking the mortgages now impeached, from the ostensible owners, whose names were entered in the revenue papers, for consideration, and in good faith.

The first question for consideration in this appeal is whether the claim of the plaintiffs was barred by limitation. The lower appellate Court was apparently led to think, by what was stated in the plaint and which does not appear to have been contested by the other side, that the defendants Nos. 1, 2 and 3 were not entitled to any share in the property of their grandfather Sardar Khan; but that is not however so. Under the Muhammedan law, on the death of Sardar Khan, the property devolved on the two plaintiffs to the extent of a two-thirds share, and the remaining one-third share devolved on the defendants 1, 2 and 3 as residuaries of the first class. The defendants Nos. 1, 2 and 3 cannot therefore be regarded as trespassers; and on the principle laid down in *Corea* v. *Appuhamy* (1) no claim to adverse title can be set up by these defendants

(1) (1912) A.C. 230.

because among co-sharers the possession of one co-sharer cannot become adverse to another except where the co-sharer in possession has explicitly denied and repudiated the title of the others and has been in possession since then for more than 12 years. The plaintiffs produced evidence to show that they had been in receipt of the profits up to 1324 Fasli but that evidence is of little value. One of the plaintiffs was living in a village in the Meerut district; the other plaintiff was living in the house of Chhidda Khan, the brother of her deceased husband. The defendants 1, 2 and 3 had applied for the mutation of their names on the 22nd November, 1907, and they got an order for mutation in their favour without any objection some time in February, 1908. After the death of Sardar Khan, Mahmud Khan was appointed *lambardar* of the villages in question, and there is no reliable evidence to show that any profits were paid by Mahmud Khan to any of the plaintiffs. After the death of Mahmud Khan, Nazar Muhammad Khan was appointed *lambardar* of the village but Nazar Muhammad Khan has not been produced; and we see no reason for differing from the view taken by the learned Subordinate Judge on this matter. The finding of the learned Subordinate Judge that the possession of the defendants Nos. 1, 2 and 3 was adverse from its inception is, however, vitiated by the fact that according to his view the defendants Nos. 1, 2 and 3 were trespassers, whereas they were really co-sharers; and as co-sharers there is nothing to show that they had ever set up an express ouster against their aunts or that they had set up an adverse title within their knowledge. The claim of the plaintiffs as against these defendants cannot therefore be deemed to be barred by limitation or by adverse possession within the meaning of article 144 of the Indian Limitation Act.

The next question for consideration is whether the plaintiffs had ever surrendered their claim to a share in the property of their father. The only evidence produced on the point is that of Ahmad Baksh who states that some time before his death Sardar Khan had stated that his property should be entered in the names of his sons after his death. In the application made for the mutation of names after the death of Sardar Khan by the defendants Nos. 1, 2 and 3 no such oral devise was referred to. The claim was then based on inheritance and we do not consider that the evidence of Ahmad Baksh on that point can be accepted as reliable. The learned Subordinate Judge refers to the conduct of Mahmud Khan in not setting up a claim to what was supposed to be his share in the property of his brother; but as we have already pointed out that reasoning proceeds on a misapprehension of the manner in which the property devolved on the death of Sardar Khan. Mahmud Khan was not entitled to any share in the property of Sardar Khan in the presence of the plaintiffs and the defendants 1, 2 and 3; and his conduct in not applying for the entry of his name is explicable and cannot affect the title of the plaintiffs to a share in the property of their father.

The learned Subordinate Judge, however, proceeded to base his decision against the plaintiffs on a third ground which was stronger, namely, that the claim was barred by section 41 of the Transfer of Property Act. It appears from the description of the mortgaged property given in the deeds of mortgage produced by the mortgagees that the property in dispute had been partitioned apparently some time after the death of Sardar Khan between the different co-sharers of the villages in question and that the defendants Nos. 1, 2 and 3 along with some of the other co-sharers had made mortgages for consideration in favour of Narain Das and his son Kishori Lal and some of the other defendants between 1911 and 1917. All these deeds of mortgage give a detailed description of the mortgaged property with the *mahals* to which they appertained at the time of the mortgage; and we have no doubt that copies or extracts from the *khewats* must have been available at the time these mortgage-deeds were written in order to supply the parties to the transaction with an accurate description of the entries that existed at that time in the revenue papers in regard to them. These entries must naturally have satisfied the mortgagees that the mortgagors had a good title to the properties, which they were mortgaging; and we have no doubt that acting on these entries the mortgagees advanced the considerations mentioned in the deeds of mortgage. As observed by Lindley, L.J., in *Bailey* v. *Barnes* (2)

(2) (1894) 1 Ch. Div. 25.

"A purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business ; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects, which would have come to his knowledge, if he had transacted his business in the ordinary way."

There was nothing in the course of dealings connected with the property in dispute, which would have required on the part of the mortgagee's who lived in other places greater circumspection than appears to have been exercised in the present instance by an examination of the entries in the revenue papers. These entries would in the ordinary course have been sufficient to satisfy a mortgagee of the title of the mortgagor to mortgage the properties in question; and we do not consider that there were any circumstances rendering a further enquiry on his part necessary. Section 41 of the Transfer of Property Act lays down that "where, with the consent, express or implied, of the persons interested in the immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

The plaintiffs had, by their conduct or omission, allowed the defendants Nos. 1, 2 and 3 to get their names entered in the revenue papers to their exclusion. These entries existed from as far back as 1908 and remained unchallenged till the present suit was filed. The mortgagees advanced money on the strength of these entries to the persons whose names were entered in the revenue papers as the owners of these properties. They acted in good faith. There was no circumstance established which rendered it necessary for them to take greater care than what appears to have been taken in the present instance and we consider that the mortgagees are sufficiently protected in what they did by the above provisions.

On behalf of the plaintiffs reliance has been placed on the decision in *Partab Chand* v. *Saiyida Bibi* (3), and *Azima Bibi* v. *Shamalanand* (4), but the circumstances of each case would naturally vary and the conclusion based on facts found in one case cannot be of any assistance in the determination of a similar issue on the facts found in another case. In the former case it was found that the transferee could have ascertained that the property which the transferors professed to transfer was acquired in their names by their father, who was a Tahsildar, when they were children of tender years, and that there were other circumstances which rendered it incumbent on the transferee not to rest satisfied with merely seeing that the names of the transferors were entered in the revenue records. In the latter case the transferee was a pleader from whom greater circumspection would naturally have been expected; and the main ground on which the transferee sought protection was that he thought that the transferor who would ordinarily have been governed by the Muhammedan law had still retained the Hindu law in the matter of inheritance. The plea set up on behalf of the transferee was of such an unusual nature that their Lordships of the Privy Council felt constrained to think that he had not discharged the onus which lay upon him of making due enquiry in regard to the manner in which the property had descended before taking the mortgage. A reference has also been made to the decision in *Muhammad Sulaiman* v. *Mt. Sakina Bibi* (5) but in that case it was found that the transferee, though aware of the title of the original owner before he had taken the transfer, had omitted to make further enquiry as to how that title had passed from the original owner to the transferor. No such special circumstances exist in the present case. On the other hand, the circumstances of the present case are somewhat similar to those in *Khwaja Muhammad Khan* v. *Muhammad Ibrahim* (6) and we are satisfied that there was nothing in the transaction to require the mortgagees to make a further enquiry as to the real title to the property beyond what appeared from the entries in the revenue papers.

(3) (1901) 23 All. 442.
(4) (1918) 40 Cal. 378 (P.C.).
(5) 1922 All. 392.
(6) (1904) 26 All. 490.

The claim of the plaintiffs is, therefore, barred as against the transferees in regard to the property mortgaged with them. Their claim as against the defendants 1, 2 and 3 must, however, succeed. We allow the appeal accordingly and decree the claim of the plaintiffs against the defendants Nos. 1, 2 and 3 with costs here and hitherto; but dismiss it as against the remaining defendants who will get their costs here and hitherto from the plaintiffs-appellants. The costs in this Court will include fees on the higher scale.

Among the papers printed by the defendants-respondents there are several papers which do not relate to the properties in dispute. There are others which were equally unnecessary to be printed for the purposes of this appeal. In fact, no reference has been made to most of these papers. We direct accordingly that the costs incurred in the translation and printing of the tabular matter exhibited from pages 116 to 181 of the printed record shall be excluded from the defendants' costs.

Appeal partly allowed.

---

* 1924 Allahabad 388.

LINDSAY AND SULAIMAN, JJ.

Mt. Khudaijatul Kubra and another—Appellants

v.

Mt. Amina Khatun and another—Respondents.

F. A. No. 330 of 1921, decided on 19th December, 1923, from the decree of Sub-Judge, Bijnor, dated 26th May, 1921.

• *Juisdiction—Plaintiff's valuation determines jurisdiction; at least where defendant does not object Court can't be said to be acting without jurisdiction.*

It is perfectly clear on all hands that when a suit is filed in a Civil Court the pecuniary jurisdiction of the Court is primarily determined by the valuation which the plaintiff puts upon the subject matter of the suit. It is open to a defendant when he appears to answer the suit to raise the plea that the suit has not been properly valued and to show if he can that the Court in which the suit has been brought has no jurisdiction to try it. But clearly if no such plea is taken by a defendant when he has had the opportunity of raising it it cannot be said that the Court has acted without jurisdiction. [P. 389, C. 2.]

S. Raza Ali—for Appellants.

S. A. Haider—for Respondents.

Lindsay, J.:—After hearing the learned Counsel for the appellants in this case we are clearly of opinion that the appeal must fail.

The relevant facts to be stated are as follows:—

In the year 1882 one Muhammad Rahmat Ali executed an agreement whereby he undertook to pay to his daughter-in-law Mt. Amina Khatun a sum of Rs. 15 a month for food and clothing. This payment was to be made to her during her life-time.

In order to secure the performance of this undertaking Saiyid Rahmat Ali hypothecated a 5 biswas *Muafi* share in the village named Phondapore and charged this property with the allowance which he had contracted to give his daughter-in-law. It was distinctly provided by this agreement that if Rahmat Ali failed to pay the said monthly allowance of Rs. 15 any month, the lady was to be entitled to take possession of the property which was charged and to realise the income thereof under her own supervision and to spend the same for her food and clothing.

Pausing here, it is clear beyond all doubt that the lady if she took possession was to be entitled to bring to her use the entire income of the property upon which her allowance had been charged during her life-time.

It is apparent from the judgment in this case that Amina Khatun has had on more than one occasion to bring suits to enforce this agreement.

Rahmat Ali himself has died but he has left daughters, Mt. Khudaijatul Kubra and Mt. Atiqatul Kubra, who are the plaintiffs in the present suit.

The other issue of Rahmat Ali is Saiyid Saqib Husain who is married to Mt. Amina Khatun.

In the year 1920 Mt. Amina Khatun brought a suit against the present two plaintiffs, Mt. Khudaijatul Kubra and Mt. Atiqatul Kubra, for possession of a $2\frac{1}{2}$ biswas share of the property in mauza Phondapur.

It appears that these ladies were in possession of this $2\frac{1}{2}$ biswas share, that being one-half of the 5 biswas share upon which Rahmat Ali had created the charge in favour of his daughter-in-law Mt. Amina Khatun.

Full particulars of this case are not before us. All we have on record is the

judgment of the Munsif. There are also one or two copies of certain statements which were made in the course of this case.

According to the finding of the Court below the lady, Amina Khatun, alleged apparently that a sum of Rs. 54 odd was owing to her on account of arrears of the allowance to which she was entitled and she asked to be allowed to enforce the agreement by taking possession of the property charged with her maintenance including the 2½ biswas of this property which were in the possession of the present plaintiffs at the time.

According to what is stated in the judgment of the Subordinate Judge, this suit was decreed *ex parte*, but after due service upon Khudaijatul Kubra and Atiqotul Kubra.

In execution of that decree possession over this property has passed to Mt. Amina Khatun.

It is important to observe that neither of the defendants in that suit has ever made any attempt to challenge the decree in appeal.

Instead of doing this they have launched the suit out of which this present appeal has arisen with all sorts of allegations directed against Mt. Amina Khatun with respect to the conduct of the earlier suit in the Munsif's Court. It is said that the suit was brought collusively and fraudulently, and it is also sought to be made out that the decree of the Munsif under which possession passed to Amina Khatun is altogether void for want of jurisdiction.

With regard to this plea of want of jurisdiction the case which was put for the plaintiff was this, namely, that the value of this 2½ biswas share which has passed into possession of Amina in execution of decree is Rs. 7,000. It is pointed out that this being the value of the property in suit in the case which was tried by the Munsif, the Munsif had no jurisdiction to give a decree for possession inasmuch as his pecuniary jurisdiction is limited to suits of a value not exceeding Rs. 1,000 or at most Rs. 2,000, if he has been specially invested with higher powers.

The question really is whether these plaintiffs are entitled to maintain a suit on this allegation. We are clearly of opinion that no suit of this kind can be maintained to set aside the Munsiff's decree on the ground of want of jurisdiction.

It is perfectly clear on all hands that when a suit is filed in a Civil Court the pecuniary jurisdiction of the Court is primarily determined by the valuation which the plaintiff puts upon the subject-matter of the suit.

It may be, that sometimes the value of the suit is exaggerated and sometimes it is under-estimated, but at any rate, when a suit is brought and the Court has to make up its mind as to whether it is within its pecuniary jurisdiction, all that it can rely on is the valuation of the subject-matter which is given in the plaint.

Of course, it is open to a defendant when he appears to answer the suit, to raise the plea that the suit has not been properly valued and to show, if he can, that the Court in which the suit has been brought has no jurisdiction to try it. But clearly, if no such plea is taken by a defendant when he has had the opportunity of raising it, it cannot be said that the Court has acted without jurisdiction. The Court has assumed jurisdiction on the basis of a statement made in the plaint upon which it is bound to rely, a statement which has not been challenged or corrected in any way; and so it is not possible to argue as has been argued here that the decree passed by the Munsif in this case was altogether void for want of jurisdiction in the Munsif.

In this connection we may draw attention to the provisions of section 11 of the Suits Valuation Act, Act VII of 1887. That section lays down that unless an objection to the over-valuation or under-valuation of a suit has been raised in the Court of first instance it shall not be entertained by an appellate Court unless, for reasons to be recorded in writing, the appellate Court is satisfied that the suit in appeal was wrongly valued and that the wrong valuation has prejudicially affected the disposal of the suit on its merits. This enactment operates in spite of anything contained in section 578 of the Code of Civil Procedure which corresponds to section 99 of the present Code. It is clearly contemplated there that any objection which is to be raised on the ground of pecuniary jurisdiction must be taken in the trial Court at the earliest possible opportunity and where the objection is not taken it is not to be entertainable thereafter unless the appellate Court is satisfied that there has been some miscarriage of justice on the merits.

If this is the law in so far as it concerns procedure in appeals, it seems to us that in no way ought it to be possible for a party against whom a decree has been passed in the circumstances we find in this case, to be able to go to another Court and institute a fresh suit for the purpose of having the decree set aside. If this sort of things were allowed there would be no end to litigation. It is perfectly well understood of course, that the decree of a Court may be set aside by a suit brought, but it is also the rule that no such decree can be set aside except on the basis of fraud or of something akin to fraud. In the present case, although there were allegations of fraud made in the plaint, no case of fraud whatever has been made out and for this reason therefore we hold that this suit to set aside the decree which was passed by the Munsif on the 7th of May, 1920, is not maintainable. This finding of ours really puts an end to the whole of the case. It has been suggested to us that we ought, in any case, to allow an account to be taken between the plaintiffs and Mt. Amina Khatun on the ground that she is entitled under the agreement only to a sum of Rs. 15 a month, whereas, the present profits accruing from the property upon which this allowance is charged, are greatly in excess of that sum. We think it inexpedient to say anything about this claim except that the suit as framed was not a suit for accounts.

Another suggestion has been made to us that, in any case, under the terms of an award which is printed at pages 22 and 23 of the record, we ought to pass a money decree against Saiyid Saqib Husain the second defendant who is the husband of Mt. Amina Khatun. It is not clear to us however what decree for money could be passed against Saqib Husain and again we have to draw notice to the fact that no such relief was claimed in the plaint.

We are satisfied therefore that this suit was a suit which ought not to have been entertained and which though for other reasons, was rightly dismissed by the Court below. The appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

* 1924 Allahabad 390.

LINDSAY AND KANHAIYA LAL, JJ.

Samar Bahadur Singh and another— Defendants-Appellants

v.

Jit Lal and another— Plaintiffs-Respondents.

S. A. No. 385 of 1922, decided on 7th February, 1924, from a decree of Small Cause Judge, Allahabad.

* (a) *Transfer of Property Act, S. 120—Exchange is not market value of the property given by either but the inherent value and the convenience of either party.*

The value of the property and the convenience which one person secures is the price that he receives for the property exchanged. Intrinsic value of the property as distinguished from the market value varies according to the purpose or the necessity which induces the exchange. An exchange implies an interchange of property with another and except in so far as the price is not payable in money the rights and obligations attaching to an exchange are analogous to a sale. But those rights and obligations are enforceable between the parties *inter se*. Thus third parties cannot be substituted in place of either. [P. 391, C. 2.]

(b) *Pre-emption—Exchange.*

Exchange is not sale and consequently where sale alone gives the right of pre-emption there is no such right in case of exchange.

K. N. Katju—for Appellants.

S. N. Sen, Iqbal Ahmad and *S. P. Sinha*—for Respondents.

Judgment:—The question for consideration in this case is whether a right of pre-emption can be claimed in respect of an exchange. By an agreement dated the 21st October, 1919, some land situated in the village Ramnagar *urf* Gansiari was given by Ahmad Zaman Khan in exchange for other land situated in the village Balika Jalalpur given by Samar Bahadur Singh and Jaduraj Singh. The object of the latter in taking the former property in exchange was to construct a road running from their village through the former village. The plaintiffs claim to be co-sharers of the village Ramnagar Gansiari and seek to pre-empt the land given by Ahmad Zaman Khan for the construction of the road. The *wajib-ul-arz* of that village provides that any co-sharer, wishing to sell or mortgage the whole or part of his property shall, on the receipt of the price offered by a stranger, transfer it first to co-sharers who are descended with him from a common stock and are closely

related, then to the other co-sharers of the village, and on their refusal to a stranger.

The Courts below, relying on the decision in *Niamat Ali* v. *Asmat Bibi* (1) and *Bhagwan Singh* v. *Kaharag Singh* (2), came to the conclusion that the custom recorded in the *wajib-ul-arz* was applicable to an exchange; and they granted a decree for pre-emption subject to the payment of the value of the property mentioned in the deed of exchange.

> An exchange implies an interchange of property with another, and except in so far as the price may not be payable in money, the rights and obligations, attaching to an exchange, are analogous to those of a sale. Section 120 of the Transfer of Property Act lays down that save as provided in Chapter VI of that Act, each party to an exchange has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of the buyer as to that which he takes. But those rights and liabilities, are enforceable between the parties to the exchange *inter se*. Third persons cannot be substituted in the place of either of them, because they cannot give what does not belong to them. The intrinsic value of the property given in exchange, as distinguished from its market value, would, moreover, vary according to the purpose or necessity for which the exchange was effected. The custom recorded in the *wajib-ul-arz* is in terms confined to a sale or mortgage; and in either of those cases a money equivalent would be an adequate compensation to the party concerned. The price, which a person receives for the property exchanged, is represented by the value of the property he gives and the convenience which he secures for himself. The latter cannot always be valued in money.

Indeed, as pointed out in *Bhagwan Singh* v. *Rajwanta Kunwar* (3) the question for consideration in such a case is whether the incidents of the particular custom set up cover an exchange. The plaintiff in each case must prove not merely that some custom prevails but he must prove a custom under which he is entitled to claim pre-emption. The language used in the *wajib-ul-arz* in the above case was closely approximate to the language used here.

(1) (1885) 7 All. 626 (F.B.).
(2) (1907) 4 A.L.J. 756.
(3) (1917) 38 I.C. 157.

In *Niamat Ali* v. *Asmat Bibi* (1) the language used was much more general. The right of pre-emption was there allowed in the case of a transfer of any kind, whereas in the present case the right is allowed only in the case of a transfer by sale or mortgage.

In *Bhangwan Singh* v. *Kaharag Singh* (2) the language used was not so general; but the decision in that case must be deemed to be qualified by the latter decision in *Bhagwan Singh* v. *Rajwanta Kunwar* (3).

A reference has also been made to the decision in *Daryao Singh* v. *Jhan Singh* (4); but the language used in the *wajib-ul-arz* in that case was similarly more general, and the decision arrived at on the construction of the *wajib-ul-arz* there relied upon cannot therefore apply to the facts established in the present appeal. This appeal must therefore be allowed and the claim of the plaintiffs dismissed with costs in all Courts.

Appeal allowed.

(4) (1909) 31 All. 539.

---

* 1924 Allahabad 391.

STUART AND MUKERJI, JJ.

Babu Ram—Appellant

v.

Mt. Kokla—*Respondent.*

S.A. No. 633 of 1922, decided on 5th December, 1923, from the decree of District Judge, Pilibhit, dated 28th February, 1922.

Restitution of conjugal rights—Cruelty.

Where an order for maintenance had to be executed by imprisonment of the husband who had alleged wife's unchastity, *Held* there is reasonable apprehension of bodily injury if she returns to her husband.

S. N. Sen—for Appellant.

Respondent was not represented.

Stuart, J.:—This is an appeal by a husband whose suit for restitution of conjugal rights has been dismissed by the lower appellate Court. The learned District Judge not having decided certain points, we propose to decide them ourselves under the provisions of section 103 of the Code of Civil Procedure. These are the facts as we find them. The appellant is a Brahman. Many years ago he turned his wife out of doors stating that he suspected her chastity. The woman went to live with her uncle who supported her. She then

applied to the Criminal Court for a maintenance order under section 488 of the Code of Criminal Procedure and she obtained an order awarding her sufficient maintenance. It is to be noted that under the law she could not have received maintenance if without sufficient reason she refused to live with her husband or if they were living separately by mutual consent. The plaintiff has admitted that when the maintenance proceedings were in progress before the Magistrate he even then refused to take his wife back stating that at the time he suspected her chastity. When the woman endeavoured to obtain the money that was due to her the husband refused to pay it and she had to attach his property and to arrest him and place him in custody to execute the order. At the end of this he has applied for restitution of conjugal rights against her and has advanced the somewhat amazing suggestion that although he has suspected her chastity for 20 years, now that she has claimed an order of maintenance against him, his suspicion has been allayed. It is perfectly clear why he has brought this suit. If he succeeds he will be able to go to the Criminal Court and say that his wife is refusing to live with him without sufficient reason and the order of maintenance will then be cancelled. But what will become of the woman? She will be deprived of maintenance and will then be compelled to return and live with her husband sooner or later. In the circumstances we have no hesitation in saying that she will have a reasonable apprehension of bodily injury if she returns to her husband. We consider that the suit was rightly dismissed and dismiss this appeal. The appellant will pay his own costs. The other side being unrepresented will pay her own costs.

Appeal dismissed.

---

* 1924 Allahabad 392.

KANHAIYA LAL AND MUKERJI, JJ.

Behari Lal—Appellant

v.

James Maclean and others—Respondents.

S. A. No. 726 of 1922, decided on 4th January, 1924, from the decree of District Judge, Farrukhabad, dated 10th February, 1922.

Nuisance—Discomfort must be substantial and must be to any person irrespective of age, health or status.

A discomfort to be actionable should be substantial. It should be substantial not merely with reference to the plaintiff it must be of such a degree that it would be substantial to any person occupying the premises of the plaintiff, irrespective of his position in life, age or state of health. There is a distinction between an action for a nuisance in respect of an act producing a material injury to property and one brought in respect of an act producing personal discomfort. As to the latter a person must in the interest of the public generally submit to the discomfort of the circumstances of the place and the trades carried on around him. The nature of the interference has to be examined in each case in the light of the circumstances of the place where the thing complained of actually occurs and the degree of inconvenience caused must determine the nature of the relief to which the person complaining may be entitled. But where an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material or substantial interference with the ordinary physical comfort and convenience of another person residing in that locality then very different considerations unquestionably arise. [P. 393, Cs. 1 and 2.]

K. N. Katju—for Appellant.

Gulzari Lal—for Respondent.

Kanhaiya Lal, J.:—The plaintiff, Imamuddin, owns a house situated in bazar Katra Ahmadganj in Farrukhabad City. The house is occupied by the other plaintiffs, one of whom is a clergyman and the other who is his wife, practises as a lady doctor. Behind this house is situated a house belonging to the defendant, where a flour mill worked by an oil engine has been recently started. The allegation of the plaintiff was that the working of the flour mill caused great trouble to the occupants of the house and interfered with their business and ordinary physical comfort. The defendant stated that he had been working the flour mill in another house situated at a distance of about 20 to 25 paces from that place for nine years, that that house was recently purchased by Mathura Prasad who started a steam engine of his own in that locality, and that he had consequently to shift from that place to the present house.

Both the Courts below inspected the locality and came to the conclusion that the working of the flour mill in that locality undoubtedly interfered with the comfort of the occupants of the house and disturbed them in carrying on their usual business. The Court of first instance referred to the evidence of one of the plaintiffs and stated

that the soot arising from the chimney of the oil engine would spread into the house of the plaintiffs and fall upon the articles kept there, that there would be bad smell produced from the kerosine oil used in the engine, and that the noise resulting from the close proximity of the house of the plaintiffs to the place where the engine was worked would cause substantial inconvenience to the tenants occupying the same and more so to the lady doctor who had to use a Stethoscope to examine the hearts and the lungs of the patients coming to her for treatment. The lower appellate Court made no attempt to discuss the evidence at all. The view taken by it was that the smell of the smoke from the engine caused little discomfort but the noise and regular throb of the engine so close to the house of the plaintiffs was "a distinct and pervading nuisance" to the occupants of the house, whose nerves would naturally be disturbed till in course of time they got accustomed to the same.

What may, however, cause inconvenience to persons with dainty or elegant modes or habits of living may not cause similar inconvenience to persons accustomed to live in the busiest portion of a town. A discomfort to be actionable should be substantial. It should be substantial not merely with reference to the plaintiff; it must be of such a degree that it would be substantial to any person, occupying the premises of the plaintiff, irrespective of his position in life, age, or state of health. As pointed out by Lord Westbury in *St. Helen's Smelting Co.* v. *Tipping* (1), there is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around him. The nature of the interference has to be examined in each case in the light of the circumstances of the place, where the thing complained of actually occurs, and the degree of inconvenience caused must determine the nature of the relief to which the person complaining may be entitled. "If a man lives in a town," said Lord Westbury, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop". But where an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material or substantial interference with the ordinary physical comfort and convenience of another person, residing in that locality, then very different considerations unquestionably arise.

No attempt was made by the Court below to determine how long this oil engine had been at work, if not in this house, at least in the locality close to this building. The lower appellate Court does not say that the disturbance would be so substantial as to render the house practically uninhabitable for ordinary people without serious discomfort. It is in evidence that Mathura Prasad has a flour mill worked by a gas engine at about 20 to 25 paces from this locality. It is also in evidence that the present Chairman of the Municipal Board has in his own compound at Fatehgarh close to a public hospital, where patients have to be examined from time to time by the medical attendants, a flour mill in working order, to which no objection has ever been taken on the score of discomfort or otherwise by the residents of the locality. There is also evidence to show that an attempt was made to move the Municipal Board under section 245 of the U. P. Municipalities Act (I of 1916) to remove the oil engines working within Municipal limits or to stop the starting of factories worked by oil engines there and that the Municipal Board refused to take any action in the matter. Several residents of the locality, where the flour mill engine is at work, were produced on behalf of the defendant to show that no discomfort was suffered by the neighbours or residents of that locality. A sub-assistant surgeon was, moreover, examined who stated that he

(1) 11 H.L. Cases 642.

had seen the flour mill engine actually at work and that the noise produced by the oil engine was of an ordinary character and that no injury to the health of the residents of the locality was likely to result from the working of that engine at that place. We are prepared to give due weight to the observations made by the Courts below on an examination of the locality and have no doubt that the noise produced by the engine must be a source of some inconvenience to the persons residing there. But a flour mill worked by a gas engine is already in existence in that locality and from the fact that such flour mills exist in other parts of the town we are not prepared to say that any reasonable case for the removal of the flour mill or oil engine has been made out.

Whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself but with reference to its circumstances; and where a locality is used for the purpose of carrying on a trade or manufacture, the fact that such trade or manufacture does exist elsewhere, not far from the place, cannot be left out of account. As pointed out by Clerk and Lindsell, the affairs of life in a dense neighbourhood cannot be carried on without mutual sacrifice of comfort and in all actions for discomfort the law must regard the principle of mutual adjustment, and the notion that the degree of discomfort, which might sustain an action under some circumstances, must therefore do so under all circumstances is as untenable as the notion that if the act complained of was done in a convenient time and place, it must, therefore, be justified, whatever was the degree of annoyance that was occasioned thereby, (Clerk and Lindsell on Torts, 6th edition, p. 419.)

It is not seriously suggested that the house of the plaintiffs will become wholly untenable by reason of the construction of the flour mill or the use of the oil engine; and we do not consider that any substantial interference with the physical comfort and convenience of the residents of the house has been made out. In these circumstances we allow the appeal and dismiss the plaintiffs' suit with costs here and hitherto.

Appeal allowed.

* 1924 Allahabad 394.

KANHAIYA LAL, J.

Durga Prosad—Defendant-Appellant

v.

Lachmi Narain—Plaintiff-Respondent.

S. A. No. 1216 of 1922, decided on 29th January, from a Decree of District Judge, Cawnpore.

* *Easements Act, Ss. 33 and 35—No damage is substantial unless value is materially diminished and physical comforts or business are materially interfered with.*

Each case of disturbance of light and air must be decided on its own facts. Under Ss. 33 and 35 no damage is substantial unless it materially diminishes the value of the dominant heritage and interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he might have done prior to the disturbance. [P. 395, Cs. 1 and 2.]

* *Easements Act, S. 28—Scope.*

Extent of an easement other than an easement of necessity as also the mode of its enjoyment must be fixed with reference to the purpose for which the right was acquired.

K. N. Katju and *H. K. Kaul*—for Appellant.

G. W. Dillon—for Respondent.

Kanhaiya Lal, J.:—The question for consideration in this case is whether the defendant was entitled to construct his wall in such a manner as to block a window in the verandah of the plaintiff which opened towards the land of the defendant. The window had been in existence for more than twenty years. The Court of first instance refused to direct the demolition of the wall by which the window was blocked, holding that the construction had not had the effect of materially interfering with the access of light and air to the verandah of the plaintiff. The lower appellate Court, however, thought that as the effect of the construction of the wall was to block the window entirely, the plaintiff was entitled to have the obstruction removed in order that the access of light and air through the window might remain unaffected. In doing so it disregarded the conditions of the locality, inasmuch as the verandah of the plaintiff had sufficient access of light and air from the other sides and the blocking up of the window had made no difference whatsoever to the light and air which was obtainable to the verandah of the plaintiff otherwise.

Section 28 of the Indian Easements Act lays down that the extent of an easement

other than an easement of necessity, and the mode of its enjoyment must be fixed with reference to the purpose for which the right was acquired. The verandah in question has got a street in front, from which any amount of light and air can be obtained. It has got three or four doors behind and a window on the north, which would help the passage of air from one end of the verandah to another. The window in dispute was on the south and its obstruction cannot possibly involve a material interference with the access of light and air, so as to entitle the plaintiff to claim that it should be restored to its original condition.

The lower appellate Court refers to the decision in *Khunni Lal* v. *Kundan Bibi* (1) but it is possible that the circumstances of that case may have justified an order for the removal of the obstruction. Section 35 of the Indian Easements Act lays down that subject to the provisions of the Specific Relief Act of 1877, an injunction may be granted to restrain the disturbance of an easement, if an easement is actually disturbed, when compensation for such disturbance might be recovered; and section 33 of the same Act declares that the owner or occupier of a dominant heritage can institute a suit for compensation for the disturbance of the easement where the disturbance has actually caused a substantial damage to the plaintiff. Where the easement disturbed is a right to the free passage of light, passing to the openings in a house, no damage is considered substantial within the meaning of sections 33 and 35, unless it materially diminishes the value of the dominant heritage and interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he might have done previous to the disturbance.

In *Paul* v. *Robson* (2) their Lordships of the Privy Council, referring to the case of *Colls* v. *The Home Colonial Stores* (3) pointed out that the legal test in such an action was whether the obstruction complained of was a nuisance or whether the owner of the dominant tenement was getting the uninterrupted access through his ancient windows of a quantity of light, the measure of which was what was required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind.

In *Gajadhar* v. *Keshav Lal* (4) it was similarly held that the owner of a dominant tenement was not entitled to an injunction except in such cases where he would be entitled to recover damages, or in other words where the disturbance in equity caused substantial damages to the plaintiff of the kind referred to in the explanation appended to section 33 of the Indian Easements Act.

The plaintiff has therefore no absolute right to protect his window against obstruction. He has a right to the access of sufficient light and air through his window, but if there is already a sufficient access of light and air to his house through the other openings therein and the obstruction caused to the window does not materially or in any measure interefere with the sufficiency of the access of such light and air, the plaintiff is not entitled to any relief.

The lower appellate Court has omitted to find whether the obstruction of the window had the effect of materially interfering with the access of light and air to the verandah of the plaintiff or not, but the learned Munsif who inspected the locality points out that the verandah of the plaintiff is quite open in front, that is, on the western side, where there is an open space forming the ground of the Pokhrayan market, that there is another window on the northern side and that there are some doors on the eastern side opening into the sitting room of the plaintiff which bring in an abundant supply of light and air to the verandah. In fact, according to the map attached to the plaint there is a street in front of the verandah and the plaintiff does not really suffer any injury by the blocking up of the window. Each case of an alleged disturbance of an easement of light and air must be decided on its own facts. On the facts disclosed in the present case the plaintiff is not entitled to any relief, as he has suffered no real injury. The appeal is, therefore, allowed and the claim of the plaintiff for the demolition of the wall, blocking up the window in question, is dismissed with costs here and hitherto.

Appeal allowed.

(1) (1907) 29 All. 571.
(2) (1915) 42 Cal. 46 (P.C.)
(3) (1904) A.C. 179.
(4) (1915) 13 A.L.J. 885.

* 1924 Allahabad 396.

MUKERJI, J.

Ram Sarup—Plaintiff-Appellant

v.

Hardeo and others—Defendants-Respondents.

S. A. No. 1358 of 1922, decided on 12th February, 1924, against the decree of District Judge, Bulanashahar, dated 7th September, 1922.

(a) *Transfer of Property Act, S. 54—Contract of sale does not create interest in immoveable property—Contract.*

A contract of sale of immoveable property does not create even an equitable interest in immoveable properties.

(b) *Registration Act, S. 49—Absence of registration.*

An unregistered compromise of an offence compounded with the permission of the Criminal Court by which some rooms belonging to the accused were treated as belonging to the complainant and were given in exchange for the rooms belonging to the accused, does not pass title to the complainant.

(c) *Transfer of Property Act, S. 54—Vendee under an unregistered deed in possession cannot be ousted by vendor without paying the vendee the price thereof.*

Where by an unregistered compromise of a criminal case two rooms belonging to the accused were given to the complainant, the accused can recover them back without on paying the price to the complainant as the title did not vest in the complainant, the property being worth more than Rs. 100; but only on paying the price can he do so.

Nihal Chand—for Appellant.

B. K. Mukerji—for Respondents.

Judgment:—The facts which have given rise to this second appeal are briefly these:—

There is an enclosure No. 43, in which there are, it seems, several rooms or houses. The appellant who was the plaintiff in the Court below, has been found to be the owner of the entire enclosure. Two of the rooms or buildings in this enclosure are the subject-matter of the suit. In a portion of this enclosure, the defendants and their predecessors were living. It has been found by the Court below that their possession was permissive. The parties, it appears, quarrelled and fought over the possession of the defendants and one of the parties on the side of the defendants sustained grievous hurt. There was a criminal case and a compromise was arrived at on the 5th of June, 1918. It was embodied on a paper bearing a stamp duty of eight annas and was not registered. It was stated in the compromise deed that room No. 126 was given up by the defendants and that they were given room No. 129 in lieu of the same. It was further stated and agreed that the defendants would continue in possession of room No. 128 'as before'. The finding is that on this compromise being entered into, the prosecution was dropped and evidently the permission of the Court was obtained to the compounding of the offence. For the compromise was filed in the Criminal Court. Just on the last day of the expiry of three years, the plaintiff filed this suit for recovery of possession of the rooms Nos. 128 and 129. He pleaded that the compromise had been obtained by the exercise of undue influence. But that point has been given up in appeal in this court. The only point that has been argued is this. The compromise was really a document by which the plaintiff transferred his title to the property in favour of the defendants. The value of the property has been found roughly, by the Court below, to be about Rs. 500. Such a transfer could only be effected by means of a registered document under the provisions of the Registration Act, section 17 and section 54 of the Transfer of Property Act. The document being unregistered it really conveyed no title to the defendants and therefore the plaintiff is entitled to get back what was really his own property.

The Courts below dismissed the suit holding that the plaintiff was estopped from claiming the property back, although the title still remains with him.

I have to see whether this proposition of law is correct. It having been found that the property originally belonged absolutely to the plaintiff and it having been found that the possession of the defendants was only permissive there can be no doubt that the defendants are bound to leave the property when the plaintiff asks them to do so. If any document is pleaded in bar of such a suit that document must be registered under the law already quoted. Even if we take the transaction as one by which the plaintiff relinquished his title in favour of the defendants, the document would come under clause (*b*) of section 17 of the Registration Act and his title to it can be extinguished only by a registered document.

The document being unregistered is inadmissible in evidence under section 49 of the Registration Act. Indeed the defendants are precluded from saying that there is a document in their favour by which the title of the plaintiff has been extinguished. Further they are not permitted to prove the agreement by oral evidence because the agreement such as it was had been reduced into writing (section 92 of the Evidence Act). Such being the case there really remains nothing to prevent the plaintiff from recovering.

For the respondents reliance has been placed on the case of *Salamat-ul-Zamini* v. *Masha Alla Khan* (1), a decision by two learned Judges of this Court. In that case it appears that there was an exchange of property between two parties and that exchange had been acted upon. After some time one of the parties to the exchange wanted to go back over the transaction and sought the recovery of the property which he had given away. There was no registered document to record the transaction. It was held by Walsh, J., that the rules of equity would prevent the plaintiff from succeeding. Piggott, J., was of opinion that the title of the plaintiff was not lost but on equitable principles the Court would not give its aid in favour of the plaintiff. In my opinion that ruling has no bearing on the facts of this case. In the case before me, the defendants gave nothing to the plaintiff in the shape of any tangible property, according to the finding of the Court below. The property which they purported to exchange was the property of the plaintiff himself. The entire enclosure has been found to be the property of the plaintiff. All the consideration that the plaintiff got for purporting to give away his two rooms Nos. 128 and 129 was the dropping of the prosecution that was going on against him. This was no doubt a good consideration and would have created a valid consideration for a sale. But the question is, where there is no sale-deed, can the mere fact that a consideration passed operate to create a title. To put it in simple terms suppose a man agrees to sell for a sum of Rs. 500, his house. He receives the consideration and hands over the property. Can he not in the absence of a registered sale-deed go back over the contract and say here is the sum of Rs. 500 which you gave to me; take it and give me back my property. If he could not be allowed to say so, the result would be an extension of the law, as embodied in section 54 of the Transfer of Property Act. It lays down that in the case of property of the value of Rs. 100 or more, a sale could be effected only by a registered instrument. In the case of property of lesser value a sale could be effected by delivery of possession. If we say that the mere fact that possession had been delivered and the sale price had been paid, was sufficient for the creation of a title or for preventing the plaintiff from getting back his own property, shall we not really be legislating? The Calcutta High Court in a case directly on the point, *Jagadbandhu Shah* v. *Radh Krishna Pal* (2) held that the rules of equity would not apply where there were clear provisions of law, to the contrary. In the case of *Umrao Singh* v. *Lachhman Singh* (3), there was a compromise in the nature of a family settlement. It had been partially acted upon as the son of one of the parties to the contract obtained arrears of maintenance on foot of it, but their Lordships of the Privy Council had no hesitation in holding that the compromise failed so far as immoveable property was concerned simply because the document had not been registered under Act XI of 1877, section 17. That, in India a mere contract does not create any equitable interest in immoveable property was held in the Privy Council case of *Maung Shiva* v. *Maung Inn* (4).

The title being with the plaintiff, as I have said, he must succeed. But he must also put the defendants in the same position in which they would have been in, if there had been no compromise. The compromise was to the effect that they would have a certain consideration for dropping the prosecution. If the consideration had been a certain sum of money there would have been no difficulty in putting the plaintiff to terms. He could have got his decree for possession on payment of the sum of money which was the consideration. In this case the prosecution was dropped in consideration of the two houses which have been found to have been the absolute property of the plaintiff. There was no clear issue before the lower Court as to the actual value of the houses. This point therefore

(1) (1923) 40 All. 487.

(2) (1914) 36 Cal. 920.
(3) (1911) 33 All. 344 (P.C.).
(4) (1917) 44 Cal. 542 (P.C.).

should now be decided. It is my opinion that the plaintiff would be entitled to recover the houses only on payment of an equivalent in money of the same.

I remand the following issue for trial to the Court below :—

What is the value of the two houses Nos. 128 and 129 in enclosure No. 43?

Fresh evidence would be allowed on behalf of the parties. The finding would be returned in two months. Ten days' time is allowed for filing objections.

Case remanded.

---

* 1924 Allahabad 398.

PIGGOTT, J.

Dwarka Dhish Prosad Singh—Plaintiff-Applicant

v.

Raja Kesho Prosad Singh—Defendant-Opposite party.

O.S. No. 1 of 1923, decided on 18th December 1923.

** Civ. Pro. Code, O. 47, r. 1—Allegations of fraud in connection with petition of compromise accepted by a Court do not justify either review or revision under S. 151, Civ. Pro. Code—Civ. Pro Code, S. 151.*

A party filed a petition of compromise supported by an affidavit. On the day fixed for the appearance of the party himself his Counsel asked the Court to excuse the non-attendance of the party and stated that he had been instructed by the party personally to press the application for compromise. The Court accordingly passed a decree in terms of the compromise. Some time after the party applied for review of judgment on the ground that the petition of compromise and the affidavit were executed by the party because he was in fear of his life at the hands of the defendant. *Held*, that S. 151 could not be applied and O. 41, r. 1, also could not be applied.

N. P. Asthana—for Applicant.

Piggott, J.:—The application before me is one presented on the 8th of September, 1923, asking this Court to review an order of the 11th June, 1923, according to which it was held that a certain suit pending before the Court had been wholly adjusted by a lawful agreement and it was ordered that a decree should be passed in the terms contained in a certain paragraph of an affidavit purporting to be sworn by the plaintiff in connection with the aforesaid agreement. The application, as presented to the Court, did not refer to any provisions of the Code of Civil Procedure; but I have been informed in argument that it is intended to invoke either the inherent jurisdiction of this Court under section 151 of that Code, or the power of review given by Order 47, rule 1 of the same. When I set myself to specify the grounds upon which this application is made to me, I find it exceedingly difficult to compose any coherent summary of the 66 paragraphs of the affidavit which has been sworn in support of the application. The first 19 paragraphs are recitals of facts, some of which are apparent from the record before the Court and none of which have any bearing upon the question for determination, except in so far as they may be regarded as necessary to introduce or lead up to the allegations made in subsequent paragraphs. In the next four paragraphs it is merely asserted that the defendant, at a certain stage of the proceedings, communicated to the plaintiff a desire to enter into negotiations for a settlement of the suit. The six following paragraphs contain allegations, some of which are preferred in terms perhaps designedly vague, and certainly susceptible of more than one interpretation; but I can only understand these paragraphs as meaning that a certain petition of compromise and affidavit, which were presented to this Court on the 23rd of May, 1922, were executed by the plaintiff without knowledge of their contents, and because he was in fear of his life at the hands of the defendant. The story is continued in the next few paragraphs, but they do not seem to me to contain any matters directly bearing on the question now before me until I come to the 42nd paragraph of the affidavit. It is now necessary to explain exactly what did take place in this Court. A petition of compromise, supported by affidavit, was presented to me on the 23rd of May, 1923. I took up the matter in the presence of Counsel for both parties on the 25th of May. The important part of my order was that the application should be put up for disposal on the 11th June, 1923, and that the plaintiff should then attend in person. On the 11th June the plaintiff did not attend in person, but was represented by Mr. Sultan Ahmed, Advocate of the Patna High Court, a gentleman of the highest position in his profession, who was appearing in this Court by permission of the Hon'ble the Chief

Justice. The record of the proceedings which followed shows that I was fully alive to the difficulties of the situation created by the failure of the plaintiff to comply with the order directing his personal attendance. I was assured by Mr. Sultan Ahmed that the order requiring the personal attendance of the plaintiff had reached the said plaintiff and that he, as Counsel for the plaintiff, had been instructed by the latter to ask the Court to excuse the non-attendance of the plaintiff in person and not to pass any further order insisting upon his personal attendance on a subsequent date. I also received from Mr. Sultan Ahmed, and accepted from him, his assurance that he had been instructed by the plaintiff personally to press the application of the 23rd of May, 1923, that is to say, the application compromising the suit. I was also fully awake to the fact that this application amounted in substance to a withdrawal of the suit by the plaintiff and an abandonment by him of the claim which he had preferred against the defendant. I dealt with the matter on the basis of a petition of compromise tendered to the Court by Mr. Sultan Ahmed, under instructions from his client, on the 11th June 1923. I am, therefore, not concerned to enquire into the precise circumstances under which the petition was presented to this Court on the 23rd of May, 1923, or the affidavit by which it was supported came to be sworn. I accepted Mr. Sultan Ahmed's assurance that his client had expressed to him a desire that he should represent him before the Court on the 11th of June, 1923, that he should ask the Court to excuse the personal attendance of the said client and that he should ask the Court to dispose of the suit in the terms of the petition of compromise which had been laid before me, in the first instance, on May the 23rd, 1923. After considering the affidavit now laid before me, I am of opinion that I was not only justified in accepting these assurances from Mr. Sultan Ahmed, but that I was bound to do so. In the face of these assurances, I disbelieve the statement made in paragraph 42 of the affidavit now before me. I take note that in paragraph 44 of the said affidavit, the plaintiff does not say that he did not instruct Mr. Sultan Ahmed to do any one of the things which he now knows that Mr. Sultan Ahmed did on his behalf on the 11th June 1923. What he says is that he represented to the said Counsel what he had been previously told to say by the defendant, and he asserts that he did this because he only saw Mr. Sultan Ahmed in the presence of the defendant and that the defendant had told him that he would come to serious grief if he failed to give Mr. Sultan Ahmed those instructions which he actually did give. The paragraph does not even assert that the plaintiff asked to be allowed to see Mr. Sultan Ahmed in private and without the presence of the defendant. To sum up the matter, it seems to me that the allegations in the affidavit before me are, in substance, that the plaintiff signed certain papers and swore a certain affidavit, without knowing the contents of those papers or of the affidavit, at a certain place in Allahabad on the 23rd of May 1923, at a time when he was suffering wrongful confinement at the hands of the defendant and the servants or agents of the defendant, and because he believed his life to be in danger at their hands if he refused to sign these papers and to swear this affidavit. I have not examined the officer before whom the affidavit was sworn; but there are in my opinion considerations apparent enough on the materials now before me to justify me in declining to take any action upon these allegations. I have asked whether any report was ever made to the police in Allahabad, or any complaint ever presented to a Magistrate of this place, in respect of the offences of wrongful confinement, criminal intimidation and extortion disclosed by paragraphs 25 to 31 of this affidavit, and I am informed that nothing of the sort was ever done. I have sufficient confidence in the official who certifies that the affidavit in question was solemnly affirmed before him to feel certain that he did not permit the plaintiff to affirm without first satisfying himself that the plaintiff was aware of the contents of the affidavit. Finally, I am of opinion that it is a question of minor or subsidiary importance to consider the circumstances under which this affidavit was sworn, or this petition presented to me on the 23rd of May 1923, seeing that my decision on the 11th June 1923, was wholly based upon the assurances given me by Mr. Sultan Ahmed.

For these reasons I am not of opinion that this is a case which calls for the exercise of any inherent powers which this Court may possess, in order to set aside the order of

the 11th June, 1923, or the decree which followed thereon. As a question of law, I am further of opinion that the provisions of Order 47, rule 1 of the Code of Civil Procedure would not warrant me in allowing this application on the basis of an application for review of judgment. The case is in my opinion obviously distinguishable from that reported in 44 Bom. 408. The Calcutta High Court has held that, where the attention of a Court is invited to the fact that some fraud has been practised upon a party in connection with a petition of compromise which has been accepted by a Court in which a suit was pending, that Court may apply the provisions of Order 47, rule 1, to set aside the order accepting the compromise, if satisfied that the alleged fraud has been practised. I cannot find any allegations of fraud in the affidavit before me. There are allegations which go far beyond the mere assertion that the plaintiff's assent to the compromise or withdrawal of his suit was obtained by undue influence. They are, as I have noted, assertions that the said compromise was obtained by the wrongful confinement of the plaintiff, by criminal intimidation and by extortion. Those assertions I distrust and I have given reasons for doing so sufficient to warrant me in taking no action upon the affidavit which contains them. Even in cases where fraud has been alleged, with that definiteness and fulness of specification which the law requires, the decisions of the Calcutta High Court which have been laid before me in argument, while asserting jurisdiction on the part of a Court to take up a petition like the one before me as a petition for review, on the strength of the words, "or for any other sufficient reason" in the aforesaid rule, express the opinion that the matter is one which should ordinarily be litigated in a separate suit. My own opinion is that the words, "or for any other sufficient reason", must be taken to refer to something *ejusdem generis* with the words that precede. My attention has been drawn to one case, not to be found in the authorised Law Reports, in which the Madras High Court held that a review of judgment could be granted in a case of fraud, where the circumstances were such that the Court could bring the case under the earlier provisions of Order 47, rule 1 of the Civil Procedure Code, by holding that the application for review was based upon the discovery of new and important matter. In so far as the affidavit laid before me in support of this application purports to refer to any new or important matter supposed to have come to the knowledge of the plaintiff since the 11th June, 1923, I disbelieve any allegations to this effect, principally by reason of the confidence which I feel in accepting the assurances given me on that date by Mr. Sultan Ahmed. For these reasons I reject this application.

Application rejected.

---

* 1924 Allahabad 400.

LINDSAY AND SULAIMAN, JJ.

Basdeo Rai and another—Defendants-Appellants

v.

Jhagru Rai—Plaintiff-Respondent.

F.A. No. 108 of 1923, decided on 28th January, 1924, from the order of Sub-Judge, Basti.

(a) *Specific Relief Act, S. 27—Contract of pre-emption can be enforced against representatives—Case-law discussed.*

If a contract of pre-emption be deemed to be a contract of sale it can be enforced under certain circumstances under S. 27 against the representatives of the original parties to the contract.

(b) *Contract Act, S. 23—Contract of pre-emption is not against public policy—Case-law discussed.*

In view of the fact that in the United Provinces contracts for pre-emption have been enforced for several years the contract of pre-emption cannot be deemed to be against public policy.

(c) *Transfer of Property Act, S. 14—Contract of pre-emption being already recognised does not offend against the rule in S. 14—Case-law discussed.*

In view of the fact that the different High Courts have recognised the contract of pre-emption, the contract cannot be deemed to offend against the rule of perpetuities and is therefore not invalid and unenforceable. Rules of English law must be applied to Indian Cases with great caution. (24 W.R. 321, *Dist.*)

(d) *Transfer of Propetry Act, S. 40—Contract of pre-emption is enforceable against heirs of transferees with notice—Case-law discussed.*

Under S. 40 contracts of pre-emption being valid contracts are enforceable against the personal heirs of the original parties as also against the transferee with notice until the settlement in the Record-of-Rights of which the contract was entered into is at an end.

(e) *Contract Act, S. 29—Uncertainty.*

Where the father and grandfather had apparently signed the Zamima Khewat and thereby assented to a contract of pre-emption, *held*, that

there was no uncertainty as to their intention which was obviously to enter into a contract for the period of settlement.

Peary Lal Banerji—for Appellants.

Harnandan Prosad—for Respondent.

Lindsay, J.:—The material facts are set out in the order of my learned colleague.

On the evidence furnished by the "zamima khewat" which was drawn up in the year 1886, it has already been decided that there was a contract entered into in that year providing for a right of pre-emption. The period of the contract was the period of the settlement and that, as my learned brother has pointed out, was to come to an end on the 30th of June, 1919. It was, therefore, a contract for a definite period, and admittedly the sale now sought to be pre-empted was made on the 10th May, 1919, that is, within the period of the contract.

It is this sale which according to the plaintiff gives him his cause of action, and the question is whether he is entitled to enforce his right of pre-emption arising out of the contract, against the vendor and the purchaser.

It is found that the father of the plaintiff and the grandfather of the vendor signed the *wajib-ul-arz* and were, therefore, parties to the contract.

It has been argued before us that the contract for pre-emption cannot be enforced on the ground that it is void for uncertainty. A second argument is that such a contract should be held to be void because it is opposed to public policy. A third argument is that the contract is void for remoteness, or, to put it in other words because it is obnoxious to the rule against perpetuities. And lastly it is contended that in no case could such a contract bind the representative of the original parties.

With regard to the first argument I agree with my learned brother that no uncertainty attaches to the contract under consideration. As he points out, the intention was to contract for a definite period, namely, the period of the settlement.

As for the second argument it is quite untenable in a Province where pre-emption is recognized and encouraged.

As for the fourth argument, namely, that a contract of this nature can in no case bind the representatives of the parties, that is a matter to be decided by the enactment contained in section 37 of the Indian Contract Act. It is nothing to the point to say that a man cannot bind his representatives by entering into a contract giving rise to a right of pre-emption. Whether a person purports to bind his representatives or not, they will be bound by operation of law if the law declares them to be so bound, and such a declaration is contained in section 37 above referred to:—

> "Promises bind the representatives of the promisors in case of the death of such promisors before performance unless a contrary intention appears from the contract."

As is evident from illustration (*b*) to this section, the only exception to the rule arises in those cases in which the personal skill or the special competence of the promisor are relied upon. No such question can possibly arise in a contract giving rise to a right of pre-emption. A contract of that nature is within the general rule and can be enforced against the representatives of the promisor after his death.

There can be no difficulty in holding here that the promise can be enforced against the vendor, the grandson of the promisor and his representative within the meaning of section 37.

It remains then to be considered whether the plaintiff can enforce his right under the contract of pre-emption against the purchaser from the vendor. The law is that the liability under a contract cannot pass by an assignment which is the act of one of the parties to the contract. It may of course be transferred by agreement between the promisee and promisor in circumstances which amount to novation or the making of a fresh contract.

But the liability may be transferred by operation of law and it has to be seen, therefore, if the law, as we have it, declares that a contract giving rise to a right of pre-emption can be enforced against a third party, *e.g.*, an assignee who was no party to the original contract.

We are thus brought to a discussion of the question whether a contract of this nature binds an assignee on the ground that it contains a covenant which, according to the phraseology of the English law, "runs with the land." In this connection the law to be considered in India is the law contained in section 40 of the Transfer of Property Act which lays down what rights or obligations may be enforced against a transferee of immoveable property.

Two classes of rights are referred to in the section. The first class consists of rights to restrain the enjoyment of land or to compel its enjoyment in a particular manner. These are the rights which arise under the "restrictive covenants" which are enforced in equity in England on the ground that the person entitled to the right has an "equitable interest" in the land or a right in the nature of an equitable easement.

This class of rights obviously does not include a right to enforce pre-emption.

The second class of rights is defined in the second clause of section 40 of the Transfer of Property Act.

"Where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property but not amounting to an interest therein or easement thereon."

It seems to me that a contract giving rise to a right of pre-emption clearly falls within this category.

The promisee in such a contract is clearly entitled to the benefit of the obligation entered into by the promisor, namely, that when he proposes to sell the land, he will give the promisee the first offer. The obligation of the promisor is annexed to the ownership of the land for it is in his quality as owner that he undertakes the obligation and the obligation concerns the land, for it is an obligation to offer the land in the first instance to the promisee in case a sale is being contemplated.

And, lastly, the benefit of the obligation which arises out of a contract for pre-emption is neither an interest in the land nor an easement thereon. It is obviously not an easement, and regard being had to the language of section 54 of the Transfer of Property Act, it cannot amount to an interest in the land. The section says that a contract for the sale (and therefore for the re-sale) of immoveable property does not of itself create "*any interest* in or charge on such property." The words are "any interest," and, in my opinion, preclude the notion that an interest even of an equitable nature arises out of such a contract. I am of opinion, therefore, that the obligation which springs from a contract giving rise to a right of pre-emption is clearly one which falls within the second clause of section 40 of the Transfer of Property Act and that the benefit of such an obligation, though it amounts neither to an interest in nor to an easement on land, is enforceable against the persons specified in the section, that is, transferees with notice or gratuitous transferees.

In England the doctrine appears to be that pre-emptive covenants or covenants for re-purchase give rise to an equitable interest in the land. The result is the creation of privity of estate between the person entitled to pre-empt and subsequent transferees and it is on this basis that covenants for pre-emption are enforced in equity against gratuitous transferees or transferees who take with notice of the covenant.

In India the right to enforce the covenant is given by statute, section 40 of the Transfer of Property Act where the right does not amount to an interest in land. I agree, therefore, with my learned brother when he points out that cases such as the one we have before us are not to be decided upon the doctrines of the English law but must be decided upon the law as enacted in India. I am satisfied that in the present case the right is enforceable against the transferee by purchase who cannot be allowed to plead want of notice of a contract contained in the *wajib-ul-arz* of the village in which the property is situated. There remains the argument about remoteness. It is said that such a contract offends against the rule relating to perpetuities as laid down in section 14 of the Transfer of Property Act.

But clearly that rule can only be applied in cases where there is an attempt to create an interest in property. A contract for a right of pre-emption or re-purchase does not give rise to any interest in immoveable property. The language of section 54 of the Transfer of Property Act is clear upon that point. It follows that the rule against perpetuities cannot be invoked for the purpose of arguing that the contract with which we are concerned in this case is void for remoteness.

I have abstained from comment upon the numerous cases which have been cited before us in argument. They are all set out and discussed in the judgment of my learned colleague. I would only observe that it seems to me that in most, if not all, of the cases in India to which our attention has been drawn, the provisions of section 40 of the Transfer of Property Act have not received due consideration. In my opinion this appeal fails and should be dismissed.

Sulaiman, J :—This is a defendants' appeal arising out of a suit for pre-emotion based on a sale-deed, dated the 10th of May, 1919. The suit was originally based on an alleged custom prevailing in the village, which was denied by the vendees. The Court of first instance, finding that no custom had been established and that the entry in the *zamima khewat* relied upon by the plaintiff was one of contract, dismissed the suit. On appeal the lower appellate Court came to the conclusion that even if no custom existed, the plaintiff was entitled to succeed on the ground of a contract of pre-emption. It may be noted that the *zamima khewat* relied upon by the plaintiff was prepared at the time of the settlement of 1886 and according to the Gazetteer of the District of Basti, page 120. this settlement was to expire on the 30th of June, 1919. Thus the settlement was still in force at the time when the sale-deed in question was executed and when the alleged cause of action in the plaintiff's favour arose. The lower appellate Court accordingly set aside the decree of the first Court and remanded the case for trial on the merits. An appeal by the defendants was disposed of by a Bench of this Court of which the judgment is reported in 20 A. L. J. R. 464. This Court modified the order to this extent that it sent the case back to the first Court with direction to the plaintiff to amend his plaint so as to base his claim on the ground of contract also. As a result it may now be taken to be finally settled for the purposes of this case, that no custom of pre-emption has been proved to exist.

When the case went back to the original Court, the suit was again dismissed on the ground that there was no evidence on the record to show that either the plaintiff and his predecessors or the defendants and their predecessors had signed the *zamima khewat* which was prepared in place of the ordinary *wajib-ul-arz*. The lower appellate Court, however, admitted a complete copy of the whole record of rights and found that Gopal Rai, the father of the plaintiff Jhagru, and Dudhnath, the grand-father of the vendor Munna Rai, apparently signed it and were assenting parties to the contract. Relying on two cases of this Court, it held that in any case there was a *pima facie* presumption that the contract was made by all the then co-parceners and was binding upon them, and even an absence of their signatures would not justify an inference that they had not agreed to it. It accordingly sent the case back once again for disposal of the remaining issues.

The defendants have come up again in appeal to this Court and urge that the suit should have been dismissed. I may note that in the course of the argument no suggestion has been made that the plaintiff's father and the vendor's grand-father had not signed the *zamima khewat*. The points which the learned Advocate for the appellants has strongly urged may be enumerated as follows:—*Firstly*, that the contract of pre-emption was void for uncertainty. *Secondly*, that it was against public policy. *Thirdly*, that it offended the rule against perpetuities. And, *fourthly*, that in any case it cannot bind the representatives of the original parties to the contract.

The *wajib-ul-arz* or the *zamima khewat* does not embody the contract itself but is merely a *prima facie* evidence that such a contract was entered into by the co-sharers at the time of the settlement. In the absence of anything to the contrary, such a contract must be presumed to have been intended to hold good for the whole period of the settlement and not longer. In cases of districts which are not permanently settled, such settlements are ordinarily for fixed periods of 30 years. It cannot, therefore, be said that this contract of pre-emption was for such an unknown or indefinite period as to make it void for uncertainty. The intention of the co-sharers obviously was to enter into a contract for the period of the settlement. There is no uncertainty as to their intention. Section 29 of the Contract Act can, therefore, have no application. In the case of *Bimal Jati* v. *Biranji Kuar* (1) both Sir Arthur Strachey, C.J., and Banerji, J., remarked that such 'a covenant for pre-emption was not void for vagueness or uncertainty'. I may add that if the contract had been for an unlimited period of time, it might well have been contended that it was unenforceable against the heirs and the representatives as being too vague and uncertain.

So far as these provinces are concerned, it is not possible to contend that a contract of pre-emption is against public policy. It is well known that for a large number of years suits for pre-emption on

(1) (1900) 22 All. 238.

he basis of contracts have been decreed by this Court. Futhermore, when in numerous villages even a custom of pre-emption has grown up and has been enforced, it cannot be said that a contract of pre-emption is against public policy.

Nor can, in my opinion, the rule of perpetuities apply under the Indian Law. It may be conceded that in England the view has been expressed that a covenant for re-purchase 'without any definite limit as to the period of time within which the covenant was to have effect' could not be enforced; *vide* the case of *London and Sotuh Western Railway* v. *Gomm* (2) and subsequent cases. It must, however, be borne in mind that the rules of English law have to be applied to Indian cases with great caution. In *Gomm's* case the *ratio decidendi* was that a contract of sale did create an equitable interest in land and was, therefore, within the rule of perpetuities. Cases in India, however, are governed by the Contract Act, the Transfer of Property Act and the Specific Relief Act. Section 54 of the Transfer of Property Act (which came into force before *Gomm's* case was decided) expressly provides that a contract for the sale of immoveable property does not of itelf create "*any interest in or charge on such property.*" In the face of an express statutory provision of this kind, it is impossible to urge that a contract of that kind creates any interest, legal or equitable, in the property at all. The rule against perpetuities is embodied in section 14 of the Transfer of Property Act and under it no transfer of property can operate to create an interest which is to take effect beyond the legal limit prescribed therein. When a contract of pre emption is entered into by the proprietors of a village, there is no transfer of any property affected at all. Section 14, therefore, in terms cannot apply to it. If it be conceded that a contract of pre-emption does not create any interest in land, it would be very difficult to contend that such a contract comes within the rule against perpetuities. Such a rule cannot apply unless an interest in land purports to have been created.

The learned Advocate for the appellants has strongly relied on a number of cases in support of his contention.

The earliest case is that of *Tripoora Sundari* v. *Jugger Nath Dutt* (3). That case was decided long before the Transfer of Property Act was passed and can, therefore, be easily distinguished.

The next important case is that of *Nobin Chandra Soot* v. *Nawab Ali Sircar* (4). In that case the contract was embodied in a private document and was to reconvey the land for a fixed consideration in the event of being called upon to quit it without specifying any period of time. The learned Judges of the Calcutta High Court quoted passages from English cases, principally that from *Gomm's* case, to the effect that a covenant of this character which bound the covenantor, to convey the property to the vendor 'without any definite limit as to the period of time within which the covenant was to have effect' could not be enforced. The view expressed therein was that no limit could be imposed upon the power of alienation which extends 'beyond any definite period' and which contravenes the doctrine of remoteness.

This last case was considered by two learned Judges of the Calcutta High Court in the case of *Kali Maddin Bhuya* v. *Reasuddin Ahmed* (5) and was distinguished on the ground of there having been a devolution of interest of one of the parties by inheritance. The learned Judges, however, held that the covenant by itself was not void but was valid in law and could be enforced against the covenantor as well as a purchaser with notice from him, and a case of our Court was quoted with approval.

The next case is that of *Nabin Chandra Sarma* v. *Rajani Chandra Chakraburty* (6) There too the claim for pre-emption was based on a clause contained in a private document. Mukerji, A.C.J., remarked that it was

> "firmly settled that an option to arise on any intended sale or other particular kind of alienation by the owner *e.g.* a right of pre-emption or first refusal, is subject to the rule against perpetuities, and to bind the land or property must comply with it unless the right is conferred by statute. It may be entirely void even where limited to a proper period, if intended merely as a total check on alienation by the owner".

At page 904 the learned Judge, in repelling the argument that in particular

(2) (1882) 20 Ch. D. 562.

(3) (1875) 24 W.R. 321.
(4) (1901) 5 C.W.N. 343.
(5) (1909) 10 C.L.J. 626.
(6) (1921) 25 C.W.N. 901.

contingencies the covenant might not contravene the rule against perpetuities, remarked :

"To test whether a covenant violates the rule against perpetuities, we must look not to the particular events which may have actually happened but to all possible contingencies.....In the light of this principle, it is abundantly clear that the covenant in this case is obnoxious to the rule against perpetuities".

It is apparent that the learned Judge regarded such a covenant as altogether void and not only unenforcible against the representatives. This must of necessity be so; if a covenant does actually offend the rule against perpetuities, it is void *ab initio*. The logical conclusion to which one would then be driven would be that such a covenant cannot be enforced against even the parties to the contract. With great respect to the learned Judges of the Calcutta High Court I think that the effect of the provision contained in section 54 of the Transfer of Property Act was altogether overlooked and the basic principle underlying the English cases that such a contract creates an interest in land so as to bring it within the rule of perpetuities, was not fully appreciated.

Tyabji, J., in a very learned judgment reported in *Avula Chara Mudi* v. *Marriboyina Raghavulu* (7), has most clearly brought out the great distinction which subsists between the rules of English law and the Indian Statutory law. He has pointed out that it is settled beyond argument that an agreement merely personal not creating any interest in land is not within the rule against perpetuities and he has shown how the English cases are on that ground clearly distinguishable and cannot apply to a case arising in India which is governed by the Contract Act, the Transfer of Property Act and the Specific Relief Act. He has also very cogently remarked that, if the right that is sought to be enforced were to depend upon the existence of an interest in the land and that interest itself were void in law as offending against the rule against perpetuities, it would not matter whether the persons that are before the Court are those who have themselves been parties to the transaction attempting to create the interest or that they are strangers or transferees. I fully agree with the view expressed by the learned Judges of the Madras High Court. In fact there is no good answer to the contention there put forward that if a covenant of this kind were to be avoided on the rule against perpetuities, the covenant must be deemed to be wholly void and not as if it were valid against the parties and invalid against their representatives.

Even in the judgement of this Court in *Gopi Ram* v. *Jeot Ram* (8), on which strong reliance has been placed on behalf of the appellants, it was conceded that a contract of sale of immoveable property as laid down in section 54 of the Transfer of Property Act, if no interest is created in immoveable property under a contract of sale, the latter cannot be vitiated by the rule against perpetuities.

In view of these authorities and the statutory provisions in India, I am of opinion that the contract of pre-emption cannot be held to be invalid and unenforcible on the ground that it offends the rule against perpetuities.

The last point urged on behalf of the defendants-appellants is that even if such contract was not altogether void, it was certainly unenforcible against any persons other than the actual parties to the original contract. That at the time when the contract was entered into by the co-sharers it must have been contemplated by them that it would hold good during the whole period of the settlement, cannot seriously be disputed. We all know what the intentions of the proprietors at the settlement times usually are. They enter into a number of agreements, all ultimately recorded by the settlement officer, which are intended to be binding on the whole co-parcenary body while that settlement lasts. There cannot, therefore, be much doubt that the intention of the proprietors at the time when the contract was certified before the settlement officer, clearly was that it would be binding on all proprietors, whoever they may happen to be during the whole of the coming period of settlement. The question whether in point of law such an agreement could bind their representatives is of course quite another matter.

The line adopted by the learned advocate for the defendants-appellants has been that such a contract was in substance a contract entered into by the then proprietors for

(7) (1915) 39 Mad. 462.

(8) 1923 All. 514.

themselves as well as on behalf of their future heirs and representatives. The contention, therefore, is that these proprietors had no power whatsoever to enter into a contract on behalf of their future heirs and representatives, and if they did, that contract could not bind the latter. I am of opinion that this is not a correct appreciation of the position of the proprietors. They did not enter into any contract acting as agents of their future heirs or representatives, but they by virtue of their position as proprietors, entered into a contract themselves. If a contract entered into by them is held to be enforcible against their heirs or representatives also, it is not necessarily tantamount to holding that the proprietors had authority to enter into a contract as agents of their heirs and representatives. A contract of pre-emption in substance is a contract that before any share in the village is transferred to a stranger, an offer would be made to the other co-sharers, or to put it in a negative way, a contract that no transfer shall be effected to a stranger without an offer having first been made to the other co-sharers. Such a contract is made by the then proprietors in respect of the property which they hold at the time. No one says that it creates any interest in or charge or easement on that property. Nevertheless it is an agreement made in respect of their property and by virtue of their position as proprietors. If the law makes such contract of the then owners enforcible against their representatives, that necessarily does not confer on them a power to act as the agents of their representatives. In my opinion there is a clear distinction between the contract of *A* being enforcible under the law against his respresentatives and the power of *A* to enter into a contract on behalf of his representatives. The latter position cannot be maintained, but the former may well be consistent with the provisions of Statute. As a matter of fact it is well known that claims of pre-emption are brought after the property has been transferred and they are enforced against the stranger transferees, who were no parties to the contract.

If the contract entered into by the proprietors was not void on the ground of uncertainty or as being against public policy or as offending the rule against perpetuities, then the question is why could it not be enforced against his legal representatives? Section 37 of the Indian Contract Act provides generally that 'promises bind the representatives of the promisors unless a contrary intention appears from the contract.' I have already remarked that there can be no doubt that a contract of pre-emption when entered into by the proprietors for the time being is intended to be binding on all the co-sharers whoever they may be during the whole period of the settlement. In such a contract there is nothing to show a contrary intention not to bind the representatives. If a contract of pre emption be treated as nothing more nor less than a contract of sale, then under section 27 of the Specific Relief Act such a contract can, under certain circumstances, be enforced against the representatives of the original parties to the contract.

Again, section 40 of the Transfer of Property Act lays down a statutory provision which requires a careful consideration. I am aware that in none of the cases cited before us section 40 was applied to a contract of pre-emption. Nevertheless I have come to the conclusion that such a contract must come within the wide scope of that section. That section provides that

> "Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or *where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon*, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not "against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands."

I concede that a right of pre-emption, which may be described as a right of first refusal, cannot be described to be a right to restrain the enjoyment of the others' property or to compel its enjoyment in a particular manner. There is really no restraint on the enjoyment of the property at all. The occasion for the right arises when the owner wishes to exercise his right to dispose of it and is most often enforced after the disposition has been actually made. I am however distinctly of opinion that such a contract does come within the second part of the section. When all the proprietors enter into an agreement by

which they bind themselves by virtue of their position as proprietors that within a time fixed no transfer shall be effected without a first offer having been made to the other co-sharers, they are entering into a contract out of which an obligation arises on each, to the benefit of the other co-sharers, and which obligation is annexed to the ownership of the immoveable property (not annexed to the property itself) and does not amount to an interest therein or easement thereon. The section speaks of the benefit of an obligation arising out of contract and not only arising out of a breach of contract. It follow that the section would apply when a contract subsists, even though no occasion has arisen for its performance, and even though no breach has actually taken place. In cases other than that of pre-emption, there may be a suit to restrain an apprehended infringement. The only other words in the section which require some consideration are the words 'annexed to the ownership.' This latter expression cannot be understood to mean 'creating any interest or charge in the land but simply 'relating to the ownership', or 'by virtue of the right of proprietorship'. It is apparent to my mind that a contract of pre-emption entered into by the proprietors though a personal one, in the sense that it creates no interest in land, is also entered into by virtue of their position as proprietors and is entered into in respect of their property and must from its very nature be deemed to have been annexed to their ownership. Having regard to the true conception of such a contract of pre-emption, I am of opinion that, though not amounting to an interest in or easement on land, it certainly creates a benefit of an obligation in favour of the other parties and is attached to their proprietorship. Such a contract, therefore, under the law can be enforced against all gratuitous transferees and even against transferees for consideration with notice. *A fortiori* such a contract could not be held to be unenforcible against the heirs of the contracting parties. If my interpretation of the section is correct then we have a statutory provision which makes contracts of pre-emption enforcible against the representatives of the original parties. No question of its offending against any supposed rule of perpetuities or its being against public policy would then arise. On the other hand, if the Calcutta view were carried to its logical conclusion, then not only a covenant for pre-emption, but even a contract for sale or a contract for reconveyance within a fixed period would become unenforcible as soon as any of the original parties dies. That is to say, if *A* sells his property to *B* absolutely and *B* enters into a separate and independent contract with *A* for consideration, undertaking that the property would be reconveyed if the amount is repaid, within, say a year, and, unfortunately for *A*, *B* dies within that time, the former can never get back the property. I find myself unable to accept this view.

I think that a contract of pre-emption can be enforced against the personal representatives as well as transferees as the original parties in the same manner and to the same extent as the restrictive covenants mentioned in the earlier part of section 40 of the Transfer of Property Act.

It may, however, be contended that the application of section 40 to a contract of pre-emption is not supported by any authority in the sense that, so far as is known, it has not been directly applied to a suit for pre-emption based on contract. Even accepting this to be so, I must say that my conception of a contract of pre-emption is quite consistent with the conception which has found favour with a number of learned Judges of this Court.

The earliest case that I may refer to is the Full Bench case of *Ishri Singh* v. *Ganga* (9). Oldfield, J., remarked in that case that "when a *wajib ul-arz* records a right of pre-emption by contract between the share-holders, it is evidence of a contract binding all the parties" to it *and their representatives*, and there will be a presumption that all the share-holders assented to the making of the entry and in consequence were assenting parties to the contract of which it is evidence and it will be however open to those repudiating the contract to rebut the presumption". Similarly Spankie, J., remarked that "when such a document has been attested before the settlement officer, such a record is *prima facie* binding on all the co-sharers, and cannot be repudiated by any one succeeding to or acquiring a share except as permitted by section 91 of the old Rent Act." Pearson, J., agreed with the

(9) (1880) 2 All. 876 (F.B.).

opinion expressed by Oldfield, J., and Straight, J., agreed with the opinion expressed by Spankie, J.

I would next refer to another Full Bench case of *Karim Bakhsh Khan* v. *Phula Bibi* (10). Pethram, C. J., there remarked: "It has always been considered—and this view has been acted upon—that agreement of this nature *runs with the land to this extent*, that a co-sharer wishing to purchase, and to whom the property has not been offered, can follow it in the hands of the vendee and get possession of it himself. If this is so, the agreement *so far runs with the land*; and if it does so to any extent, it must, in my opinion, do so to the full extent of the agreement." Straight, J., Oldfield, J., and Broadhurst, J., agreed with that opinion, and so did Tyrell, J.

The conception of a contract of pre-emption having such a connection with land as to bind representatives of the original parties can also be gathered from other Division Bench cases. In *Gokal Singh* v. *Mannu Lal* (11), where the pre-emption clause was based on a contract, Mahmud, J., in a separate written judgment, which does not fully appear in the report, remarked: "The mere apportionment of revenue and the disseverance of the liability to that revenue could not, *ipso facto*, defeat a covenant relating to pre-emption entered into by all the co-sharers for the time being, and which covenant *ran as an incident of the tenure of the lands* owned by them before such partition."

In the case of *Kunwar Dat Prasad Singh* v. *Nohar Singh* (12) it was again remarked that 'this pre-emptive right *runs with the land*.'

In *Ram Jiwan Sahu* v. *Rituraj Singh* (13), it was again held that 'the right of pre-emption was one created by agreement between the co-sharers of the village, and constituted a covenant which *attached to and ran with the land*.'

It is true that these cases were referred to by Strachey, C.J., in the leading judgment which he delivered in the Full Bench case of *Dalganjan Singh* v. *Kalka Singh* (14). At page 19 he remarked: "I cannot agree.....with the conception of pre-emption as a covenant running with the land.....To describe pre-emption as a covenant running with the land is to misapply a technical term of the English real property law." The point was not at all necessary for decision in that case, but the remark is entitled to great weight. All that the learned Chief Justice, however, meant was that it was improper to import the technical expression 'covenant running with the land' from the English real property law and apply it to pre emption as understood in India. No one can dispute the correctness of that observation. The expression 'covenant running with the land' is a technical expression which has a special meaning in the English real property law. It is certainly not proper to say that pre-emption is a covenant running with the land in the sense in which that expression is used in English law. What, however, had been expressed in previous cases was that the right was of such a nature as not only to affect the persons who were actual parties to the contract but also their representatives. Even after the observations of Strachey, C.J., a Bench of this Court in *Bahadur Singh* v. *Ram Singh* (15) again used the expression '*run with the land*'.

In view of the conception of an agreement of pre-emption as entertained by so many Judges of this Court, who had a vast experience of pre-emption cases, I am of opinion that its obligation must be deemed to be annexed to the ownership of land though not annexed to the land itself. Even bearing in mind that section 40 of the Transfer of Property Act has not so far been applied to a covenant of pre-emption, I have come to the conclusion that its language covers such a right. That section was not directly considered in any of the cases which have so far held that such a right was unenforceable against the representatives.

Coming to the two recent cases of the Allahabad High Court, *Balli Singh* v. *Raghubar Singh* (16) and *Gopi Ram* v. *Jeot Ram* (8), I must at once mention that the previous Allahabad cases to which I have referred, were not at all cited before the Bench nor was the applicability of section 40 of the Transfer of Property Act pressed. I may also add that the learned Judges were to a

(10) (1886) 8 All. 102 (F.B.).
(11) (1885) 7 All. 772.
(12) (1888) 11 All. 257.
(13) (1889) A. W. N. 81.
(14) (1899) 22 All. 1 (F.B.).
(15) (1904) 27 All. 12.
(16) 1923 All. 511.

great extent influenced by the circumstance that in both of those cases the contract was intended to be operative for an unlimited period of time. At page 414 it was remarked 'the village being permanently settled, no time is fixed for the revision of record, and that therefore the covenant might bind people for *an indefinite period.*' Similarly in the latter case, at page 433, it was pointed out that the agreement was to re-convey the land whenever demanded to do so on the payment of a certain sum and that 'there was *no limit of time* in which the sale was to be re-made.' On the same page it was further remarked that it was doubtful whether the provisions of section 37 of the Contract Act enabled an owner of an immoveable property to enter into an agreement with another imposing a restrictive covenant for an *indefinite period* on the disposition of the said property so as to bind his heirs and representatives.

It is, therefore, possible to distinguish both these cases on the ground that the contract was intended to be enforced for an indefinite period of time. In the present case however, it has already been noted that the contract could not have been intended to be operative beyond the period of about 30 years fixed for the settlement of 1886. The learned Judges had before them certain observations contained in the judgment of the Madras High Court in the case of *Avula Charamudi* v. *Marriboyina Raghavalu* (7) as against the Calcutta cases as well as two Bombay cases. They came to the conclusion that "the balance of authority appears to be on the side of the vendees." Main reliance was placed on the remarks of Macleod, J., in the case of *Dinkarrao Ganpatrao* v. *Narain Vishnath* (17), quoted as follows:—"The principle which underlies the rules of perpetuities applies to this class of contracts." These exact words are, however, to be found in the head-note and not in the judgment itself, though they may well be taken to represent the gist of his conclusion. At page 206 the learned Chief Justice remarked that contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future, "do not according to the law in India create an interest in land either equitable or executory;" they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties, and then after referring to the judgment of their Lordships of the Privy Council, in the case of *Maharaj Bahadur Singh* v. *Balchand* (1), he remarked at page 210, "but the judgment indicates that *in spite* of section 54 of the Transfer of Property Act the agreement could be read as creating an interest of such a nature as to bring the agreement itself within the rule against perpetuities". I know of no authority for saying that where no *interest in land*, legal or equitable, present or future, is purported to have been created and the rule against perpetuities does not apply, the principle underlying that rule can apply. I would say with great respect that that deduction does not follow from the judgment referred to above and that in any case it would not apply to a covenant for pre-emption. In the Bombay case the agreement purported to give his heirs a right to buy the land at the original price and was unlimited in point of time. I may also add that another learned Judge of the Bombay High Court, *i.e.*, Pratt, J., had been of opinion that "if the intention was merely to create a personal obligation, the covenant is good and binding on the covenantor and covenantee *and their personal representatives*", but he held that it created no future right *in rem*.

Now, the Privy Council case of *Maharaj Bahadur Singh* v. *Balchand* (18), was of a peculiar nature inasmuch as the plaintiffs had not sued for specific performance but on title, alleging apparently that the agreement amounted to a grant, and that the plaintiffs had taken possession of the land and were then dispossessed. While referring to the plaintiffs' contention that the contract was binding upon the assigns under section 40 of Act IV of 1882 because that Act was passed before the decision in *South-Western Railway Co.* v. *Gomm* (19), and was not confined to restrictive covenants but applied to every obligation arising out of contract and annexed to the ownership of immoveable property, Chamber, C.J., remarked: "Assuming that that contention was correct, we have to consider next whether the plaintiff is entitled to maintain the suit." In his opinion the plaintiff had "failed to prove any title to the land in suit". Their Lordships of the

(17) 1922 Bom. 84.

(19) (1920) 48 I.A. 376 (P.C.).
(19) (1882) Ch. D. 562.

Privy Council in affirming the decree pointed out that " for the appellants, therefore, to succeed, it is essential to show that this agreement created in them some present estate or interest which would prevent the Raja from having made the grant ". That could only be effected by reading the deed as a grant in perpetuity which could not be done. The covenant in that case was to the effect that if the plaintiff society should require any place on the hill for erecting Mandir and Dharamsala, and for doing repairs and making bricks for the said purpose, in that case the Raja and his heirs should give land, stones from the hill and timber *free of costs*. Their Lordships remarked that such a covenant did not and could not run with the land and could not be so enforced. Their Lordships further remarked that if the deed be regarded as an agreement to grant in the future whatever land might be selected as a site for a temple as the only interest created would be one to take effect by entry at a latter date, and as this date is uncertain the provision is bad as offending the rule against perpetuities for the interest would not then vest in *presenti*, but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period.

It is to be noted that the deed in question had been executed on May 16th, 1872, long before the Transfer of Property Act came into force, and its validity had to be tested according to the rules of the English law and independently of the provisions of section 54 and section 40 of the Transfer of Property Act. It is also noteworthy that the covenant was quite unlimited in point of time and was sought to be enforced against transferees from transferees. I should further like to point out that the covenant in that case is clearly distinguishable from a covenant for pre-emption which neither creates any present interest in land nor is an agreement to grant in the future any interest in land. It is not as if any legal or equitable interest, present or future were created in the land. The right is enforced as a mere contract, and is enforced against the representatives of the original parties under the statutory provisions contained in section 37 of the Contract Act, section 27 of the Specific Relief Act and section 40 of the Transfer of Property Act. When a covenant of pre-emption does not amount to any interest present or future in immoveable property, it is difficult to see how it would come within the rule against perpetuities. And if it did, it would be void altogether and not only partially invalid.

The period of 30 years fixed for the ordinary settlements is after all not so unconscionably long as necessarily to exceed the legal limit prescribed under section 14 of the Transfer of Property Act, *viz.*, the life-time of one or more persons living at the date of such transfer (or agreement) and the minority of some persons who shall be in existence at the expiration of the period. Further, the provision in section 40 regarding notice indirectly imposes a time-limit as for all practical purposes the proof of actual notice will become more and more difficult with the lapse of time.

I am, therefore, of opinion that the contract of pre-emption as evidenced by the entry in the record of rights was not unenforceable against the personal heirs of the original parties, or their transferees with notice, so long as the settlement continued. I may say that the question whether in any particular case the transferee had or had not notice is one of fact which if raised has to be determined on the evidence.

The present case can also, in my opinion, be disposed of on a shorter ground. The parties to the original contract were the father of the plaintiff and the grandfather of the vendor. Both were Hindus and *prima facie* they formed joint Hindu families. Managers of Hindu families are the agents of those families for the purposes of contracts with other parties. They represent their respective families to the outside world. A contract which is entered into by such a manager is a contract entered into not only on his behalf but on behalf of his family of which he is a member. The contracting parties, therefore, are the two families represented by the two managers, and the contract is binding not only on the signatories to it but the families on whose behalf they are entering into the contract. In this view of the matter it is apparent that no question of this contract being enforced against the personal representatives of the original parties at all arises. The famalies are still the same though the members of it may have changed. The contract was by one family in favour of the other and was to hold good during the whole period of the settlement. So long

as these families are existing entities and are recognised by law as such, the contracts entered into between them are binding on them. The defendant-vendees cannot escape from the obligation by simply saying that the original signatories to the contract are dead. If those signatories had authority to bind their respective families, then the families are bound even after the deaths of their agents. The contract, therefore, is really being enforced against the original party to it, *viz.*: the vendor's family and its present transferees.

I am, therefore, of opinion that the order of the lower appellate Court remanding the suit with direction to dispose of the other issues involved in the case was correct, and I would, therefore, dismiss the appeal.

By the Court:—The appeal fails and is dismissed with costs.

Appeal dismissed.

1924 Allahabad 411.

STUART and MUKERJI, JJ.

Emperor—Appellant

v.

Panna Lal—Respondent.

Crl. Ref. No. 651 of 1923, decided on 3rd January, 1924.

Crim. Pro. Code, S. 307—Verdict should be interfered with only when it is perverse or when it is manifestly wrong.

The High Court has full powers to re-open matters in connection with a verdict of acquittal by a jury where the Sessions Judge has disagreed with the verdict and has referred the case to the High Court under the section. But the High Court should interfere only when the verdict is perverse or clearly and manifestly wrong. This principle will secure the object of the legislature in creating juries. Any undue interference with the verdict of a jury tends to diminish the sense of responsibilty which it is desirable a jury ought to cherish.

Penal Code, S. 376—Evidence.

In no cases is it more difficult to arrive at a confident verdict whether evidence is false or true than in cases in which women allege that they have been outraged or that an outrage has been attempted on them. Not only one has to consider the possibility of deliberate falsehood but those who have to arrive at a verdict have to consider the possibility of unintentional mis-statements produced by hysterial conditions which are apt to be found in cases of this nature.

Assistant Government Advocate—for the Crown.

J. M. Bannerji—for Opposite party.

Stuart, J.:—This is a reference by the Sessions Judge of Benares under section 307 of the Code of Criminal Procedure submitting a case in which a certain Panna Lal was unanimously acquitted by a jury on a charge of attempted rape. Before we proceed to a consideration of the facts we deem it advisable to state what powers are given to us under the law to deal with such references and the manner in which we consider those powers should be used. Under the provisions of section 307 a High Court has very full powers to re-open all matters in connection with a verdict of acquittal of a jury with which the Sessions Judge has disagreed and which he has referred to the Court under the provisions of that section. But it does not follow that because powers have been given to the Court the Court should feel justified in using those powers to the full. There have been two schools of thought both before and after the amendment of the law which took place in 1896 as to the correct legal principles to be adopted in such circumstances. One school has considered that a High Court should not interfere with a verdict unless it is perverse and clearly and manifestly wrong. The other school has held the opinion that in such cases the High Court should re-open the matter *ab initio* and apply an independent mind to the evidence and form its own conclusions thereon. It cannot be suggested that the view taken by the first school is an improper one. The High Court may exercise any of the powers which it may exercise on appeal but it is perfectly within its rights in considering that in cases such as these interference should only be permitted in cases of perversity or clear and manifest error and that where a jury has arrived at a verdict which is not perverse and not clearly and manifestly wrong such verdict should not be interfered with although it is perfectly possible to form a not unreasonable opinion contrary to the opinion taken by the jury. The advantage of adopting this course is that it secures the object of the legislature in creating Juries. If the other view be taken and the case is re-opened *ab initio* it is somewhat difficult to see what useful function is performed by a jury. For in every case in which the Judge does not agree with their verdict the case can be referred to the High Court which then proceeds to try in *de novo*. We have no

hesitation in adopting the view that we should not interfere unless the verdict is perverse or clearly and manifestly wrong. This is the view which was adopted prior to 1898 by the Bombay High Court in the case of *Reg.* v. *Khanderav Bajirav* (1) and the principles were laid down as aptly as they could be laid down by West, J., at page 13 :

"Trial by jury is a recent institution in India ; the Judge may differ from the jury as to the facts, and the duty of dealing with a case of that kind is then cast upon the High Court. On a reference by the Sessions Judge, the whole case is opened up. The section we have quoted lays down that the Court may acquit or convict without reference to the charges made against the accused. In other words, the functions both of the Judge and jury are cast upon the Court, and this differentiates our position very widely from that of the Courts in England.

Notwithstanding this difference, however, and the more onerous duties devolving in consequence on the High Courts in India, we still desire to be guided, as far as may be, by the analogies of the English law. It is a well recognized principle that the Courts in England will not set aside the verdict of a jury, unless it be perverse and patently wrong, or may have been induced by an error of the Judge. We adhere generally to this principle, notwithstanding our large discretionary powers *first*, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the legislature, and *secondly* because any undue interference may tend to diminish the sense of responsibility which it is desirable that a jury should cherish."

The same view was taken by a Bench of this Court in *Emperor* v. *Chirkua* (2). This being our opinion as to the principle of law which should guide us, we now turn to the facts of the case.

The acquitted man Panna Lal was charged with having in company with another man enticed on to the roof of a deserted building standing in a small garden in the heart of Benares City a young low caste Hindu married woman of some 14 years of age. The two men according to the girl complainant having obtained her presence in this place proceeded to throw her down and commit acts which could undoubtedly be only considered, if they really happened, to be acts committed preparatory to the commission of a rape. The Magistrate who committed the case and the Judge who heard it believed the girl to be telling the literal truth. There was certain corroborative evidence, which the Judge believed, to the effect that on the roof where the offence was said to have been committed were found the fragments of broken glass bangles of a pattern similar to the pattern which the girl was wearing at the time she made her first complaint. There was further evidence of neighbours who stated that their attention was attracted by the outcries of the girl so that they arrived upon the scene of the occurrence and saw Panna Lal and his companion running through a gap in the wall of the garden. If upon this evidence the jury had arrived at a verdict of "guilty" it certainly would have been difficult to criticise that verdict. But in our opinion we cannot say that their verdict of "not guilty" was perverse or clearly and manifestly wrong. It is a common-place to those experienced in the administration of criminal law that in no cases is it more difficult to arrive at a confident verdict as to whether evidence is false or true than in cases in which women allege that they have been outraged or that outrage has been attempted upon them. Not only has one to consider the possibility of deliberate falsehood but those who have to arrive at a verdict have to consider the possibility of unintentional misstatements produced by hysterical conditions which are apt to be found in cases of this nature. The difficulties are increased when from the nature of the charge there can be no physical trace of outrage such as in a case of attempted rape. There are peculiarities about this case and there are distinct discrepancies in the evidence. Panna Lal may be guilty of the offence or he may not. But this much we are able to say with certainty. We see no reason to suppose that the jury did not give an honest and a not unreasonable verdict and in these circumstances we find it impossible to interfere with that verdict. We accordingly acquit the accused of the offence upon the charge framed and direct that he be at once released from custody.

Accused acquitted.

(1) (1875) 1 Bom. 10.
(2) (1905) 2 A.L.J. 475.

1924 Allahabad 413.

MEARS, C.J. and STUART, J.

Lachhman—Appellant

v.

Emperor—Respondent.

Cr. A. No. 992 of 1923, decided on 17th December, 1923, from the order of 2nd Addl. Sessions Judge, Cawnpore.

Penal Code, S. 84—Knowledge that an act is wrong along with unsound mind is not covered by S. 84.

Where the accused was of a unsound mind at the time of committing the murder but he knew perfectly well that he was doing a wrong thing, *held*, that S. 84 did not apply to the case but that capital sentence should not be passed. The proper course is to sentence him to transportation for life so that he could be kept under observation. If the accused continues in a stage of apparent sanity for a sufficiently long period the local Government can pass such orders as clemency may suggest upon satisfactory medical report.

Government Advocate—for the Crown.

Stuart, J.:—This case presents unusual features. There is not the slightest doubt that on the 18th of August, 1923, Lachhman, appellant, murdered a man of the same name in the village of Samadhanpurwa. These are the circumstances. Lachhman, appellant, is a Pasi. The deceased man was a chamar. It is established to our satisfaction that for some time previous to this occurrence the appellant had shown peculiarities from which it can only be inferred that he was at that period insane. We are satisfied that he used to talk wildly and incoherently, tear up his clothes, strip himself stark naked in public, and we see no reason to distrust the evidence which would show that he besmeared himself occasionally with faecal matter. His family believing him to be insane sent for the deceased man Lachhman, chamar, who had a reputation as an exorcisor of evil spirits to remove the insanity by exorcism. Apparently the presence of Lachhman chamar, irritated the appellant to such an extent that he attacked him. There can be no doubt as to the fact that he did attack him with a heavy bullet of wood and inflicted terrible injuries all over his body, smashing his head and breaking both his arms. These injuries resulted in the death of Lachhman chamar. The appellant was at once seized and tied with a rope to a pillar. He broke away, ran to the river Ganges and plunged in. He was taken out and kept in custody until the police arrived. These facts admit of no doubt.

When the appellant was put upon his trial he had recovered his senses. The Civil Surgeon, whose evidence we see no reason to discredit, has said in his evidence that for the period of 15 days the appellant was under his observation he was not insane and it would appear that his mind was not deranged to a very serious extent while he was on trial. It is, however, to be remarked that certain of his answers in the case indicate that his mentality was far from normal while under his examination but on the evidence he knew the nature of his act and knew that what he was doing was wrong and contrary to law. I had to deal with a similar case some years ago and stated my views as to the law governing such cases therein. See *Muhammed Hasan v. King-Emperor* (1). I have nothing to add to what I stated then as to the law, and would suggest the same action against this man as was taken in that case. This is certainly in my opinion not a case in which the capital sentence should be passed. At the same time the benefit of section 84 of the Indian Penal Code cannot be extended to the appellant. I would suggest that the sentence be altered into one of transportation for life and that the case be reported to the Local Government for special consideration. The same course was pursued in the former case.

Mears, C. J.:—I think the evidence establishes that this man was suffering from a type of insanity known as *folie circulaire*, that is a type of insanity which commences of abnormality of conduct on the part of the sufferer. That abnormality of conduct increases by degrees until a period is reached when the man is manifestly insane. That is when the disease is at its height. Gradually the man gets better, the abnormality ceases and for a period he again becomes perfectly sane. After a time abnormality begins again and so the circle continues with alternating periods of lunacy, abnormality and insanity. I am of opinion from the evidence that although this man was of unsound mind at the time when he committed the deed, he knew perfectly well he was doing what was a wrong thing to do; and that being so he cannot claim the exemption of section 84.

---

(1) (1918) 15 O. C. 321.

I agree that the proper course is to alter the nature of the sentence and to sentence him to transportation for life, so that he can be kept under observation. If he is for a sufficiently long period a man of apparent sanity, it is always competent to the Local Government to pass such order as clemency may suggest, upon satisfactory medical certificates.

By the Court:—The order is that the conviction be upheld and the sentence be reduced to transportation for life, and that the case be reported to the Local Government with a copy of this judgment.

Conviction upheld, sentence reduced.

1924 Allahabad 414.

MEARS, C.J. AND PIGGOTT, J.

Moti Ram—Defendant-Appellant

v.

Kunwar Md. Abdul Jalil Khan—Plaintiff-Respondent.

F. A. No. 29 of 1921, decided on 14th February, 1924, from the decree of Sub-Judge, Aligarh.

Companies Act, VI of 1882, S. 4.

The word 'person' can be used to include a number of persons such as joint Hindu family or a varying number of beneficiaries who may from time to time become interested in the trust property. Thus a person figuring in a different capacity in the constitution of a company is to be treated as one member.

P. L. Bannerji and *Panna Lal*—for Appellant.

Abu Ali and *Iqbal Ahmed*—for Respondent.

Mears, C.J.:—This is an appeal from a preliminary decree in which the defendants were held liable to account to the plaintiff for the profits in a Cotton Ginning Factory which had accrued on the shares originally held by one Kunwar Muhammed Abdul Ghafur Khan, a deceased ancestor of the plaintiff. The original defendants were Moti Ram and Lala Har Prasad. The latter died during the pendency of the suit and his heirs have been duly brought on the record. They have not appealed from the preliminary decree. Moti Ram, the present appellant, was sued in the character of an agent who had received moneys as and for the use of the plaintiff. He was alleged to be withholding a sum which with interest amounted to over Rs. 35,000. He admitted that there was a considerable sum of undistributed profit. The principal point upon which he relied as enabling him to retain this money was that the Company was an illegal association inasmuch as it consisted of more than 20 persons and therefore violated the conditions of section 4 of the Indian Companies Act of 1882 which prohibits the formation of an unregistered company in excess of that number. If, in our opinion, the appellant is wrong in that contention then the appeal must fail. The Companies Act of 1882 nowhere defines 'person.' We are therefore, thrown back upon the General Clauses Act (No. X of 1897) 'Person' is there defined to include any Company or Association or body of individuals whether incorporated or not. It is therefore, obvious that 'person' can be used to include a collection of people and an appropriate illustration which will at once occur to Indian lawyers is that association of individuals known as a joint Hindu family. Analogous thereto are the varying number of beneficiaries who are from time to time interested beneficially in property vested in a trustee or trustees. The obligations of the appellant and the representatives of Har Prasad as agents are contained in an agreement which is one of partnership and also one of agency; it is dated the 20th of August, 1910, and omitting for a moment the consideration of the legality or otherwise of the inception of the contract the liability to account was in that agreement clearly provided for; nor is there any dispute as to the actual failure to deliver accounts throughout the period as to which default is alleged.

The appellant takes his stand as we have said on the illegality of the above mentioned agreement. He contends that on an investigation and enumeration of the persons beneficially interested in the partnership their number amounts to more than 20. The number of the various members of the partnership enumerated as they themselves thought correct, amount exactly to 20. Mr. Peary Lal Banerji, however, contends that inasmuch as Moti Ram scheduled as holding shares on behalf of his two grandsons, his name should be cut out and the beneficiaries, his two grandsons substituted in it. It may be noticed that Moti Ram is himself beneficially interested in another block of shares. No. 12 is given as:—

"Mt. Mohani.....for self and guardian of Moti Lal, minor adopted son of Ganeshi Lal."

The appellant's contention as regards this lady is that she must be counted as one person in respect of her own personal interest in that block of shares and a second person by reason of her holding an interest in the Company as the guardian of Moti Lal. If both these points were conceded, namely, the cutting out of Moti Ram's name at No. 4 and the substitution of his two grandsons and if the name of Moti Lal the adopted son of Ganeshi Lal had also to be added at No. 12 in addition to the name of Mt. Mohani then the number of persons would undoubtedly be over the prescribed limit of 20. We, however, do not agree with the view put forward by the appellant and it is to be noticed that at page 25 where the agreement is set out Moti Ram is in fact counted as two persons that is to say he is counted in respect of the block of shares of which he should receive the profit to his own use and benefit and also of the shares which he holds as trustee for his two grandsons; even on that assumption the number of persons do not exceed 20. We do not agree with the view that the name of Moti Ram must give place to that of his two grandsons, nor do we agree that it is necessary to indicate as regards Mt. Mohani and Moti Lal that both of their names should be reckoned in the constitution of this Company. In fact there were, as the appellant would wish us to delete or to accept, two Moti Rams. There was throughout the whole transaction one Moti Ram to whom the Company was accountable. In the same way the Company was accountable only to the one lady Mt. Mohani independently of the circumstance that she in her turn would be accountable to Moti Lal, the adopted son of Ganeshi Lal in respect of whatever interest he happened to hold in the Company through her as trustee. Again as regards Moti Ram it is to be noted that the contracting person in the first instance was the same Moti Ram who had a personal interest in the Company and the appellant and Har Prasad were bound to account to him and to him alone both for the shares in which he had his own beneficial interest and the shares which he held as a trustee for his grandsons. A similar consideration applies to the case of No. 8 Bithal Das who as guardian of his minor son Kishen Gopal also figures with another man as a proprietor having a direct beneficial interest in the partnership. But the accountability of the Company to Bithal Das was an accountability to him alone both as regards his beneficial interest and as regards the shares which he held in a representative capacity for other persons. The number however would exceed 20 if certain persons presumably members of a joint Hindu family and so found by the Judge were in fact separate and thus capable of being regarded as separate contracting parties. The learned Subordinate Judge considered all the arguments put forward and came to the conclusion that the persons alleged to be joint were in truth joint and could be represented by one member of the joint family and that as regards the others, specially, Moti Ram and Mt. Mohani and Bithal Das, that in truth they had been accurately described in the agreement. When these principles are applied to the document in question it becomes clear that the partnership certainly did not exceed 20 and probably did not exceed 18 persons. Agreeing with the learned Subordinate Judge we hold that the partnership was not invalid in its inception and that the appellant and the representative of Har Prasad are accountable to the plaintiff for his share in the profits for the period claimed. We also agree with the lower Court that the plaintiff having procured a succession certificate for the shares in the Factory can maintain the action for profits. We therefore dismiss the appeal with costs and fees on the higher scale.

Appeal dismissed.

1924 Allahabad 415.

LINDSAY and SULAIMAN, JJ.

Raghubar Dayal and another—Defendants-Appellants

v.

Secretary of State—Plaintiff-Respondent.

F. A. No. 95 of 1921, decided on 19th February, 1924, from the decree of Sub-Judge, Meerut.

Cantonment — Regulation allowing sale to Civilians with sanction of military authorities creates licenses in favour of grantees—Transfer without consent justifies a suit for declaration.

Where Army Regulations were in force by which a house could not be sold at all to Civilians and later on it was allowed to be sold with the sanction

of the commanding officer, *held*, in the absence of evidence as to the actual terms, it must be presumed that the permission was subject to a reservation about sanction. Therefore every transfer made with the permission of the military authority must be treated as indicating an admission of a new license upon the prevailing conditions. *Held* further, that a transfer without sanction furnished a cause of action for a declaration that it was not binding on the Secretary of State.

Per *Sulaiman, J.*—The rights of the occupier to sell the materials of the house are not affected by the Regulation.

Army Regulations Vol. II, App. IV.

The rules in App. IV of Vol. II have no force as law, and a transfer which is valid under the ordinary law cannot be invalidated by contravention of those rules but where a person takes a grant of cantonment land subject to those rules he would be bound by them.

B. E. O'Conor and *K. N. Katju*—for Appellants.

L. M. Bannerji—for Respondent.

Lindsay, J.:—This appeal has arisen out of a suit filed by the Secretary of State for India in Council in the Court of the Subordinate Judge of Meerut for the purpose of obtaining a declaration that a deed of sale executed by the first defendant, Raghubar Dayal in favour of the second defendant Mr. Thomas Singlehurst on the 28th July, 1919, and registered on the 9th August, 1919, was null and void and ineffectual on the ground that the previous consent of the military authorities had not been obtained, and that the transfer was detrimental to the interests of the military officers in the Meerut Cantonment.

The reason for the suit is indicated in para. 6 of the plaint.

Under section 11 (c) of the Cantonments (House Accommodation) Act of 1902 (Act II of 1902) which was in force at the time the suit was brought, no notice under section 6 of the Act can issue in respect of a house in Cantonments occupied by the owner; in other words where the owner of such a house is in actual occupation he cannot be required, by notice under section 6, to let the house to a military officer. The declaration sought for in the plaint was therefore being asked for in order to have it established that the military authorities were not under any legal obligation to treat the second defendant, Singlehurst, as the owner of the house conveyed by the deed in question for the purposes of the Act just referred to.

The house is described as Bungalow No. 42, Bedford Row in the Meerut Cantonment.

It is not disputed in this case that the land upon which this bungalow stands is cantonment land and therefore the property of Government. Nor is it disputed that at the time when this conveyance was executed the vendor, Raghubar Dayal, was entitled to be treated as the owner of the house.

The case for the plaintiff was that the relations between him and the defendant Raghubar Dayal were governed by certain rules set forth in Appendix IV, Volume II of Army Regulations, India, para. 35.

The rules in question purport to regulate the conditions upon which land in cantonments was granted prior to the introduction of the Cantonment Code in the year 1899. It is declared that the conditions are to be subscribed to by every grantee of cantonment land as well as by every person to whom the grant may be subsequently transferred. The particular condition with which we are here concerned is laid down in the following terms:—

"If the ground has been built upon, the buildings are not to be disposed of to any person who does not belong to the army until the consent of the officer commanding the station has been previously obtained under his hand."

It is upon this condition that the plaintiff rests his case. No previous sanction to the transfer now in question having been obtained from the authority mentioned in the condition it is claimed that the plaintiff (and under him the military authorities) has the right to ignore the transfer.

The first and second defendants resisted the suit on the same grounds. It was denied that the house had ever been sold to the defendants or their predecessors subject to the condition just mentioned, and it was claimed in substance that the house was held and had been held free of any of the conditions imposed by the Army Regulations cited in the plaint.

It was pleaded that these Regulations had not the force of law and could not be resorted to in order to affect the right of transfer as laid down in the Transfer of Property Act. It was also pleaded that there was no cause of action for the suit; that the plaintiff was not entitled to maintain a suit for declaration; and in any case that the declaration should not be granted on the ground that the military authorities in withholding sanction had acted in an unjust, illegal and arbitrary manner.

The Subordinate Judge has found in favour of the plaintiff. He was of opinion that the suit was maintainable, that the plaintiff had a cause of action, that the relations of the parties were governed by the Army Regulations quoted in the plaint, that the first defendant was bound by the condition requiring previous consent to the transfer and that such consent not having been obtained the plaintiff was not obliged to recognize the transfer and to treat the defenant Singlehurst as the owner of the house for the purposes of the Cantonment (House Accommodation) Act, 1902. In the result the Court below gave the plaintiff a decree declaring that the sale-deed in dispute was not binding and is ineffectual as against the military authorities of the Cantonment.

The memorandum of appeal submitted to this Court embodies the various pleas which were raised by way of defence in the Court below. The purely technical pleas have not been strongly pressed before us, nor indeed could they have been.

It being admitted that the land on which the house in dispute has been erected is the property of the plaintiff it could scarcely be contended that the plaintiff has not such an interest in the property in dispute as would entitle him to maintain a suit for declaration under section 42 of the Specific Relief Act.

And clearly if the relations between the parties are governed by the Army Regulations the plaintiff had a cause of action, for it is plain that the transfer to the second defendant was made in spite of an express refusal of the military authorities to accord sanction to the sale. Mr. O'Conor has argued the case on the merits and has contended that the military authorities have no right to withhold sanction, that the Regulations upon which the plaintiff relies have not the force of law and cannot interfere with the right to transfer the house, that the grant of the land was not made subject to the conditions contained in these Regulations and that the want of sanction cannot invalidate the sale or justify the plaintiff in ignoring it so as to deprive the purchaser, Singlehurst of the protection afforded by section 11, clause (c) of the Cantonments (House Accommodation) Act, 1902.

In the course of the arguments we have been referred to the history of the site of the bungalow in dispute and it will be as well here to set out the relevant facts in this connection. There was produced in the Court below a set of the registers relating to the transfer of houses in the Meerut Cantonment and these books have been inspected by us during the hearing of the appeal.

The earliest entry we can find is contained in a register which, so far as we can ascertain, must have been prepared for the first time soon after the year 1833.

On the 16th September, 1833, a General Order was issued by the Commander-in-Chief directing that a register should be kept in the office of the principal staff officer in certain cantonments, including Meerut, for the purpose of recording all transfers of houses, bungalows or gardens in cantonments. It was ordered that all proprietors of houses, etc., should forward to the Staff Officer concerned a memorandum stating when they purchased or became proprietors of the houses from whom they obtained them and the dimensions of their different compounds. It was further directed that all future transfers of houses should be entered in the register (see the compilation of orders printed in the Gazette of India of the 5th November, 1898, Part V, page 371).

There can be little doubt that the first volume of the registers produced before us must have been prepared in accordance with these instructions. We find, then, that the first entry relating to the site of the house now in question shows that a house on this plot was in the occupation of a gentleman named McGarison who was a Civil Surgeon.

On the 18th December, 1844, we find it stated that the house on this site was transferred by one Charles Modden, Civil Surgeon to Major Matthew Smith of H.M.'s 9th Fowt.

On the 29th July, 1852, this officer transferred the house to Lt.-General Sir Joseph Thackwell, G.C.B.

From this date till the 7th February, 1874, the house seems to have remained the property of the Thackwell family.

On this latter date according to an entry in another volume of the register, the house which was then in ruins was sold by the Cantonment Magistrate at public auction and was purchased by one E. C. Roberts, a person who did not belong to the army.

Roberts on the 20th November, 1895, sold the house to a Mrs. Stevenson who on the 2nd July, 1901, made a gift of it in favour of a minor named D. M. Bower.

On the 21st March, 1912, G. T. Bower, the certificated guardian of the minor owner sold the house to Raghubar Dayal, the first defendant in the present suit, and for the purposes of this case it is important to notice what took place on this occasion.

The Cantonment Magistrate having been informed of this proposed transfer wrote both to the guardian and to Raghubar Dayal pointing out that in accordance with Army Regulations bungalows in Cantonments could not be sold without first obtaining the sanction of the Officer Commanding the Station. Both parties were further informed that the land being the property of Government could not be sold and that no sanction would be given to the transfer unless a declaration was made in writing that the land was not being sold and that all that was being transferred was the bungalow together with the out-houses (see the correspondence at page 34 of the printed record).

Bower, the guardian, replied to the Cantonment Magistrate by letter (Ex. 4), dated the 29th March, 1912, that he "noted" that the bungalow could not be sold without the sanction of the Officer Commanding. He further stated that both he and the purchaser (Raghubar Dayal) were aware that the land was the property of Government and could not be sold (see page 35 of the printed record).

After this correspondence the Cantonment Magistrate obtained the sanction of the Officer Commanding at Meerut and this fact was notified to Bower by letter (Ex. 6) dated the 23rd April, 1912.

It is clearly established therefore that when Raghubar Dayal acquired this house in the year 1912 he was made aware of the fact that the military authorities were applying the rules laid down in the Army Regulations and were insisting that the conditions contained in the Regulations governed the transfer of the property and in the circumstances it did not lie in the mouth of Raghubar Dayal to plead as he did plead in para 12 of his written statement that "the bungalow in dispute was never sold to any predecessor of the defendants or to himself, subject to the condition stated in clause (*c*) of rule 35, Army Regulations, India, Vol. II."

That was without doubt a false plea. Raghubar Dayal was well aware that the sale to him had been made subject to the condition in clause (*c*).

That falsity of this statement is further demonstrated by the fact that on the 29th July, 1919, when he was arranging to sell this house to Singlehurst he made an application to the Cantonment Magistrate asking him to obtain the sanction of the Officer Commanding the Station to the sale of the house and praying that the sale should be registered. He quoted the Army Regulations in this application and obviously knew all about them (see p. 45 of the printed record). He admits this knowledge in a later letter sent by him to the Cantonment Magistrate on the 12th August, 1919.

We may further note that in another letter printed at pages 51 *et seq* of the record, Raghubar Dayal described himself to the Cantonment Magistrate as a practising Barrister of nearly twenty years standing with considerable knowledge of Cantonment law.

Whatever be the legal consequences of the notice given to Raghubar Dayal when he was purchasing in the year 1912, it is clear on all hands that he knew that he was taking subject to the condition that the exercise of the right to transfer the house he was buying could only be made with the previous sanction of the Officer Commanding the Station.

With regard to the plea that these Army Regulations relied upon by the plaintiff have no statutory authority and have not the force of law we think it is well-founded and we are unable to agree with the Subordinate Judge who took the contrary view. He refers to the Bombay Regulations which were cited before their Lordships of the Privy Council in the well-known Poona case of *Kaikhusru Aderji* v. *Secretary of State* (1) and seems to have thought that the Army Regulations with which we are dealing in this case stand on the same footing. But that is not so. The Bombay Regulations in question were statutory enactments made under the powers reserved to the Governor in Council prior to the introduction of the Government of India Act, 1833.

The Army Regulations with which we are here concerned cannot, so far as we can ascertain be traced to any statutory origin.

The various rules and orders to which the collective name of "Army Regulations, India," was subsequently given were all

(1) (1912) 36 Bom. 1 (P.C.).

collated and set out in an appendix to the Cantonments (House Accommodation) Bill which was introduced in the Council of the Governor-General in India for the purpose of making Laws and Regulations on the 4th November, 1898.

The appendix is to be found in the Gazette of India of the 5th November, 1898 at pages 366 *et seq.*

These orders which issued from time to time between the years 1789 and 1887 are all set out here and are described in various ways, *e.g.*, General Orders, Extracts from proceedings of the Governor-General in Council, General Orders by the Commander-in-Chief, Resolutions of the Military Board, etc. They cannot in our opinion be treated as rules having the force of law; they appear rather to be departmental rules issued with a view to the regulation of administrative business in the Army Department.

The particular rules which we have to consider in this case, *i.e.*, the rules regulating the occupation of land and the disposal of premises and buildings were first promulgated by a General Order of the Governor-General in Council, No. 179, dated the 12th September, 1836, and these rules were re-published from time to time with amendments and variations till they assumed their present shape in Army Regulations, India, 1887, section 17 (see page 394 of the Gazette of India, Part V of the 5th November, 1898).

The General Order of 1836 imposed practically the same restrictions upon the transfer of houses in cantonments as those which are set up by the plaintiff in the present case. It was expressly laid down that where cantonment land had been built upon, the buildings could not be disposed of to any person not belonging to the army until the consent of the Officer Commanding the Station had been previously obtained under his hand.

Now while it might be conceded that this rule, having no force as law could not operate as *per se* to invalidate a transfer which is good under the ordinary law, it may nevertheless be that a person who has taken a grant of cantonment land subject to this rule may be bound by it. It is true that in the present case we have no evidence of the terms in which the grant of the land upon which the bungalow in dispute now stands was first made. No document of grant is forthcoming nor indeed do we know when the grant was made. There is, however, little doubt that a house had been erected on the land by the year 1833 and before the promulgation of the General Order of 1836.

Up till the year 1874 when the house was transferred to a civilian named Roberts the house and the site had remained in occupation of persons who actually belonged or were deemed to belong to the army.

Since the date of the transfer to Roberts the house changed hands several times, the transferee in each instance being a person not belonging to the army, and it is a fact that each of these transfers down to the transfer in favour of Raghubar Dayal in 1912 has been recorded in the register of transfers maintained by the Cantonment Magistrate. We cannot imagine that any of these transfers could have been made without the previous sanction of the Officer Commanding the Station. It must be presumed that the Cantonment Magistrate in each case acted in accordance with the Army Regulations which were certainly binding upon him as a military officer and we have direct evidence in the case of the transfer to Raghubar Dayal that the previous sanction of the Officer Commanding the Station was sought and obtained before the transfer was registered. We have already pointed out that the conditions governing the transfer of the house were brought to Raghubar Dayal's notice and accepted by him. We have referred, moreover, to the fact that Raghubar Dayal sought previous sanction when he was about to transfer to the defendant Singlehurst.

While there is therefore no available evidence to show what conditions were attached to the grant of the site of the house when it was first built, there is in our opinion ample evidence to show that Raghubar Dayal took the house in 1912 subject to the limitation imposed by the rule upon the right of transfer and we hold that in the circumstances he is bound by the condition.

In the Poona case referred to above (36 Bom. 1) it was held that the appellants and their predecessors-in-title held merely upon cantonment tenure and had no status therefore other than that of licensees. That, in our opinion, is the status of Raghubar Dayal and of his successors-in-interest since his death. It is not claimed here, as it was in the Poona case, that the land is not the property of Government. On the

contrary it is admitted freely that the land does belong to the Government. Raghubar Dayal and his predecessors held no lease, it is not pretended that they did, and that being so they could not be more than licensees, and therefore bound by the conditions of the license. Each transfer as it was made and sanctioned amounted to nothing more than the transfer of a license. That was the view taken by Russell, J., in the judgment of the Bombay High Court, and we understand that view to have been accepted by their Lordships of the Privy Council.

At page 9 of the report, dealing with the meaning of the word "sanctioned" endorsed upon the document of transfer in favour of the predecessor-in title of the appellants he observed as follows:—

"What is the meaning of the word 'sanctioned' in Ex. 71? The only meaning I have been able to attribute to that word upon Ex. 71 is that in accordance with the Rules and Regulations then prevailing upon the subject, the Brigadier-General permitted and ratified the surrender by Beyts, and the admittance of Dorabji Pastonji. I cannot believe that it was intended to refer merely to the transfer of one name in place of another in the register, for otherwise the register would be a purely useless and unnecessary document. By the use of the word 'sanctioned' I take it what the Brigadier-General meant was that inasmuch as Mr. Beyts had surrendered all his rights to this cantonment property the Brigadier-General was willing to substitute Dorabji Pastonji for him under the then prevailing orders and regulations under which, as we know, it was entirely *ultra vires* for the Brigadier-General to allow or to connive at allowing the vendee of those rights to acquire any proprietary rights whatever in the land itself."

Adopting the view laid down in this passage of the judgment we hold that each transfer in the present case made with the previous assent of the proper military authority amounted merely to admission of a new licensee upon the conditions prevailing at the time with respect to the transfer of houses in the Meerut Cantonment.

Raghubar Dayal therefore came in as a licensee in 1912 and took the premises in dispute subject to the condition that he had no right to transfer them without the previous sanction of the Officer Commanding the Station.

The transfer now under consideration having been made without such sanction and in violation of the condition, the plaintiff is not bound to recognize it.

We are of opinion therefore, that the decision of the Subordinate Judge is correct and should be affirmed, and we dismiss this appeal accordingly with costs including in this Court fees on the higher scale.

Sulaiman, J.:—The plaintiff's case as set forth in the plaint was that all the land in Meerut Cantonment was the property of Government and was acquired between the years 1811 and 1815, that under certain Army Regulations 'if the ground has been built upon, the buildings are not to be disposed of to any person who does not belong to the Army, until the consent of the Officer Commanding the Station has been previously obtained,' and that the defendant No. 1 by a deed dated the 28th of July, 1919, sold the bungalow in dispute to defendant No. 2 without having obtained any such consent. The plaintiff therefore prayed that the sale-deed might be declared null and void and ineffectual inasmuch as it was executed without obtaining the previous consent of the military authorities, and was detrimental to the interest of the Military Officers.

The defendant did not deny that the site belonged to the Government. They did not specifically set up any lease or specific grant in their favour but took their stand on the broad ground that they had a transferable interest in the house.

The learned Subordinate Judge has given the plaintiff a declaration that the sale-deed of the house is not binding on and is ineffective as against the military authorities.

There is no direct evidence to show under what conditions the land was originally occupied by the predecessor-in-title of the defendants. Nor is there any evidence to show for how long before 1842 this house had existed. There is no lease or written grant that can be traced. The previous history of devolution of this house has been fully set forth in the judgment of my learned colleague. All that is known is that this land lies within the cantonment and has been occupied by a house which has been transferred from time to time with the consent of the military authorities.

I agree that the Army Regulations relied upon by the plaintiff have not the force of law by themselves to render the transfer altogether invalid. They however have a special bearing on the case which I propose to consider.

The Regulations of 1807 required that no bungalow or quarter within the cantonment was to be sold to or occupied by any one not belonging to the army, and that if any individual other than an Army Officer

purchased it he must remove the materials. But the house as such was in no case to be made over to a civilian. Under the Regulations of 1833 a register was to be kept in which transfers of such houses were to be duly entered. The General Order of the Governor General in Council No. 179, dated the 12th of September, 1836, is particularly important inasmuch as the Regulations thereby brought into force for the first time authorised transfer to a non-military officer under certain restrictions. A right of resumption subject to a payment of compensation was reserved, the ground itself could not be sold, but the house might be transferred without restriction by a military or medical officer to another such military or medical officer, and if the ground had been built upon, the house was not to be disposed of to any one not belonging to the military department without the sanction of the Commanding Officer, and in case of sales of houses over Rs. 5,000 in value, the sales had to be subject to the sanction by the Government of India.

There can be no doubt that the Regulations of 1836 were in full force till long after 1842 when the existence of this house is distinctly established. As the house is situated within the Cantonment and as there were these old Regulations in force under which originally a house could not be sold to a civilian at all and later on it could be sold only with the sanction of the Commanding Officer, it is fair to presume, in the absence of any direct evidence as to the actual terms on which the site was originally occupied, that the permission was subject to this reservation. It is unthinkable that Military Officers who at any rate were themselves bound by those regulations would have made a grant of a site in defiance of the Regulations in force. The defendants are not setting up lessee's rights in the land. They can at best be mere licensees whose predecessors were allowed to occupy the land by building a house on it subject to certain restrictions. My learned brother has shown how the successive transfers of this house prior to the transfer in question were duly entered in the register of houses which fact in a way implies the sanction of the military authorities.

Under section 56 of the Indian Easements Act a license as such cannot be transferred. It is clear, therefore, that the legal effect of the past sanctions was simply to continue the license in favour of the transferees. It was so to speak a fresh license with the coming in of each new transferee. It would follow therefore that defendant No. 2 cannot claim the benefit of that license unless the plaintiff agrees to renew the license in his favour, that is to say, the defendant No. 2 can have no right to insist on retaining the house as a place of residence and in that way occupy the site unless he obtains the consent of the plaintiff.

On the other hand it has to be noted that even under the Regulations of 1807 if a house situated in the cantonment was sold to an individual other than a military officer, the transferee was entitled to remove the materials of the house.

The Regulations of 1836 in no way affected the rights of the occupiers of houses to transfer the materials. Nor is there anything in the previous history of this house which would suggest that the proprietary interest in the materials of the house did not vest in the persons who had occupied it from time to time, or were not transferable.

The defendant No. 1 who was indisputably the owner of the house and was occupying the site with the consent of the plaintiff had by a registered sale-deed transferred the house as it stands with all the materials, etc. He has purported to transfer the right of residence plus the proprietary interest in the materials of the house. So far as the materials go they have under the registered deed absolutely passed to the defendant No. 2. And I know of no ground under which it can be said that the sale of those materials is null and void or ineffectual. Neither the plaintiff nor the military authorities can refuse to recognise that ownership in the materials has passed to the defendant No. 2. But I have already remarked that the right of residence cannot pass to the defendant No. 2 unless the plaintiff agrees to it.

The decree passed by the Court below is not very happily worded as it declares that the sale-deed of the house is not binding and is ineffective as against the military authorities. If I had thought that by this the learned Subordinate Judge meant that the military authorities could ignore the sale-deed absolutely and treat the defendant No. 1 as still the owner of the house then

I would not have wholly agreed with him. I, however, think that all that he meant was that the defendant No. 2 had no absolute right to occupy the site without the consent of the military authorities and on such terms as they choose to impose on him.

I also would therefore uphold the decree of the Court below and dismiss the appeal with costs.

By the Court:—The appeal is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

1924 Allahabad 422.

LINDSAY AND RYVES, JJ.

Kanhaya Lal—Plaintiff-Appellant

v.

The Maharajah Sri Prabhu Narain Singh Bahadur and another—Defendants-Respondents.

S. A. Nos. 164 to 166 of 1921, decided on 30th January, 1924, from a decree of District Judge, Allahabad.

Civ. Pro. Code, S. 86—Suit against ruling chief in his capacity as co-sharer in respect of property in British India is governed by S. 86.

Under cl. 26 of the instrument of transfer conferring the dignity of a ruling chief and the Maharajah of Benares there was the declaration that "within the other estates now in the possession of His Highness" which are outside the State of Benares, he shall continue to have the status and responsibilities of a land-holder under the ordinary law and within the pergannah of Kaswar Rajah he shall assume that status and those responsibilities." By cl. 26 the British Government reserved the right to itself to withdraw from the Maharajah any special privileges which he had enjoyed in a certain pergannah Kaswar Raja estate. *Held*, that cl. 26 did not indicate that His Highness intended to waive his right to plead his status as a ruling chief in the case of suits in respect of properties held by him in British India. S. 86 therefore could be invoked in his aid.

N. P. Asthana—for Appellant.

Kumuda Prasad—for Respondents.

Lindsay, J.:—These three second appeals have arisen out of suits for profits under section 165 of the Tenancy Act. The property in respect of which the profits were claimed is situated in the Allahabad district and it is admitted that His Highness the Maharajah of Benares is one of the co-sharers in each of the villages in respect of which these suits for profits were brought.

His Highness the Maharajah was made a defendant in each of the three suits and as against him both, the Courts below have dismissed all the suits on the ground that no decrees could be passed against His Highness on the ground that the consent of Government had not been obtained to the institution of the suits against him. In other words, the Courts below applied the provisions of section 86 of the Code of Civil Procedure.

We have now before us three second appeals in which the plaintiff challenges the correctness of the decision of the Courts below. The case for the appellant (the appellant is the same in all three cases) is that the Courts below were wrong in holding that so far as these suits were concerned the Maharajha was not liable to be sued without the previous consent of Government being obtained.

There can be no doubt whatever that His Highness is a Ruling Chief. We have before us the Treaty or Instrument of Transfer which was executed when the dignity of a Ruling Chief was conferred upon His Highness by the British Government.

The first clause of this Instrument declares that His Highness shall be the Ruling Chief of Benares from the first day of April, 1911.

There can be no doubt that so far as suits under section 165 of the Agra Tenancy Act are concerned the provisions of the Code of Civil Procedure apply, as laid down in Chapter 13 of the Agra Tenancy Act (U.P. Act II of 1901), and a reference to the Chapter will show that the provisions of Chapter 28 of the old Code of Civil Procedure, Act XIV of 1882, were applicable in their full force to all suits and other proceedings under the Agra Tenancy Act. It follows therefore that the provisions of sections 83 to 87 of the present Code of Civil Procedure apply to suits under the Tenancy Act.

It therefore cannct be doubted that it was competent to His Highness the Maharajah in these suits to plead that he was not liable to be sued without the previous consent of the Governor-General in Council or of any other authority to whom the power of granting such consent has been delegated under section 86.

The matter would be perfectly clear except for one provision which is to be found in the Instrument of Transfer by which His Highness was constituted a

Ruling Chief. Clause 26 of this Instrument provides in the first instance, that the right to repeal or amend in any way and at any time Bengal Regulation VII of 1828 or any other Regulation or law in virtue of which the Raja of Benares enjoys any special privileges within the *pergana* of Kaswar Rajah which heretofore was included in the family domains but is excluded from the State of Benares constituted by this Instrument, is hereby expressly reserved to the Lieutenant-Governor of the United Provinces of Agra and Oudh. So far as this part of clause 26 is concerned, it clearly reserves a right to the Lieutenant-Governor of the United Provinces to withdraw from the Maharaja any special privileges which he had hitherto enjoyed in the Perganah of Kaswar Raja. Attached to this clause 26 there is a declaration which runs as follows :—

"Within the other estates now in the possession of His Highness which are outside the State of Benares, he shall continue to have the status and responsibilities of a landholder under the ordinary law and within the perganah of Kaswar Raja he shall assume that status and those responsibilities."

We may observe here that by U. P. Act No. VI of 1915, Regulation 7 of 1828 was repealed and the provisions of the Agra Tenancy Act and the United Provinces Land Revenue Act were made applicable in their entirety to all the property of the Maharaja situated in Perganah Kaswar Raja.

Mr. Narain Prasad, who appears for the appellant here argues that on the language of this concluding portion of clause 26 the Maharaja in these suits is not entitled to raise the plea that he has the status of a Ruling Chief and is therefore only liable to be sued in case the sanction of the Government has been obtained.

It is contended that this language properly interpreted means that with respect to all lands situated outside the State of Benares the Maharaja has waived his right to plead his status as a Ruling Chief and is subject to all the responsibilities and liabilities of a landholder under the ordinary law.

It is difficult to ascertain what is the correct meaning of this provision and it was in view of this difficulty of interpretation that the learned Judge of this Court before whom this case came in the first instance referred it for consideration by a Bench.

We are not however disposed to accept the plea of the appellant that the language of the concluding portion of clause 26 indicates that His Highness the Maharaja intended to waive any right to plead his status as a Ruling Chief in the case of suits which were brought against him in respect of property held by him in British India.

We think that with respect to his liability to be sued in British India it would be difficult to invest His Highness with a dual personality (1) that of a Ruling Chief, and (2) that of an ordinary citizen.

Clearly, section 86 of the Code of Civil Procedure contemplates the case of a Ruling Chief being sued with respect to interests which he has outside his own territory and within the limits of British India, and it seems to us that the fact that a Ruling Chief may own immoveable property within the limits of British India and outside his own state territories does not entitle the Courts to treat him with respect to the latter property as an ordinary private citizen. That meaning certainly could not be attached to the language of section 86 of the Act. If we look at sub-section 3 of section 86 we find that no Ruling Chief is liable to arrest under the Code, and further, except with the consent of the Governor-General in Council, certified as aforesaid, no decree can be executed against the property of a Ruling Chief.

If we were to accept this argument and treat His Highness as having two personalities in the eye of the law we should be obliged to hold that in his capacity as a private citizen he would be liable to arrest under the terms of sub-section 3 of section 86. We can hardly think that the language of section 86 contemplates a contingency of this kind and we are therefore of opinion that His Highness being undoubtedly a Ruling Chief was entitled in these suits to claim the benefit of section 86. We do not think we ought to hold that clause 26 of the Instrument of Transfer operates in the manner contended for by the learned counsel for the appellant in these cases.

Admittedly the suits with which we are now concerned do not fall within the purview of sub-section 5 of clause 86. In the class of suits indicated in this

sub-section no consent of course is necessary but these suits were not suits brought by a tenant of immoveable property against His Highness the Maharaja as land-holder. They were as we have stated, suits brought by one co-sharer as against His Highness in his capacity as a co-sharer.

We hold, therefore, that His Highness was entitled to take the benefit of section 86 and to plead in bar of the suits the want of consent of the Governor-General in Council. In our opinion the appeals were rightly decided. We dismiss these appeals accordingly with costs including in this Court fees on the higher scale.

Appeals dismissed.

1924 Allahabad 424.

LINDSAY AND SULAIMAN, JJ.

B. Nandan Singh—Appellant

v.

B. Guptar Singh and others—Respondents.

S. A. No. 548 of 1922, decided on 22nd November, 1923, from the decree of S. A. J. of Gorakhpur, dated the 23rd December, 1921.

Pre-emption—Custom—Gorakpur District.

About the *Zamima Khewhat* of 1885 of Gorakhpur it must be assumed that it was prepared in the manner directed by the Board of Revenue, that is to say, it must be taken that the proprietors must be other than Mahomedans and expressly desired to have the custom of pre-emption recorded and must have adduced proof before the Settlement Officer, conclusive to show that the custom existed.

Iqbal Ahmad and *S. P. Sinha*—for Appellant.

N. Upadhiya—for Respondents.

Lindsay, J.:—The sole question for determination in this appeal is whether the lower appellate Court was right in holding that the custom of pre-emption alleged by the plaintiff was established.

The two pieces of evidence which were relied upon for the purpose of establishing custom were the *wajib-ul arz* of 1860 and the *zamima khewat* of 1885. The case is from the Gorakhpur district. We may also notice that the *kaifiat serishta nizamat* was also in evidence for the purpose of showing the history of the village.

It is important to notice in connection with the *zamima khewat* of 1885 that that document is of peculiar weight having regard to the circumstances in which this record was framed at the time of the settlement of Gorakhpur in or about the year 1885. We have it stated at page 210 of Mr. Agarwala's Commentary on the Land Revenue Act, 5th Edition, (page 210), that in the month of August, 1886, certain directions were issued to the Settlement Officer of Gorakhpur with regard to the preparation of the record which had hitherto been known as the *wajib-ul-arz*.

The Settlement Officers were directed to make particular note regarding any custom of pre-emption. The instructions laid down that a custom of pre-emption should be recorded when the proprietors expressly demand that it be noted and it is proved conclusively that the custom exists. This direction was given with regard to *mahals* belonging to other than Muhammadan proprietors.

It is clear therefore that in dealing with the question of the existence of the custom in this case we are entitled to lay particular stress upon the *zamima khewat* of 1885 for we must assume that it was prepared in the manner directed by the Board of Revenue, that is to say, it must be taken that the proprietors must be other than Mohamedans and expressly desired to have the custom of pre-emption recorded, and must have adduced proof before the Settlement Officer, conclusive, to show that the custom existed.

The *wajib ul-arz* of 1860 also shows that a custom is recorded.

It was argued in the Court below that the existence of the custom had not been established in view of the early history of the village as deduced from the *kaifiat serishta nizamat*.

From that document it appeared that the first settlement of this village was made in the year 1245 Fasli corresponding roughly to 1838. That settlement must have been the first regular settlement made under the Regulation of 1833.

It is also shown from the *kaifiat* that up to the year 1220 Fasli, corresponding to 1813 A.D. there was no zamindar or *mustajir* recorded as being in possession.

It is not however to be assumed from these facts that there were no owners of this village prior to the year 1838 when the settlement was made. It is quite

possible that for a long period the Government may have refused settlement to the zamindars or have refused to farm the property out to the owners for various reasons. The Judge was, we think, right in saying that this part of the evidence would not suffice to overturn the presumption attaching to the *wajib-ul-arz* of 1860 and attaching still more strongly to the *zamima khewat* of 1885.

The other attempt which was made in order to show that the record was not one of custom was in the direction of showing that the two records were in conflict, and that being so, neither of them could properly be regarded as a record of custom.

We find in the *wajib-ul-arz* of 1860 that the pre-emptors are divided into three categories :—

(1) *hissedar karib* ;
(2) *digar bissedar thok* ; and
(3) *dusre thok ke hissedar.*

In the *zamima khewat* of 1885 we find four categories :—

(1) *rishtedar karib,*
(2) *rishtedar baeed,*
(3) *shurkai baeed,*
(4) *shurkai tahte nambardari.*

Mr. Iqbal Ahmad has argued that two completely new categories are introduced in this later record, namely those of near and distant relations, (categories 1 and 2) and according to his argument, the record now means that a relation without being a co-sharer is entitled to pre-emption.

At first sight this argument seems to be a plausible one but on the other hand we think Mr. Upadhiya is probably right in contending that the second record is nothing more than an amplification of the earlier record, the reason being, that more particular enquiries were made during the settlement of 1885-86 which led to the disclosure that preference in the matter of pre-emption was given in the first instance with reference to nearness of degree in relationship. And we are also inclined to believe that the word "*rishtedar*" in the record of 1885 really means a person who is at the same time a sharer and relation. We arrive at this conclusion having regard to the whole context because we find in the four categories mentioned in the second record that the third and fourth consist of persons who are co-sharers in the patti and then persons who are co- sharers in the same *nambardari*. The third and fourth categories correspond in our opinion to the second and third categories of the earlier *wajib-ul-arz* and it is reasonable to assume therefore that the first and second categories in the second record are really a sub-division of the first category in the earlier record. At any rate, this is a possible interpretation, and we are not prepared to say that the decision arrived at by the learned Judge is erroneous.

No other question arises for disposal.

The appeal fails and we dismiss it with costs including in this Court fees on the higher scale.

Appeal dismissed.

1924 Allahabad 425.

LINDSAY AND KANHAIYA LAL, JJ.

Beni Prosad and others—Plaintiffs-Appellants

v.

Sheodin and another—Defendants-Respondents.

S. A. No. 609 of 1922, decided on 7th February 1924, from a decree of District Judge, Cawnpore.

Pre-emption—Wajib-ul-arz — Wajib-ul-arz *prepared at partition does not abrogate old customs.*

Where a *wajib-ul-arz* allowed pre-emption to co-sharers who are kinsmen and on their refusal to other co-sharers and later on a village was divided into two mahals one of which temporarily became the property of a single individual and the *wajib-ul-arz* prepared at the time of partition provided that the right of pre-emption shall belong to the *Hissader ekjaddi* and after him to the other co-sharers of any mahal of the village and the mahal owned by single person became the property of several co-sharers one of whom sold his share to a stranger, *held*, that the partition *wajib-ul-arz* did not record a contract and that the partition did not destroy the old custom. [P. 426, C. 2.]

K. N. Katju and *U. S. Bajpi*—for Appellants.

Iqbal Ahmad—for Respondents.

Kanhaiya Lal, J.—This appeal arises out of a suit for pre-emption. The property in dispute comprises a one anna share in *mahal* Rukmin Kunwar of the village Azampur Garhua and was sold by the defendant Manni Lal, to the other defendant, Sheo Din, for a consideration of Rs. 4,000 out of which Rs. 2,500 were credited towards a mortgage held by the vendee, Rs. 652 were paid at the time of registration, and the balance was left with the vendee for payment to one Ram Sahai.

The plaintiffs claimed to be the co-sharers of the vendor in *mahal* Rukmin Kunwar. The defendant vendee was a stranger to the village. The allegation of the plaintiffs was that there was a custom of pre-emption applicable to *Mahal* Rukmin Kunwar. The Courts below found that there was a custom of pre-emption applicable to the village Azampur Garhua; but it had been abrogated by the partition of the village in 1906 and that what was recorded in the *wajib-ul-arz* prepared at the time of partition was a mere contract, which terminated with the expiry of the term of the settlement. They further found that in any case the custom could not survive the partition, because there was a single proprietor left of the entire mahal, in which the property now in dispute was situated.

The existence of a custom of pre-emption applicable to the village Azampur Garhua as originally constituted, and carrying the incidents recorded in the *wajib-ul-arz* of 1876 is not now disputed. It allowed a right of pre-emption in the first instance to such co-sharers of the vendor as were his kinsmen and on their refusal to the other co-sharers of the village. In 1906 the village was divided into two mahals, one of which was called Mahal Rukmin Kunwar. It was the sole property of Mt. Rukmin Kunwar. The *wajib-ul-arz* of *Mahal* Rukmin Kunwar prepared at that time provided that the right of pre-emption shall belong to the *Hissedar ekjaddi* and after him to the other co-sharers of any *mahal* of the village. The effect of the latter *wajib-ul-arz* was that the custom, as originally recorded in the *wajib-ul-arz* of 1876, was maintained intact in spite of the partition between the co-sharers of the different *mahals*. *Mahal* Rukmin Kunwar had for the time being become the property of a single individual; but later on the *mahal* became the property of several co-sharers, one of whom sold the share in dispute to a stranger. It was open to the co-sharers of the new *mahal* at the time of partition to submit to a continuance of the custom as it stood prior to the partition or to abrogate it. In the present instance they agreed to submit to the continuance of the custom, and the plaintiff, who is one of the co-sharers of *mahal* Rukmin Kunwar, is entitled to claim pre-emption in respect of the share sold out of that *mahal*.

It is contended on behalf of the defendant vendee that the fact that the *mahal* Rukmin Kunwar had become the property of a single co-sharer, had the effect of abrogating that custom in its entirety; but what was done at the time of partition was to continue the application of the custom to the altered state of things by declaring that the right of pre-emption shall be enforceable as between the co-sharers of the different *mahals* in the same manner as if no partition had taken place. What was recorded in the *wajib-ul-arz* prepared at the time of partition cannot, therefore, be regarded as a contract; and the plaintiffs are entitled to sue for pre-emption. In *Prabhu Dayal* v. *Jamiluddin* (1), it was held in somewhat similar circumstances that the effect of the partition was not to abrogate or extinguish the old custom but to maintain it.

In the Court of first instance one of the pleas raised by the defendant vendee was that the entire consideration mentioned in the sale-deed was genuine. Out of the three items mentioned in the sale-deed two were allowed by the Court of first instance, namely, the sum of Rs. 2,500 which was credited towards the prior mortgage held by the vendee and that of Rs. 652 paid in cash before the Sub-Registrar. As regards the third item the Court of first instance held that it was doubtful whether that money was really due to Ram Sahai inasmuch as Ram Sahai was related to the vendee: but without recording a definite finding on that point, it proceeded to declare that if the amount was really due to Ram Sahai, the matter could be determined in a suit between the person liable to pay the money and the person who claimed it. The defendant vendee admitted that he had not paid the money left with him for payment to Ram Sahai; and in those circumstances no further finding is called for.

This appeal is therefore allowed and the suit of the plaintiff decreed for pre-emption subject to the payment of Rs. 3,152 to the defendant vendee within two months from this date. In case of non-payment the suit of the plaintiff will stand dismissed. As regards the sum of Rs. 848 left with the defendant vendee for payment to one Ram Sahai the plaintiffs will have to take their chance to pay this money if Ram Sahai succeeds in establishing his right to it. In

(1) (1921) 19 A.L.J. 911.

case of payment of the amount first mentioned, the plaintiffs will get their costs here and hitherto from the defendant vendee, who will bear his own costs throughout. In case of non-payment the defendant vendee will get his costs from the plaintiffs-appellants in all the Courts including in this Court fees on the higher scale.

Appeal allowed.

1924 Allahabad 427.

STUART AND MUKERJI, JJ.

Karim Bakhsh—Appellant

v.

Wahaj-ud-din and others—Respondents.

S. A. No. 665 of 1922, decided on 5th December, 1923, from the decree of Judge of Court of Small Causes as Sub-Judge, Allahabad, dated 8th February, 1922.

(a) *Partition proceedings—Revenue Court.*

Where applicant was allowed to withdraw but another co-sharer was allowed to continue the proceedings, *held*, that there was no cessation of the proceedings and the order on petition to withdraw amounted in effect to a cancellation of the sanction to withdraw.

(b) *U. P. Land Revenue Act, S. 233-K.*

Only parties to partition proceedings are barred and a Muhammedan tenant in-common cannot represent his co-tenant. (*Per Mukerji, J.*, but a non-party by not having his name recorded as a co-sharer is estopped from claiming relief.)

S. 233-K can ordinarily only operate as against those recorded co-sharers who have been parties to the partition proceedings. A Muhammedan tenant-in-common cannot be held to be represented by another Muhammedan tenant-in-common merely because their interests are identical. [P. 428, C. 1.]

P. L. Banerji and *M. A. Aziz*—for Appellant.

Iqbal Ahmad—for Respondent.

Stuart, J.:—This appeal is mainly on two points. The first is whether certain partition proceedings in a Revenue Court were vitiated by the omission to issue fresh proclamation of the proceedings, and the second is whether even if those proceedings were regular the plaintiff-appellant is prevented from obtaining a relief under the provisions of section 233-K of Local Act III of 1901. The facts in respect of the first point are these:—A certain Wahaj-ud-din applied to the revenue authorities for partition of his share in a village in the Allahabad district. He put in this application in 1909. In the course of the proceedings two brothers Meera Bakhsh and Aulia Bakhsh who are recorded co-sharers of a two pie share took certain objections to the partition which involved a question of proprietary title. These objections were decided against them and that decision became final. These objections were decided against them before March, 1916. In March, 1916, Wahaj-ud-din withdrew his application for partition and if this withdrawal had been accepted the whole of the partition proceedings would ordinarily have come to an end and there would have been no partition. The withdrawal was accepted as far as Wahaj-ud-din was concerned but almost directly another co-sharer Abdul Jalil who had been a party to the partition proceedings demanded that the partition should be allowed to go on and his request was acceded to. The partition was accordingly completed and finally sanctioned on the 10th of October 1917. The first point which we have to decide is whether the acceptance of Wahaj-ud-din's withdrawal automatically brought proceedings to an end and necessitated the commencement of new proceedings with the issue of fresh notices and a complete cancellation of the previous proceedings. I am of opinion that on the merits there was no cessation of the proceedings and that the order of the presiding officer on Abdul Jalil's petition amounted in effect to a cancellation of the sanction to withdraw. The appeal therefore cannot succeed upon the first point.

The second point is more important and more difficult. The present plaintiff Karim Bakhsh is a younger brother of Aulia Bakhsh and Meera Bakhsh. He was a posthumous child being born after the death of his father Maula Bakhsh. Maula Bakhsh owned a two pie share in mauza Scondha. At his death this was recorded jointly in the names of his two existing sons Aulia Bakhsh and Meera Bakhsh. I am not in a position to say whether the entry was made before or after the birth of Karim Bakhsh. Karim Bakhsh was born about 1888 and had attained his majority before the partition proceedings commenced. His name was not recorded as that of a co-sharer at the time that the partition proceedings commenced and it was not so recorded till the 16th of August, 1915, when Aulia Bakhsh died. Then the name of the plaintiff-appellant was recorded in place of

Aulia Bakhsh in the revenue papers but he was not brought on as a party to the partition proceedings and he was never a party to the partition proceedings. The question which he wishes to re-open in the suit out of which this appeal arises is the very question of proprietary title which was decided against his brothers Aulia Bakhsh and Meera Bakhsh some time in 1911. His case is that as he was not a party to the partition proceedings section 233-K has no application and that under the law as it is understood in this Court he has a perfect right to raise the matter now. Section 233-K can ordinarily only operate as against those recorded co-sharers who have been parties to the partition proceedings. The Courts below repelled the plaintiff-appellant's plea on the ground that although his name did not appear he was sufficiently represented by his elder brothers. I doubt the soundness of this proposition. I do not see how a Muhammedan tenant-in-common can be held to be represented by another Muhammedan tenant-in-common merely because their interests are identical. But I would agree with the Courts below in refusing the plaintiff-appellant any relief for a different reason. We have a clear and binding finding as to the facts and on these facts it appears that the plaintiff-appellant had attained majority before the partition proceedings ever commenced and that he deliberately permitted his brothers Aulia Bakhsh and Meera Bakhsh to remain recorded as co-sharers in respect of the property which really belonged to him and that he permitted them to represent his interests in that property and to assert claims of proprietary title on their own behalf which were really assertions of proprietary title on his behalf. I do not consider that this representation was a good representation in law but I do consider the plaintiff-appellant's conduct in refusing to disclose his title and refraining from having his name recorded as a co-sharer and thus giving notice to the parties and the presiding officer as to his position estops him from seeking any relief in the present proceedings. I consider that this is a clear case of estoppel by conduct and for that reason I would dismiss this appeal.

Mukerji, J.:—I quite agree with my learned brother that the appeal should be dismissed, but I wish to add a few words. I would rest the decree of this Court more on the ground of representation than on the ground of estoppel. I quite agree that the principle of estoppel applies to the facts of the case but I should think that in the peculiar circumstances of this case the question of representation does come in although the appellant is a Muhammedan. The rule of estoppel by substantial representation is based on broad principles. The rule applies with great force in the case of a Hindu family simply because of the constitution of it, but in other cases only if the facts are sufficient for its support. The object of this rule is this. The Court is to dispense justice, and the rules of procedure should not be allowed to defeat the ends of justice. It is for this reason that in cases where it is found that a minor was not substantially represented in a previous litigation he is not allowed to have set aside the decree, on the simple ground of want of representation. It has been held that he must show that he has been substantially prejudiced by the decree.

In the circumstances of this case the appellant was living with his brothers. The brothers were carrying on all the business of the family. In fact it was they who brought him up. It has been found as a matter of fact that he was all along aware of all the litigations that were going on in the family. It has been found in the case that altough he was adult at the date when the partition commenced he never asked for being recorded as a co-sharer with his brothers. It was only on the death of his elder brother Aulia Bakhsh that his name was recorded. Even then his name was recorded not under his independent right but as an heir to Aulia Bakhsh. If, therefore, his brothers raised the same contention about the partition of the abadi of Yusufganj as the appellant is now raising and if that contention was found against his brothers, is it conducive to the interests of justice that Karim Bakhsh should be allowed to re open the question which was settled against his brothers and for all practical purposes against him? I think that he should not be allowed to re-open the partition. I also would dismiss this appeal.

By the Court:—The order of the Court is that the appeal is dismissed with costs which will include fees on the higher scale.

Appeal dismissed.

1924 Allahabad 429.

STUART AND MUKERJI, JJ.

Yaqub Ali and others—Appellants

v.

Dhan Singh—Respondent.

S. A. No. 733 of 1922, decided on 9th January, 1924, from the decree of District Judge, Bulandshahr, dated 23rd March, 1922.

U. P. Land Revenue Act, Ss. 87, 88—Recorded rent must be decreed by Civil Court except in case of clerical error — Agra Tenancy Act, Ss. 43 to 46.

In rent suits in the Revenue Courts against occupancy tenants the Courts must award rent at the rates which are fixed upon the papers unless those rates are entered erroneously by a clerical mistake, and where there is a binding order of competent authority the Court has no discretion but must allow the rent at the rates directed. If either the landlord or the tenant has any objection to those rates he must apply to the proper authorities to have these rates altered but the Court trying a suit for arrears of rent has no authority in the matter. [P. 430, C. 1.]

Abu Ali and *Iqbal Ahmad*—for Applts.

St. C. Thompson—for Respondent.

Stuart, J. :—This appeal raises a question of some importance. The facts are as follows :—The plaintiffs-appellants are according to the statements in the plaint residents of Bulandshahr city. They own zamindari in the village of Bahlimpura. The defendant-respondent is an occupancy tenant in Bahlimpura holding 8 bighas and 3 biswas in occupancy tenancy. The plaintiffs sued the defendant for the rent of 1327 Fasli, that is to say, 1919-20 and calculated the rental on a grain basis according to which it amounted to about Rs. 160 which worked out to Rs. 20 a bigha. In the plaint it was admitted that the entry in the revenue papers showed that the defendant was liable only to pay Rs. 61 as cash rent and the plaint contained the argument-plaints in Revenue Courts frequently are argumentative—that a mistake had been made and that somehow or other the rent had been commuted from grain rent to cash rent without the knowledge of the plaintiffs or their ancestors. The argument continued that the rent had formerly been a grain rent and that it should remain as a grain rent. The defendant replied that in the progress of a recent settlement the Assistant Settlement Officer had commuted the rent from grain rent to a cash rent on the 29th August, 1918, and, that he had tendered the rent as fixed by the Assistant Settlement Officer to the zamindars who had refused to accept it. The Assistant Collector who heard the case was not satisfied with the entry in the patwari's papers which show Rs. 61 as the amount of rent fixed upon this occupancy holding at the time of the settlement but went into the question as to how that rental had come to be fixed. He ascertained that the rental had formerly been a grain rental but that the Assistant Settlement Officer had under the provisions of section 88, Local Act III of 1901 commuted the grain rent into a cash rent. He considered however that that order of the Assistant Settlement Officer was null and void because upon enquiry it was ascertained that by a mistake not of the defendant but of some clerk in the Settlement Office notice had not issued to the plaintiffs in this case when these proceedings were in progress. He accordingly decreed the higher rental against the defendant. The defendant appealed to the District Judge who took the view that the rate of rent to be allowed was the rate fixed by the Assistant Settlement Officer.

We are not concerned with the decision of the point whether the plaintiffs-appellants were or were not prejudiced by the omission to give them notice of these proceedings. We consider it exceedingly unlikely that they had no knowledge of the proceedings, for on facts before us the settlement authorities were commuting grain rents not only in respect of this holding but in respect of many others in the village. Ordinarily these absentees would have an agent in the village who would generally be fully conversant with the proceedings of the Settlement Department. Further the settlement arrived at must have been put before them for acceptance. No attempt was made by the Assistant Collector to ascertain whether they had or had not been prejudiced in reality. The view which he took was that the Assistant Settlement Officer's order was *ultra vires* and that he should not decree the suit according to the recorded rates but was obliged to go back to what had occurred before those rates were recorded and put the matter right. In other words he abrogated to himself the functions of a Court of revision over the Assistant Settlement Officer. In our opinion the matter is very clear in a case like this. In rent

suits in the Revenue Courts against occupancy tenants the Courts must award rent at the rates which are fixed upon the papers unless those rates are entered erroneously by a clerical mistake, and where there is a binding order of competent authority such as an order by the Settlement Officer under sections 87 and 88, Local Act III of 1901 or under sections 43 to 46, Local Act II of 1901, the Court has no discretion but must allow the rent at the rates directed. If either the landlord or the tenant has any objection to those rates he must apply to the proper authorities to have those rates altered, but the court trying a suit for arrears of rent has no authority in the matter. This is sufficient to dispose of the appeal which in my opinion should be dismissed with costs on the higher scale.

Mukerji, J.:—I wish to add a few words having regard to the importance of the question involved. The argument addressed by the learned counsel for the appellants to us seemed to take it for granted that the proceedings before the Settlement Officer were in the nature of a regular suit and that, therefore, the order passed could not bind a party who was not formally before the Settlement Officer. If we peruse carefully sections 87 to 90 of the Land Revenue Act of 1901 we shall see that no such procedure as that of a suit is necessary. Section 88 of the aforesaid Act lays down that an occupancy tenant among other tenants may apply for a commutation of rent; section 89 says that when such an application is made it would be the duty of the Settlement Officer to commute the rent. Unless he has been specially authorised to refuse any such application he cannot refuse it. He has to proceed as directed in section 87 of the Revenue Act. That section authorises the Settlement Officer to fix rent even on his own motion. Nowhere is it laid down that a tenant making an application should name any person as the opposite party to whom notice has to be formally sent. It would be the duty of the Settlement Officer or his assistant officer to issue notice to the parties concerned and to hear those who according to his idea may be interested in the matter. In the circumstances the order of the Settlement Officer or his assistant unless reversed in appeal is final although no person whatsoever may have been informed of the proceedings. I am speaking of an extreme case.

The result is that the judgment of the court below is perfectly right and I agree in the order proposed by my learned brother.

By the Court:—The appeal is dismissed with costs on the higher scale.

Appeal dismissed.

1924 Allahabad 430.

KANHAIYA LAL, J.

Man Singh—Appellant

v.

Madho Singh and others—Respondents.

S. A. No. 840 of 1922, decided on 3rd December, 1923, from the decree of Additional Judge, Aligarh, dated 31st March, 1922.

(a) *Agra Tenancy Act, S. 57—Turning into grove creates liability to ejectment within a year.*

An occupancy tenant has no right to convert a portion of the occupancy holding into a grove. If he does so the landholder has got the power to eject him for doing an act detrimental to the purpose for which the land was let. But the power can only be exercised within one year from the date of the conversion. [P. 431, C. 1.]

(b) *Occupancy holding—Grove planted even with acquiescence of landlord is transferable by tenant.*

The general rule applicable to stray trees growing on an occupancy holding does not apply to groves planted by tenants with the implied or express acquiescence of the Zemindars. Where land has been let to a tenant for the special purpose of planting a grove thereon or where a grove planted by a tenant has been allowed to exist unchallenged by the Zemindar the person who plants the grove acquires a transferable interest therein, and in the absence of a custom to the contrary the trees become his property. [P. 431, C. 1.]

A. Sanyal—for Appellant.

Gulzari Lal—for Respondents.

Judgment:—The dispute in this appeal relates to a mango tree which formed a part of a grove standing in No. 254 Kashra of the village Nagla Lala and had fallen in a storm some time in July 1921. The plaintiffs are the zemindars of that village. The defendant, Man Singh, is the groveholder or the descendant of the person who had originally planted the grove. The land in question was at one time his occupancy holding, but the portion which is now covered by the grove was converted into a grove some time before the old settlement. The allegation of the plaintiffs was that the defendants had no

right to sell the fallen wood and appropriate its price. The courts below found in their favour and decreed the claim. It is objected on behalf of the plaintiffs that no second appeal lies, because the suit was of a Small Cause Court nature. The allegation of the plaintiffs, however, amounted to a charge of criminal misappropriation of the wood, and clause 35 of the Second Schedule of the Provincial Small Cause Courts Act, 1887, excluded it from the jurisdiction of a Small Cause Court. Clause 43 A of the said Schedule would be similarly applicable. Even if these articles had not been applicable, there would have been sufficient reason for converting this appeal into a petition in revision to meet the ends of justice.

The main point about which the parties are at issue relates to the right of a person, who had planted a grove on what was originally an occupancy holding, to cut the trees or appropriate the fallen wood thereof. An occupancy tenant has no right to convert a portion of the occupancy holding into a grove. If he does so, the landholder has got the power to eject him for doing an act detrimental to the purpose for which the land was let under section 57 of the Agra Tenancy Act (No. II of 1901). But that power can only be exercised within one year from the date of the conversion. The defendant Man Singh stated that the grove stands on about two bighas of land and that it had been planted by his ancestors. The plaintiffs admitted that the tree in dispute was 80 years old. Their witness Roddar Singh similarly admitted that the tree in dispute appertained to a grove belonging to Man Singh whose ancestors had planted it. The general rule applicable to stray trees growing on an occupancy holding does not apply to groves planted by tenants with the implied or express acquiescence of the Zemindars. Where land has been let to a tenant for the special purpose of planting a grove thereon or where a grove planted by a tenant has been allowed to exist unchallenged by the Zemindar, the person who plants the grove acquires a transferable interest therein, and in the absence of a custom to the contrary the trees become his property, vide *Jaleshar Sahu* v. *Raj Mangal* (1) and *Baijnath Singh* v. *Chandrapal Singh* (2). In *Nathan* v. *Kamla Kunwar* (3) it was held that a Zemindar claiming a right to the fallen wood of self-sown trees which had been growing on an occupancy holding must prove some custom or contract by which he was entitled to take such wood. This rule will apply *a fortiori* to a grove which has been planted by the tenant. In *Chokhe Lal* v. *Behari Lal* (4) it was held that under the general law a grove-holder possessed all rights in respect of his grove which were excluded by the provisions of the *wajib-ul-arz*. When the *wajib-ul-arz* in the present instance was prepared the Zemindars claimed that the grove-holders had no right to cut the trees standing in the grove without their permission, while the tenants claimed a right to cut the trees without any reference to the landholders, and no decision was arrived at. The grove in dispute unquestionably stands on a part of a larger holding, but as the lower appellate Court points out, the holding consists of a number of plots and the grove stands on one of them and forms a separate entity. The incidence of an agricultural holding does not attach to such a grove after it has been allowed to exist so long unchallened. The appeal is therefore allowed and the suit of plaintiffs dismissed with costs here and hitherto.

Appeal allowed.

(1) (1921) 43 All. 606.

(2) 1923 All. 559.
(3) (1891) 13 All. 571.
(4) (1920) 18 A.L.J. 820.

1924 Allahabad 431.

MUKERJI, J.

Rani—Appellant

v.

Aidal Singh and another—Respondents.

S. A. No. 869 of 1922, decided on 17th December, 1923, from the decree of First Additional District Judge, Aligarh, dated 21st March, 1922.

Agra Tenancy Act, S. 79—Ejectment by landlord means by all co-sharers.

For the application of the rule of six months' limitation and of S. 79 of the Tenancy Act it would be necessary for the whole body of co-sharers to eject the tenant of the lambardar to do so on behalf of the whole body of co-sharers. [P. 432, C. 2.]

G. Agarwala—for Appellant.

Panna Lal—for Respondents.

Judgment:—This appeal arises out of the following circumstances. The respondents who are four in number instituted the suit out of which this appeal has arisen for the ejectment of the appellant's predecessor-in-interest (husband) from certain plots. The allegation was that the respondents were the occupancy tenants and the original defendant was their sub-tenant. The defendant pleaded that he was a co-sharer in the village and he was holding the land as his *khudkasht*. He denied the respondent's rights to eject him as a sub-tenant. He also pleaded limitation.

The suit was thrown out by the Court of first instance, but on appeal the learned District Judge remanded an issue to the Munsif. That issue was: "Are the present appellants occupancy tenants in the land in dispute or is it *khudkasht* of the present respondents." The learned munsif held that the plaintiffs, the appellants before the first appellate Court, were occupancy tenants. He also held that there was no relation of landlord and tenant between the parties and that the respondent (the original defendant) was a co-sharer in the *patti* in which the lands were situated and he held the land without the consent of the plaintiffs. He also held that as there was a *lambardar* in the *patti* the defendant could not be regarded as landholder.

On receipt of the finding the lower appellate Court decreed the suit. It did not come to any conclusion in what capacity the defendant was in possession nor did it come to any conclusion how long did the defendants' possession extend.

These points not having been determined by the Court below, with the help of the learned counsel for the parties I went through the evidence and come tc the following conclusion. I find that the defendant was one of the co-sharers in the *patti* and that he had been in possession of the lands for a period between six and ten years without the consent of the plaintiffs.

On these findings it has been argued by the learned counsel for the appellant (the original defendant's successor-in-title) that the suit should have been thrown out as being barred by limitation. Under section 79 of the Tenancy Act and serial No. 30 of the fourth schedule of the Tenancy Act, the period of limitation is laid down as six months.

It has been argued by the learned counsel for the respondents that the appellant cannot be called the "landholder." She is only one of the several co-sharers who are acting through a *lambardar*, one Roshan Singh. The question is how far this contention of the respondent is correct.

No authority bearing on the point has been cited to me. If we look to the definition of the word 'landholder' to be found in section 4 of the Tenancy Act we see that the landholder is the person to whom rent is payable. Where there are more than one person entitled to receive rent, the landholder would be the whole body of men and not one single member. The word 'person' should be read as having been used to include 'persons.' Applying this definition, it follows that when a tenant is unlawfully ejected, say by one of a body of 150 co-sharers in the *patti*, who together would be entitled to recover the rent, the tenant cannot be deemed to have been ejected by his landholder. Referring to the section 194 of the Tenancy Act we find that where there are two or more co-sharers entitled to any right that right must be exercised conjointly unless they have an appointed agent. Such an appointed agent would be the *lambardar*. For the application of the rule of six months' limitation and of section 79 of the Tenancy Act, it seems to me it would be necessary for the whole body of co-sharers to act (to eject the tenant) or the *lambardar* to do so on behalf of the whole body of co-sharers. This would follow from the natural meaning of the several sections. If we look to the spirit of the rule we also see that this is based on sound sense. As I have said by way of example, if there be 150 co-sharers (a matter which is not unusual in districts like Azamgarh, Gorakhpur and Basti) and one of the co-sharers happens to take it into his head to eject a tenant it would be very hard on the latter. He may sue within six months one of the 150 co-sharers and when he has received the fruit of his litigation he may be dispossessed by another of the 150 of the co-sharers.

My finding of law therefore is that the ejectment of the respondents by the appellant's predecessor was not an ejectment to which section 79 of the Tenancy Act or the short period of limitation would apply.

That being the case there seems to be no bar to the success of the plaintiffs-respondents. It is true that they brought

the suit in a Court which had jurisdiction only to eject tenants. But no question of jurisdiction having been taken and as it has been found that the title subsists in the respondents there is no reason why they should not succeed. I have already stated that the case went in appeal to the District Judge who was the appellate Court both for the Revenue and Civil Courts. The issue that was remanded by him for trial, was remanded to the Civil Court. It follows that the decree of the Court below was right.

The appeal fails and is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Appeal dismissed.

1924 Allahabad 433.

STUART, J.

Ish Narain Upadhia—Plaintiff-Appellant

v.

Rameshar Lohar—Defendant-Respondent.

S. A. No. 1082 of 1922, decided on 21st January, 1924, from a decree of Sub-Judge, Jaunpur.

(a) *Allahabad High Court Rules, Chap. III, r. 3—Even after admission to hearing of an appeal without certificate, a matter covered by r. 2 cannot be argued.*

Under Chap. III, r, 3 a certificate about absence of evidence or admission is necessary and though appeal is admitted to hearing the matter cannot be argued. [P. 434, C. 1.]

(b) *Landlord and tenant—Ejectment—Plaintiff's acquiescence in construction disentitles him from ejectment.*

Where plaintiff acquiesced in the constructions as reasonable appurtenances of the defendant's dwellings and the defendants replaced them as they were before when the purpose for which they were erected was accomplished, *held*, that plaintiff has no cause of action. [P. 434, C. 1.]

Haribans Sahay and *S. S. Sastry*—for Appellant.

Kamuda Prosad—for Respondent.

Stuart, J.:—The plaintiff-appellant is the zamindar of village Sari. The defendants-respondents are two blacksmiths living in the same village. The plaintiff sued to eject the defendants from a *saiban*, a *dalan* and a shed on the allegation that these were recent constructions upon his land. The defendants are tenants and residents in the village n which they have a house. They carry on business as blacksmiths there. The Munsif found that one of these structures was an old one and dismissed the suit in respect of it. He decreed the blacksmiths' ejectment from the two others. The blacksmiths appealed to the learned Subordinate Judge. The zamindar did not appeal in respect of the dismissal of the portion of his suit. The learned Subordinate Judge decided as follows:—He found that the two structures from which the Munsif had ordered the defendants' ejectment were at least eight years old. He continued, "I am satisfied that these constructions were in the place of the old ones and so the plaintiff did not protest when the new ones were built in place of the old ones and now owing to a criminal case he has lodged the suit." What he meant by the latter part of his finding was that the blacksmiths had got themselves disliked by the zamindar by giving evidence in a criminal case contrary to his views. The learned Subordinate Judge then dismissed the whole of the suit. The zamindar has appealed in respect of the two buildings from which the Munsif ordered the blacksmiths to be ejected. He takes the position that there was no evidence on the record to support the finding that these two structures were made in the place of old ones. This ground of appeal is not open to him under the High Court rules—see rule 3, Chap. III as no certificate is filed.

"If the ground of appeal is that there is "in fact on the record no evidence or "admission to support the decree, the "ground shall so state, and shall further "state specifically the material finding in "support of which there is no evidence or "admission on the record.

"No appeal from an appellate decree "presented by an Advocate, Attorney or "Vakil shall be admitted on any such "ground as is in this rule referred to, un-"less such Advocate, Attorney or Vakil "certifies under his hand the memorandum "of appeal that he has examined the record "and that, in his opinion, such ground is well founded in fact."

Now it is urged to me that as the appeal was admitted for hearing by a learned Judge of this Court it is not open to me to apply that rule and that in any circumstances I could permit the certificate to be filed now. I read the rule as imperative. Unless the certificate

is present the matter cannot be argued in spite of the fact that the appeal has been admitted to hearing. It does not follow that the appeal was admitted on this ground for there are other grounds which have been argued. In respect of the second point that I might allow the certificate to be filed now I note that this appeal was filed on the 10th of July 1922. The certificate should have been filed within at the most a few months. I hold a strong view that it is no use making rules unless one keeps them and that if a rule of this Court is disobeyed and the Court allows it, as I am asked to do, to be complied with some 18 months afterwards the rule is not likely to be very effective, for it will always be possible to break the rule at first, and to comply with it two or three years afterwards.

I now take the appeal upon the other points. It is urged by the learned Counsel for the appellant that on the finding of fact the appeal should succeed. His case is that acquiescence gives no title. This argument is beside the point. What I find the Subordinate Judge to have concluded is this that constructions similar to these had existed for some twelve years for the convenience of these blacksmiths upon the sites on which they now stand, and the only conclusions to be drawn from the fact that the blacksmiths worked in the village are that these constructions were for their use in carrying on their trade or business or in some way accessary to it. As the original constructions had been made many years ago the obvious presumption is that the zamindar not only had acquiesced in their having been made but accepted them as reasonable appurtenances of the blacksmiths' dwellings and when those constructions came to an end the blacksmiths had every right to replace them as they were before. I find that they have replaced them as they were before on the finding of the learned Subordinate Judge. His conclusion is therefore correct and I dismiss this appeal with costs.

Appeal dismissed.

1924 Allahabad 434.

STUART, J.

Nathu and others—Defendants-Appellants

v.

Tulsi Ram and others—Plaintiffs-Respondents.

S. A. No. 1087 of 1922, decided on 22nd January, 1924, against the decree of District Judge, Farukhabad, dated 18th April, 1922.

Easements Act, S. 60—Permanent constructions make license irrevocable.

Transferees of one of the Zemindars cannot sue occupiers of certain plots as licensees for storing manure, etc., where the occupiers on the strength of the license had been in possession for 12 years and had in pursuance of the license erected constructions of a permanent character. [P. 435, C. 2.]

Gulzari Lal—for Appellants.

S. B. Johari—for Respondents.

Judgment :—The defendants-appellants are residents of a village called Chiloli in the Farukhabad District. It appears as far as I can ascertain that the zamindars of this village were a certain Nawab Shams-ul-nissa Begam, Baba Piyare Das, Rangi Lal and some others. In 1914 Nawab Shams-ul-nissa Begam brought a suit against the defendants-appellants in which she asked for their ejectment from a compound in the village on the ground that they had no right there. The suit was dismissed by the Munsif on the ground that the land was part of the *abadi* and that the defendants had been in possession of the compound for a very long time, more than 12 years before the suit. The District Judge on appeal decreed the suit, but the High Court in second appeal dismissed it. The judgment of the High Court is in Second Appeal No. 797 of 1916 and is dated 12th July 1917. Piyare Das and Rangi Lal were *pro forma* defendants in that suit. Now it appears that on the 22nd August, 1913, Piyare Das and Rangi Lal had sold rights in the compound in question to Tulsi Ram and others the plaintiffs-respondents in the present suit and by virtue of the sale-deed in their favour these plaintiffs-respondents have instituted an exactly similar suit against the defendants-appellants for their ejectment out of the same compound. The present appeal arises out of that suit. The Munsif adopting the view, that the

plaintiffs-respondents had no right, dismissed the suit but the learned District Judge has taken a different view. He has allowed the plaintiffs a decree for joint possession and has ordered the enclosure wall to be removed. The defendants come here in appeal.

The decision in the previous suit of course does not operate as *res judicata* and it may be said that it has practically no bearing on the present suit. Whether it is desirable that in a case in which a village is owned by a large number of proprietors, one proprietor after another should be permitted to bring a suit on exactly the same cause of action against the same people is not for me to decide here. Such is the law in India and it does not follow that after the decision of this suit the point may not be raised again by somebody else in a third suit.

The findings of the lower appellate Court are these. "The constructions in suit consist only of outer wall enclosing a space of land in which are a Kacha well and 3 *nands*. The well appears to have been built in 1913. But it appears to be a fact that the defendants-appellants have been using the land for many years for manure, for pressing sugarcane and other agricultural purposes." I take the learned District Judge to mean by "many years" that the defendants have been using the land for more than twelve years before the date of suit. That was the finding in the previous case and he does not appear to have differed from it. Now what does this come to? By consent of the Zemindars for more than twelve years the defendants-appellants have been permitted to occupy as licensees a plot of land on which they store manure, press sugarcane, etc., and in pursuance of their license they have erected constructions of a permanent character in particular a wall; complete strangers who have just got into the village wish to turn them out and, not being able to procure their ejectment have procured what is equally effective a decree for joint possession. This decree if put into execution will effectively hamper the defendants-appellants in the use of the land for if the plaintiffs-respondents get joint possession over the compound its valuable will be diminished if not destroyed. They have also obtained a decree for the demolition of the wall. This is not according to the law as I read it. The defendants-appellants as licensees who have made permanent structures upon the land must be left in undisturbed enjoyment of it. They are not owners but they have the rights of licensees. The suit should be dismissed altogether.

I accordingly allow this appeal and direct that the suit stand dismissed. The plaintiffs will pay their own costs and those of the defendants-appellants in all Courts.

Appeal allowed.

1924 Allahabad 435.

SULAIMAN, J.

Imam Ali and another—Applicants

v.

Emperor—Opposite party.

Crl. Ref. No. 452 of 1923, decided on 17th September, 1923.

Crim. Pro. Code, S. 476—Notice is highly desirable before action.

The notice is not essential under law. It is highly desirable that it is given in proceedings under S. 476. In a case where preliminary enquiries in which additional evidence was taken and another independent private enquiry by the Circle Inspector were made without notice to the accused the order must be set aside. [P. 436, C. 1.]

K. Varma—for Applicants.

Judgment:—This is a reference by the Sessions Judges of Banda recommending that the order of the Magistrate for the prosecution of the applicants under section 193 of the Indian Penal Code be quashed.

The applicants are two Civil Court process-servers and witnesses, who had been sent out with a warrant of arrest against Mahant Ram Kishin Das, who was a judgment-debtor in certain execution proceedings. On the 5th of March, the applicants stated that they went to the Railway Station Babitpurwa and found the judgment-debtor there, the warrant was shown to him, and he was arrested. A police constable was also in attendance, and the judgment-debtor was asked to give in writing to the constable a written note to the effect that he had been served. He did sign a paper. Later on the judgment-debtor taking a spear from his servant asked the constable to give back the paper to him which was returned. On this he tore the paper to pieces and threw them away and then rode away from the station. The process-server picked up this paper which was all torn to

pieces and the servant of the decree-holder sent a telegram to the decree-holder at Karwi stating that the judgment-debtor had been arrested but had gone away. On the 6th of March the process-servers made a report in which they set forth their version of the occurrence and also alleged that at that time the Station Master, the Assistant Station Master, the constable and the other accused were present. The judgment-debtor was accordingly prosecuted, but was ultimately acquitted by Mr. Desai.

The judgment under which the judgment-debtor was acquitted shows that altogether 8 witnesses were examined on behalf of the prosecution, six of whom substantially supported the prosecution story. The Station Master and the Assistant Station Master who were examined on behalf of the prosecution and also were cross-examined as hostile witnesses, stated that they knew nothing of the occurrence and that within their knowledge no such occurrence took place. Taking all the points into consideration, and particularly the extremely unreliable character of the evidence, the material contradictions in the statement of some of the prosecution witnesses, and a total denial of any knowledge by the two witnesses abovenamed, as well as the non-production of the constable the learned Magistrate was convinced that the case was a false one. He accordingly acquitted the accused. He did not at once order proceedings under section 476 against the process-servers, but submitted a copy of the judgment to the District Magistrate. Later on he started proceedings under section 476.

The learned Magistrate, however, was not satisfied with the evidence which was already on the record and in order to further satisfy himself he decided to hold a preliminary enquiry. No notice to show cause was issued to the present applicants, and they were not given any opportunity to be present at the time when this enquiry was held and when further evidence was recorded. It is true that in proceedings under section 476 notice is not absolutely necessary but it has been held by this Court in a number of cases that it looks with disfavour upon an order passed without such notice and it has also often been remarked that it is highly desirable, though not essential, that such notice should be given—*vide* 10 A.L.J. 247 and 28 All. 142. This case however is stronger still. It was not only a case where no preliminary enquiry was held and notice issued but where a preliminary enquiry was actually held and additional evidence recorded by the Magistrate; and a report from the Circle Inspector, who made another independent private enquiry taken into consideration. In his order passed under section 476 the learned Magistrate has remarked that he had acquitted the accused in the previous case merely because of the unreliability of the prosecution witnesses, although no defence evidence had been taken, that later on he deputed the Circle Inspector to make a thorough local enquiry and to send a report, that he himself went to the village and made an enquiry at the station and examined some of the persons mentioned by the Circle Inspector in his report. He also added that the Circle Inspector had thoroughly enquired into the case, and every one who could throw any light in the case had been examined by him, except the constable Jamaluddin, who was alleged to have been present at the time of the occurrence, and was on leave and out of station. All this evidence was recorded behind the back of the applicants, and the report of the Circle Inspector, who made an enquiry in the absence of the Magistrate, has been taken into account and stress laid upon it.

The learned Sessions Judge who has considered the case on the merits, has pointed out that the present applicants, from the very start, had been mentioning the names of the Station Master and the Assistant Station Master, as well as the constable, who has not been examined, as being among those persons who were present at the time. It is not very probable that if the whole story was altogether false, they would have mentioned the names of the Station Master, and of the Assistant Station Master, as well as of the constable, without any expectation that they would support them. There were six witnesses produced in support of the prosecution story, and as against them the only evidence consists of the denial of the judgment-debtor and also the ignorance of the Station Master and the Assistant Station Master.

In view of all the circumstances pointed out above I am of opinion that this reference must be accepted, and the order directing the prosecution of the applicants be quashed.

Reference accepted. Order quashed.

1924 Allahabad 437.

SULAIMAN, J.

Ram Din—Applicant

v.

Emperor—Opposite Party.

Crl. Ref. No. 510 of 1923, decided on 9th October, 1923.

Salt Tax Act, XII of 1882, Ss. 15, 18 and 118—S. 15 applies in the case of authorised place—S. 18 in the case of an unauthorised place—Non-compliance with S. 118 renders search irregular.

S. 15 does not apply where salt is unlawfully manufactured at an unauthorised place to which S. 18 applies while S. 15 applies in the case of an authorised place. Non-compliance with the provisions of S. 118 renders the search irregular.

Parties not represented.

Judgment:—This reference must be accepted. The accused has been convicted under section 9 (*a*) and (*b*) of Act XII of 1882 (Salt Act) for having manufactured saltpetre without a license.

He originally had a license in the year 1922, which expired on the 31st of July, 1922. He did not take out any fresh license until the 24th of April, 1923. On that date the Salt Inspector visited a certain building, which is said to have been the place of the former factory of the applicant, and found a woman at work there. It is said that as soon as she saw him she threw into a pan some stuff which she was manufacturing. A quantity of this however was taken out of the pan by the Inspector, and it is said to have been inedible salt. On these facts the accused was convicted under the Salt Act.

There are several difficulties in the way of the prosecution. The first point to note is, which by the way has not been noted by the learned Sessions Judge, that at least on the very day, the 24th of April, 1923, when according to the Inspector salt manufacture was detected in the accused's building, he did obtain a license with effect from that date. The second thing is that there is no evidence on the record to show who this woman was, and there is no evidence to support the suggestion of the Inspector that she was the wife of the accused. Next, there is no satisfactory evidence to show that the stuff taken possession of by the Inspector was really salt.

It also appears that the search of the premises was irregular. Under section 18 of the Salt Act whenever any Salt Revenue Officer has reason to believe that salt or saltpetre is being unlawfully manufactured, refined or stored in an unlicensed place, he shall first record in writing the name, residence and calling of the informant, then the locality and description of the house where the manufacture is going on, the name of the person by or for whom the salt or saltpetre is so manufactured, refined or stored, and the supposed quantity and description of the salt or saltpetre, with the grounds for believing the same to be unlawfully manufactured; and may then summon an officer in charge of the police station of the circle to attend him, and may then, during the day, in the presence of the police officer enter and search any house in which there is reason to believe that salt or saltpetre was being manufactured, and may carry away all the salt or saltpetre so manufactured. If the place so entered is an apartment in the occupancy of a woman, who does not appear in public, the officer shall be guided by the rules prescribed for such cases in the Criminal Procedure Code. But before conducting a search under that section he should call upon two or more respectable inhabitants of the locality in which the house is situate to attend and witness the search, and the search should be made in the presence of such inhabitants.

It is not pretended that these formalities were complied with. No record was made of the nature of the information, there was no summoning of respectable neighbours as search witnesses, or the obtaining of a police officer to attend. It was however urged on behalf of the prosecution that under section 15 of the Act, the Salt Revenue Officer was entitled to search the house. In my opinion that section has no application as it is confined to the search of any place in which any article is manufactured or refined *under the license* or any rule made under the Act. If salt or saltpetre was being unlawfully manufactured, refined or stored in an unlicensed place, it would be section 18, and not section 15, which would apply. No search witness was examined on behalf of the prosecution. The Salt Inspector has stated that the patwari was present. The latter was examined on behalf of the defence and his evidence totally disproved the case for the prosecution.

In view of all these circumstances I set aside the conviction of the accused, acquit him of the offence charged, and direct that the fine if paid be refunded.

Conviction set aside.

1924 Allahabad 438.

WALSH AND RYVES, JJ.

Emperor—Appellant

v.

Sheo Baran Singh—Respondent.

Cr. A. No. 806 of 1923, decided on 26th November, 1923, from the order of First Class Magistrate, Mainpuri, dated 16th June, 1923.

Railways Act, S. 101—Omitting to see that the points are set right is negligent omission endangering human safety.

The duty of a person in control of a railway station is *first* to give the fundamental orders regulating the arrival of a train and *secondly* to see that they are accurately carried out. Where such an order was given to set the points to the loop but the slides showed main the failure to act upon a defect in the working of the machinery is an act of grave negligence. Omitting to set the points, which would prevent a train after a clear line signal is given, from running into another train is an act endangering the safety of the persons in either of the two trains. [P. 439, C. 1.]

R. Malcomson—for the Crown.

G. W. Dillon—for the Accused.

Walsh, J.:—We are of opinion that this appeal must succeed. With great respect to the Magistrate it is hardly worth while to follow him in his discussion of the law. His findings of fact are these:—Sheo Baran Singh was negligent from the very beginning. He did not check signals and points on coming to duty. He did not keep a diary (though it may be observed that hardly contributed to the accident) and did not check the setting of the points. The Magistrate comes to the conclusion that these omissions did not in themselves endanger the safety of any person. We should have thought that omitting to set the points, which would prevent a train, after you had given the signal that the line was clear, from running into another train, was an act which endangered the safety of the persons on either of the two trains.

We do not propose, because it is well known to both parties in this case, to venture upon a discussion of the mechanical arrangements of the signals and points. They are devised to prevent accidents, but nothing can prevent accidents, and machinery, like men, is fallible. But the importance of the interlocking machinery is this. It is so arranged upon a kind of duplicate check and balance system that the signal cannot be lowered for the through main line if the points are set to loop. But if the points are set to loop and the signals come down, the Station Master is at once warned that something is wrong with the machinery. His course is quite simple. He can supplement the defective machinery by human agency, put up all the signals, stop the train and examine the points. A mechanical process which has got out of order must be stopped. The Station Master cannot see the points from the place at which he works the levers which direct the work of the pointsman. But there is a check before his eyes which is worked by the points as the pointsman executes the order, and so to speak confirms by a reply the due execution of the order communicated by the lever. To put it into plain English, the moment the person in charge of the levers pulls the lever to set the points to loop, he has ready at his hands the means of knowing whether that order has been carried out. If, after he has pulled the points lever to loop, the slide of the points lever shows main, he has conclusive evidence either that his order has been disobeyed or that the machinery is out of working order. Now the evidence on both sides, after the collision which took place on this occasion, shows that it was in perfect working order. The evidence of the witnesses of the state of things before the accident indicate a state of things suggesting that the machinery was out of order. Unless we are to draw the extravagent inference that it requires a collision at this station to put the machinery into working order, there must be something wrong somewhere. We are satisfied that, possibly owing to a change of plan due to a light engine whose movements were changed at the last moment, Sheo Baran Singh the Assistant Station Master in charge of the levers at the occasion of this accident, either neglected to discover that the points slide was not working, or omitted to examine it before allowing the main through train to enter the danger zone. We are inclined to adopt Mr. Dillon's primary contention. In the face of the bewildering contradictions which this station staff have indulged in the course of this case with reference to the condition of the signals, (if ignorance of the condition of the signals, which are provided for the safety of the public is an offence under this section, they all ought to be in jail) it is difficult if not impossible to come to a satisfactory conclusion as to exactly how the signals

stood. There is great force in Mr. Dillon's contention that it is almost impossible to imagine that a responsible engine driver with experience behind him, and all the responsibilities of his own family as well his own life and safety, together with the fireman and possibly another assistant upon the coal plate, would approach from a long distance on a straight line a home signal while it was at danger and deliberately pass it without troubling to see whether it was up or down. This is extremely difficult to believe, and the difficulty becomes ten times greater if we are asked to believe that, not only the home signal was at danger in full view of the man on the engine, but that both the outer, the warner and the distant signals were also at danger and had been passed by him. The probability, therefore, is that the signals were down. Whether all were down or some were down, it is almost impossible to discover. The Sub-Inspector, who arrived shortly afterwards says that the outer and warner signals were down, but the home signal was up. Three of the employees at the station agree with this. The Station Master at Shikohabad who went on an engine, and who was the first to arrive, suggests that they were all down, because the through key was out of the frame and in the possession of the Station Master. The driver of the stationary train says they were all down, and the other Assistant Station Master says the same thing. The guard of the stationary train on the other hand, who was in close touch with Sheo Baran Singh at the time of the accident, says that the home signal was up. But there is not the slightest doubt that the points at the loop were set for the loop and that they had been set for many minutes before the arrival of the train which caused the collision. The Station Master had ample interval of time to enable him to take stock of the position. To do that is his unchangeable hourly duty. It is the A.B.C. of his office. There is a rule which requires him to check the setting of the loop line, which the Government Advocate has read to us. But it does not require a rule. Many people would do their duty much better if they used their heads more, and printed rules less. The duty of a person in control at a railway station is *first* to give the fundamental orders regulating the arrival of a train, and *secondly*, but not less, to see that they are accurately carried out, and when this man gave, as he must have given the order to set the points to the loop, it was his duty to see that the slide indicated loop. The longer the interval which elapsed the greater his neglect. If it indicated main, he knew perfectly well that his order had not been carried out or that the machinery was defective. The Government Advocate has pointed out that the disc which is provided for the purpose would also have shown loop. The defence suggested that the train standing in the loop covered the disc. All that he had to do if his slide was not working correctly was, as the Government Advocate had pointed out, to walk down the platform and look at the disc or to go across through the train and look at the disc at the other side, and if he still remained in doubt, to walk down to the pointsman and ascertain for certain. These latter considerations are really superfluous. We are satisfied, as far as it is possible to be in a case of this kind, that the slide was working in connection with the points perfectly. That view is brone out by a statement which does not seem—even if the witnesses Putto Singh and others have embellished their evidence in order to protect themselves—to have been a statement invented for the purpose of this case. It is in the evidence of Putto Singh towards the end of his examination-in-chief in the course of a natural story, and it does not appear to have been dragged in into an imaginative account for the purpose of making a point which was not very clearly made by the prosecution or appreciated by the Magistrate. Something or another, possibly as Mr. Dillon says the *hullagaloo*, induced the Assistant Station Master to come out. The witness says that he raised the outer and warner signals. As they were found down and everybody says that they were down after the accident, the probability is that he tried to raise them, but if the machinary was working properly he could not do so. But he tried to reverse the points lever, which we understand to mean set back the points to free the loop from the through main. He could not do so because it was locked. He went inside to get the key and meanwhile the collision took place. But the point is, what was it which induced him to go straight to the levers to reverse the points on coming out after hearing the *hullagaloo* if he had not some indication that the points

were set to loop? That he appreciated to the full, at the moment of the accident, that this was the fatal piece of evidence which might be used against him is quite clear from one of the witnesses he called in his own defence. The guard in charge of 102, the stationary train, had reached the platform some few minutes before the accident and he says that Sheo Baran Singh showed him (it must mean after the accident) that the train key was with him and the slides were showing main. There the defence let the matter rest. If the slides showed main when admittedly the lever had been worked for the purpose of setting loop, the failure to act upon a defect in the working of the machinery was itself an act of grave neglect. The human intellect does not think things out in detail when doing daily work, but as illustrating the importance of the performance of that duty, one may suppose that a man is taken with a fit and falls in a dead faint when in charge of a position like this and another man comes to take his place. The slides are showing main. The man who has fainted knows that they ought to show loop and the points are set to loop. Who is going to tell the new man who arrives upon the scene that the machinery is not working and that main represents loop.

Finally, the defence has made an effort to throw the blame partly on to the pointsman, and partly on to the man Ghariba who is supposed to have worked the signals. We have dealt with the question of the failure of the pointsman. If he failed in his duty it would be indicated on the slide. In substance, the accused never attempted seriously to deny that he was responsible for having the points set and the signals lowered. He was asked by the Magistrate whether he had satisfied himself on both points and he said yes. Jaswant Singh, the other Assistant Station Master, says that Ghariba was working the lever frame, but that the directions were being given by Sheo Baran Singh. The guard, again desiring to assist the Assistant Station Master, says that the Assistant Station Master was four minutes on the platform before the accident and that the signal-man was working the lever. He says that Sheo Baran Singh was near him. It was obviously his duty, and it was a paltry position to take up, to shift his responsibility upon a man under him and a man medically unfit for his duty. It is not our business to describe exactly the sequence of events and to illustrate how this accident could have happened, so long as we are satisfied that it did happen, and that it might have been prevented by the exercise of due precautions on the part of Sheo Baran Singh in having the loop line points set back to main. Mr. Dillon is quite right in saying that probably the signals could not have been lowered while the points were set to loop. It is just possible that by some break in the machinery the check did not work. We have dealt with that point, and if it did not work, the Station Master was well able to ascertain the fact. But we are not so satisfied, and no evidence was called to prove, that if the outer signal had first been lowered at the time when the line clear was given, that the loop could not be subsequently operated. It is equally speculative but it is not improbable that after the "line clear" had been given some half an hour before the accident, the change of plan by which the light engine was sent on to the siding and this at any rate was quite recent may have led to the points being set to loop and for the operation to have been successfully performed without altering the signals. It is a case involving danger to the public, and not merely to the public but what is even more important, to the men themselves working on the railway, who are entitled to look to their colleagues for the care which they themselves exercise, so that they may go about their daily duties with a sense of security. One is conscious of the failure in the performance of one's own duty and everybody is liable to make mistakes, but in all countries special legislation on railway systems has always made offences of this kind punishable with what may seem severity, and those who undertake duties of this kind must be made constantly aware of the heavy penalties visited upon serious neglect. This man has lost his post and no doubt the conduct of his defence has been a burden to him, but we cannot under the circumstances do less than to sentence him to one year's simple imprisonment with the alternative that he may reduce it to six months by a payment of a fine of Rs. 250 and each month except the last of this may be reduced by a payment of Rs. 40. The last will have to be Rs. 50. Any difficulty in carrying out this order should be communicated to this Court.

Appeal allowed.

1924 Allahabad 441.

SULAIMAN, J.

Umrao and others—Appellants

v.

Emperor—Opposite Party.

Cr. A. No. 669 of 1923, decided on 8th October, 1923.

(a) *Penal Code, S. 304—Death caused a month and a half after injuries but not due to the injury does not justify conviction.*

The deceased fell down on account of two serious blows given by the accused and had to be taken away on a charpoy. After being removed to the hospital he left it when he was progressing well. A month and a half after the receipt of the injuries he died of pneumonia. Medical evidence did not show that the death was due to the injury, *held*, no offence under S. 304 was committed. [P. 442, C. 2.]

(b) *Penal Code, S. 102—An offence is excused only so far as the right of private defence is rightly exercised.*

Where the Zemindar's men on protest from the tenants abandoned the attempt to saw a tree but made a similar attempt in which they got serious injuries, *held*, that the tenants were not bound to go to a Court for redress but their right of private defence did not extend to the inflicting of more harm than was necessary for the purpose of the defence. [P. 442, C. 1.]

C. Ross Alston, E. A. Howard and *S. D. Sinha*—for Accused.

Govt. Pleader and *G. W. Dillon*—for Crown.

Judgment:—This is a criminal appeal from a conviction under section 304 of the Indian Penal Code.

Some of the facts of this case cannot be disputed. Kunwar Karan Singh is a zemindar who owns about 16 biswas share of land in the Village Gajraula. In the beginning of January, 1923, some trees growing on the land of certain tenants were cut down under the orders of Kunwar Karan Singh. Two of these trees were allowed to be removed by him without any protest from these tenants. A pipal tree growing on a field belonging to Umrao, appellant No. 1, was also cut down under the orders of Kunwar Karan Singh while Umrao was absent. This tree, however, was not removed from the field and was allowed to lie there for some time. On the 23rd of March, 1923, the Zemindar sent some carpenters to saw the trunk and then to remove it. A protest was made on behalf of Umrao who asserted a right in himself. The carpenters therefore had to come away and nothing further was heard of till the 2nd of April, 1923, when in the morning the zemindar's agent, two of the sons of the agent, and two carpenters went to the field to saw the tree. It is not disputed on behalf of the appellants that at that time Umrao, Bhima, Nanhua and Heta, the appellants Nos. 1 to 4 were present there and remonstrated with Baldes Singh, the zemindar's agent about the cutting of the tree. They openly said that they would not allow the tree to be cut or to be taken away.

The prosecution story is that the agent and his men went to that place armed with canes or small sticks in order to explain to Umrao that he should not object to the cutting or to the removal of the tree, that Nanhua ran to the village which is not very far off from the field and brought some 12 or 13 more men armed with lathis who all fell on the agent and his men causing numerous injuries. Bansi one of the agent's party received two severe blows on the head and was knocked down and after the fight had to be removed to the zemindar's enclosure and then to the hospital. He was in hospital for some time and then was taken to his home. The Civil Surgeon paid two visits to him. He later on had an attack of pneumonia and died of it on the 23rd of May 1923. According to the story told by the prosecution witnesses Udairam, the village chaukidar, and two of three other men wanted to intervene, and prevent the fight but they too were very severely beaten, the chaukidar receiving no less than 18 injuries including a broken finger which was a grievous hurt.

The case put forward on behalf of the defence was that the fight did not take place near the spot where the tree had been cut but that it took place at the chaupal of the accused. Two witnesses were produced in support of this case who have been disbelieved. The learned Counsel for the accused appellants has not pressed their evidence before me. It may therefore be taken for granted that the fight actually took place on the field and that it took place in respect of the sawing and the cutting of the tree.

The case of the zemindar in the court below was that he had a right to cut all trees growing on the tenant's lands and that he was fully justified in cutting the tree and removing it. The learned Judge relying on the *wajib-ul-arz* has come to the

conclusion that under the custom mentioned in the *wajib-ul-arz* the tenants are the owner of such trees. The accused were therefore entitled to cut it and the zemindar and his men were not justified in either cutting the tree or trying to remove it. The learned Sessions Judge also states that in these circumstances the accused persons had a right to use some force for the protection of their property. He however goes on to add that inasmuch as on the 23rd of March, 1923, an attempt had previously been made to saw the tree and to remove it the accused had had sufficient time from that date till the 2nd of April following to have recourse to proper authorities. In this view of the matter he thought that the right of private defence under section 99 of the Indian Penal Code was excluded. In this view I am unable to concur. It is true that on the 23rd of March, 1923, an attempt had been made to saw the tree on behalf of the zemindar but as after protest the carpenters came away the accused persons, the owners of the tree, were not bound to go to any Court. When a fresh attack on their right was intended on the 2nd of April they also had a fresh right to defend their property. The police station is admittedly situated some 15 miles away from the place and it is hardly conceivable that there was time for them to send a man to the police station and bring help before the tree could be cut or removed. At the same time no right of private defence could extend to the inflicting of more harm than it was necessary to inflict for the purpose of defence. I have, therefore, to see whether the accused persons did not exceed their right to defend their property in causing so many injuries on the agent's party. No less than 38 injuries were caused on the persons belonging to the agent's party. One of whom received two serious blows on the head resulting in a partial fracture of his skull, and the other named Udai Ram got his finger broken. Having regard to these injuries, there can be no doubt that the number of persons on the accused's side was much larger than five. After all even if the zemindar's men had succeeded in sawing the tree or removing it from the field there was a remedy open to the tenants. In view of all these things I am of opinion that the right of private defence was certainly very much exceeded in the present case and that, therefore, the accused cannot get the conviction set aside.

The next point to consider is whether the conviction under section 304 of the Indian Penal Code was correct. It is true that Bansi received two very serious blows on his head and was felled down on the ground and had to be taken on a charpoy to the zemindar's enclosure. Nevertheless it is also clear that he remained in hospital for some days and when he left it he was progressing well. It was pneumonia following the injuries he received, which ultimately caused his death, but death did not take place till the 23rd of May 1923 which is certainly a month and a half afterwards. It is true that pneumonia does supervene in cases of serious injuries on the head, but the medical evidence does not show that in this particular case it was the injury only which brought on the pneumonia. The death having taken place long afterwards I am of opinion that it is very difficult to say in this case that it was the accused who caused Bansi's death. In this view of the matter the conviction under section 304 of the Indian Penal Code must be set aside. The fact however stil remains that grievous injuries were caused on Bansi as well as on the chaukidar, Udai Ram, one of the agent's party, the common intention of all the accused being to protect their property and at the same time to cause hurt to those who were asserting a contrary right. Even though therefore it is not quite clear whose blows actually caused these grievous hurts on the persons who took part in the riot the accused are guilty under section 325 read with section 149 of the Indian Penal Code.

The next point to consider is as to whether all or which of the accused persons took part in the riot. It has been pointed out that the prosecution case is that soon after the riot the agent and his men went to the zemindar Kunwar Karan Singh and consulted him at his enclosure and that it was not till after such a consultation and not till some 20 hours after the occurrence that a report was made at the police station. It is, therefore, argued that much stress cannot be laid on the circumstance that the names of all the accused were mentioned in the first information report. This argument certainly has some force. At the same time my attention has not been drawn to any part

of the evidence which would suggest that appellants Nos. 5 to 16 are persons against whom Karan Singh had any grudge or previous enmity which would justify the inference that they were falsely implicated by the prosecution witnesses. Baldeo Singh, Sriram, Udai Ram, Chhuttan Chhidda, Nanhua, Zaharya and Shib Charan have mentioned all these 16 accused; and they were also mentioned in the dying declaration of the deceased Bansi. I therefore find no ground for distinguishing the case of any of these accused persons. I accordingly set aside the conviction of all the appellants under section 304, I. P. C., but alter it to one under section 325 read with section 149, I. P. C.

The last matter to consider is the question of sentence. Umrao was admittedly the person to whom the field belonged and he was obviously the ring-leader. Bhima is his nephew and Heta also is his relation. Nanhua is the man who according to the prosecution story went to the village and brought the other appellants. These four appellants admit their presence on the spot. I have no doubt in my mind that they are the persons who took the leading part and must therefore be dealt with more severely than the others who rushed to their help. I sentence the accused Umrao, Bhima Nanhua and Heta to two (2) years' rigorous imprisonment each and the rest of the appellants to one year's rigorous imprisonment each. In other respects the appeal fails.

Conviction under S. 304, I. P. C., set aside and altered into one under S. 325 read with S. 149, I. P. C. Sentences modified.

---

* 1924 Allahabad 443.

BANERJI, AG. C.J., AND PIGGOTT, J.

Mahomed Shafi—Appellant

v.

Bindeshri Saran Singh—Respondent.

L. P. A. No. 26 of 1922, decided on 6th July, 1923.

Trespass—Suit for removal of trees and possession of land is good within 12 years.

Planting of trees on land belonging to another is an act of active trespass, and the owner of the land can sue for removal of the trees so planted and for recovery of possession of the land at any time within twelve years. (10 All. 634, *Dist.*)

Iqbal Ahmad—for Appellant.

Narain Prasad Asthana—for Respondent.

Walsh, J.:—I agree with the judgment of the Court below. I think this is an action for trespass and for possession of the land. The plaintiff was prepared to allow the defendants to remove the trees. That is not the same thing as an action for removal of the trees. The learned Judge below has decreed possession. So far as the suit for possession is concerned the period is twelve years. The defendants set up title and claimed adverse possession. I think the planting of trees on another person's land is an active trespass and certainly the owner is entitled to treat it as such if he wishes. The period is twelve years. I do not think I. L. R. 10 All. 634 applies. I have great doubts whether I should agree with it, if it did. The appeal is dismissed with costs.

[The defendant appealed under section 10 of the Letters Patent].

Judgment:—In our opinion there in no force in this appeal. The plaintiff in his plaint claimed the ownership of the land on which the defendant had planted certain trees, and he asked for the removal of the trees and for possession of the land. He also asks for further reliefs. It has been found that the land belongs to the plaintiff, that it is waste land, and that the defendant had planted trees on the plaintiff's land without having any right to do so. It was further found that the trees were planted within twelve years prior to the institution of the suit. The claim being one for possession, it was clearly within time, the period of limitation applicable being twelve years. Reliance was placed on behalf of the appellant on the ruling of this Court in *Musharaf Ali* v. *Iftkhar Husain* (1). In that case the real question was whether the limitation applicable was that prescribed by article 32. It does not appear that the claim in that case was one for possession and therefore that case cannot be deemed to be an authority in favour of the appellant's contention. The appeal in our opinion is untenable. We accordingly dismiss it with costs.

Appeal dismissed.

---

(1) (1888) 10 All. 634.

* **1924 Allahabad 444** (1).

LINDSAY AND SULAIMAN, JJ.

Ram Charan Lal—Appellant

v.

Dharam Singh and another—Respondents.

S. A. Nos. 393 and 394 of 1922, decided on 26th November, 1923, from the decree of District Judge, Sahajahanpur, dated the 21st December, 1921.

Transfer of Property Act, S. 58 (c)—Sale and agreement to reconvey within a certain period entered into simultaneously constitute mortgage by conditional sale.

Where the agreements contain in clear terms recitals that the sale-deeds were executed subject to the conditions that the property would be re-conveyed if the purchase monies were paid within certain years, that is to say, the recitals in the deeds of agreement themselves show that the transactions were not separate transactions but formed part of and parcel of the same transaction. *Held* the transactions clearly come within the definition of a mortgage by conditional sale as given in S. 58, sub-cl. (*c*).

Gulzari Lal—for Appellant.

P. L. Banerji—for Respondents.

Sulaiman, J.—These two appeals are connected and are plaintiff's appeals arising out of two suits for pre-emption based on two separate sale-deeds.

On the 1st of December, 1919, two sale-deeds of two separate properties were executed in favour of the same vendee, and on the same date two agreements were executed by the vendee in favour of the vendor promising to re-transfer the properties conveyed, for the amounts of the purchase-money if they were paid between the years 1340 and 1345 Fasli. The plaintiffs treated both these transactions as separate transactions and brought the suits for pre-emption on the ground that the property had been sold away.

On behalf of the defendants the existence of the alleged custom was denied and it was further pleaded that the custom, even if it existed in the village, would not apply to such a transaction. Both the Courts below have held that the custom of pre-emption exists in the village but that the transactions in question being only mortgages by conditional sale, they were not liable to pre-emption.

The existence of the custom has not been challenged in appeal. The only point therefore which we have to consider is, whether the Courts below were right in holding that these two sets of transactions were in reality mortgages by conditional sale and not out and out sale transactions. It is to be noted that the two sets of documents were executed on one and the same date and were presented for registration at the same time. It is also noteworthy that the agreements contain in clear terms recitals that the sale-deeds were executed subject to the condition that the property would be re-conveyed if the purchase-monies were paid within the years 1340 and 1345 Fasli, that is to say, the recitals in the deeds of agreement themselves show that the transactions were not separate transactions but formed part and parcel of the same transaction. The properties were therefore transferred to the vendee subject to the condition that they would have to be re-conveyed if the amounts were paid within a certain time fixed. The transactions therefore clearly come within the definition of a mortgage by conditional sale as given in section 58, sub-clause (*c*) of the Transfer of Property Act.

The circumstances of the case as well as the cross references are such that the Courts below have drawn the presumption that the transactions were really mortgages. We have had the documents read to us and we are satisfied that there is really no ground for differing from the view taken by the Courts below. The result is that these appeals fail and are dismissed with costs including in this Court fees on the higher scale.

Appeals dismissed.

---

* **1924 Allahabad 444** (2).

STUART AND MUKERJI, JJ.

Dildar—Defendant-Appellant

v.

Shukr-ullah—Plaintiff-Respondent.

S. A. No. 637 of 1922, decided on 4th December, 1923, from the decree of District Judge, Gorakhpur, dated 6th February, 1922.

Transfer of Property Act, S. 72—Mortgagee must account for profits of and deliver possession of plots not mortgaged but presumably got as mortgagees in possession.

On redemption mortgagees cannot retain possession of plots not mortgaged which they presumably took into possession in their capacity as mortgagees.

They are also bound to account for mesne profits to the mortgagors in respect of the plots.

Haribans Sahai—for Appellant.

S. A. Haidar—for Respondents.

Judgment:—The facts which have given rise to this second appeal are these:—The appellant and some others, on whose behalf the appellant has appealed, obtained two mortgages of certain shares in a *patti* of 4 annas. Subsequently, it is not clear whether after the redemption of the mortgages or before the redemption, the mortgagees purchased a small share (6 p.) out of the *patti*. The mortgages were redeemed. After the mortgage the appellants obtained possession over certain plots of land. Presumably this possession was obtained as mortgagees and on behalf of the mortgagors. The dispute arose when the mortgage was redeemed. The mortgagees refused to give up the lands over which they were in possession as mortgagees. Their contention was that they had become co-sharers in the lands and they were entitled to keep possession as co-sharers.

The Courts below gave a decree for joint possession to the plaintiffs and also a decree for mesne profits. The plaintiffs have not appealed. The contentions of the appellant are (1) that there should have been no decree for joint possession and (2) that there should have been no decree for mesne profits.

On the first point it seems to us clear that the mortgagees were bound to hand over the lands of which they got possession in the capacity of mortgagees, and in no other capacity. When the share was redeemed the whole quantity of land should have been handed back to the mortgagors. After that act had been performed it was for the parties to settle between themselves, if possible, what lands out of these should be handed back to the mortgagees as representing a fair share of theirs. The mortgagees were not at all entitled to keep possession simply because they had become co-sharers in the *patti*. In this view the possession of the mortgagees over the lands which they have got in the capacity of the mortgagees was unlawful. The decree for joint possession was therefore a very proper one.

On the second point the learned Counsel for the appellant has cited to us the case of *Sarbjit Singh* v. *Raj Kumar Rai* (1). In our opinion that case is quite distinguishable. It was a case in which certain admittedly joint lands were held by tenants and after the tenants left one of the co-sharers took possession of those lands. The defendants in the case were entitled to take possession of those lands as co-sharers in the village. In the present case, as we have already said, the mortgagees were bound to hand over the entire quantity of land they had taken possession of as mortgagees. In our opinion the Court below might have given a decree for possession and not only a decree for joint possession. The decree for mesne profits therefore was perfectly correct.

The appeal fails and is dismissed with costs which will include in this court fees on the higher scale.

Appeal dismissed.

(1) (1921) 19 A.L.J., 788.

---

* * 1924 Allahabad 445.

KANHAIYA LAL, J.

Bindeshwari Prasad Tiwari—Appellant

v.

Hanuman Prasad Tiwari—Respondent.

S. A. No. 891 of 1922, decided on 3rd December, 1923, from the decree of District Judge, Gorakhpur, dated 27th February, 1922.

Malicious prosecution—Complaint bona fide *to a proper officer only is privileged.*

"Communications addressed in good faith to persons in a public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime or the security of public morals are privileged provided the subject-matter is within the competence of the person addressed". Where the communication was not addressed in good faith and was unfounded, malice in law must be presumed and the privilege disappears. [P. 446, C. 1.]

Kumuda Prasad—for Appellant.

K. N. Malavya—for Respondent.

Judgment.:—This was a suit for damages for slander. The parties to the suit are residents and Zamindars of the village Jamni. In November, 1920, the Sub-Divisional Officer visited that village and met the parties. The defendant Bindeshwari Prasad told him that the plaintiff Hanuman Prasad was in the habit of causing the crops of other persons to be reaped and getting them grazed by cattle and that he was a constant source of trouble and worry to the people of the

neighbourhood. It appears that the name of the plaintiff was at one time in the history sheet and had been subsequently removed. The Sub-Divisional officer told Hanuman Prasad that he should behave in a manner calculated not to give rise to the complaints against him and the matter there ended.

The allegation of Hanuman Prasad was that the object of Bindeshwari Prasad in making that statement was to get him implicated in a proceeding under section 110 of the Code of Criminal Procedure and that he made that statement falsely and maliciously to injure him.

The Courts below found that the defendant-appellant had made the statement imputed to him and that the statement was unfounded and if acted upon by the Sub-Divisional Officer might have brought the plaintiff into serious trouble. They further found that the defendent-appellant had failed to make out that he believed in good faith that what he had said was true. It is urged on behalf of the defendant that the occasion was privileged and reliance is placed in support of that contention on *Chuni Lal* v. *Narasingh Das* (1). But as stated by Pollock: "Communications addressed in good faith to persons in a public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime, or the security of public morals, are privileged provided the subject-matter is within the competence of the person addressed." (Pollock on Torts 11th Edition, page 272). The finding in this case is that the communication was not addressed in good faith and was unfounded. In such circumstances malice in law must be presumed and the privilege disappears. Even where a complaint is filed in a Criminal Court and is afterwards dismissed, a suit for damages for malicious prosecution is in certain circumstances maintainable, because the privilege is qualified and not absolute, and there is no protection unless the case comes within the qualification attached to the privilege. The appeal, therefore, fails and is dismissed with costs including in this court fees on the higher scale.

Appeal dismissed.

(1) (1918) 40 All. 341 (F.B.).

* 1924 Allahabad 446.

STUART, J.

Shib Prakash Joshi and others—Petitioners-Appellants.

v.

Jhinguria and others—Opposite Parties.

Civ. Rev. No. 66 of 1923, decided on 27th November, 1923, from an order of Addl. Sub-Judge, Agra.

Civ. Pro. Code, S. 151—Other procedure applicable.

Where specific procedure is provided in the Code which the party neglected to avail himself of S. 151 cannot be invoked in his aid. [P. 447, C. 1].

N. P. Asthana—for Appellants.

M. A. Sanyal—for Opposite Parties.

Stuart, J.:—Jhinguria and others were appellants in a civil appeal which was transferred to the Court of the Additional Subordinate Judge at Agra for disposal. On the date fixed for hearing as they were absent and unrepresented, the appeal was dismissed for default. It was dismissed on the 25th April, 1922, under the provisions of Order 41, rule 17. There is a specific remedy in the Code of Civil Procedure to cover the case where an appellant has been prevented by sufficient cause from appearing and his appeal has been dismissed under this rule. That remedy is given in Order 41, rule 19. Under that rule the applicants could have applied for a restoration of their appeal. It appears that they have never so far adopted that remedy. On the 6th July, 1922, when an application under Order 41, rule 19 would ordinarily have been beyond time they applied for a restoration under Order 9, rule 8, a rule which had no application. Their application was dismissed. They then applied on the 19th August, 1922, for a review of the original order of the 25th April, 1922, dismissing their appeal for default. That application was dismissed. They then applied on the 11th November under section 151 of the Code. That application was dismissed. They then applied on 15th December, 1922, under section 151 of the Code and on that occasion the Presiding officer restored their appeal for hearing. His order is questioned in revision on the ground that he had no jurisdiction to pass it. The

plea must prevail. Section 151 is as follows:—

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

The enactment of this section declared the existence of an inherent jurisdiction in all Courts to go beyond the law of procedure in the ends of justice. But section 151 does not lay down and could not lay down that a Court may act in defiance of the law of procedure. A Judge is bound by the Code of Civil Procedure and the Law of Limitation. Where the Code of Civil Procedure is silent it is possible and frequently desirable to apply the provision of section 151. But the following qualification should be always applied. Section 151 cannot be applied where the rule of procedure is already laid down, and here the case is clear. The remedy lay under Order 41, rule 19. Owing to the appellants' laxity they waited until it was too late to apply under that rule and have since endeavoured to obtain the relief they desired by ignoring the provisions of the law. I agree that the learned Additional Subordinate Judge had no jurisdiction to pass his order of 17th March, 1923. He passed that order by assuming an authority which he did not possess. He had no jurisdiction to take up the matter at all. It had been finally decided before. I therefore allow this application and set aside that order. The opposite party will pay their own costs and those of the petitioners.

Application allowed.

1924 Allahabad 447.

LINDSAY AND SULAIMAN, JJ.

Puran Singh—Appellant

v.

Dat Ram and others—Respondents.

S. A. No. 378 of 1922, decided on 21st November, 1923, from the decree of District Judge, Shajahanpur, dated the 14th December, 1921.

Pre-emption—Subject-matter.

The interest of an owner in *sir* plots is a proprietary interest and the transfer of the *sir* plots is in fact a transfer of his proprietary interest.

S. P. Sinha—for Appellant.

Harnandan Prasad—for Respondents.

Sulaiman, J.:—This is a plaintiff's appeal arising out of a suit for pre-emption. Under a sale-deed, dated the 1st of March, 1920, certain plots described therein as *sir* plots within the zamindari of the executant were sold to the vendee. A suit was brought to pre-empt the sale by enforcement of the right of pre-emption. Various pleas were taken in the written statement but at the time when issues were framed by the first Court the denial of the existence of custom does not seem to have been pressed with the result that there was no issue framed as regards the existence or non-existence of a custom of pre-emption. The learned Munsif in his judgment did not deal with this matter at all. The suit was decreed. On appeal, the defendants raised before the lower appellate Court the point, that the *wajib-ul-arz* on which reliance was placed by the plaintiff, did not relate to the sale in question. The learned District Judge relying on the cases of this Court reported in (1882) A.W.N. 192 and (1884) A.W.N. 103 came to the conclusion that the transfer of the *sir* plots was not such a transfer of the share in the zamindari as would let in the right of pre-emption in favour of a co-sharer. In this view of the matter he dismissed the suit.

The plaintiff has come up in appeal and challenges the finding of the lower appellate Court. Unfortunately, the *khewat* of this village is not on the record, but the sale-deed as well as the admitted facts show *prima facie* that these *sir* plots are within the zamindari of the co-parceners. There is nothing to suggest that they are isolated plots and lie outside the 16 annas share. The point was not seriously pressed at all and was raised for the first time before the learned District Judge. We may also note that the case in (1884) A. W. N. 103 relied on by him was overruled by a Full Bench case reported in 7 All. 633 and also by another Full Bench case in 12 All. 426. It is clear that the interest of an owner in *sir* plots is a proprietary interest and the transfer of the *sir* plots is in fact a transfer of his proprietary interest. Under the clause of the *wajib-ul-arz* whenever a proprietor transfers his *haqiat* (property) a right of pre-emption accrues. We therefore think the suit should not have been dismissed on the ground above mentioned. The result is that this appeal is allowed, the decree of the lower appellate

Court is set aside and that of the Court of first instance is restored with costs including in this Court fees on the higher scale.

Appeal allowed.

---

* * **1924 Allahabad 448.**

LINDSAY AND SULAIMAN, JJ.

Umrao—Plaintiff-Appellant

v.

Lachhman and others—Defendants-Respondents.

S. A. No. 1301 of 1922, decided on 18th January, 1924, from a decree of Additional Sub-Judge, Banda.

Pre-emption—Events subsequent to first Court's cree cannot be considered.

Events subsequent to the date of the first Court's decree cannot be taken into consideration in pre-emption suits. Therefore the loss of a status of a co-sharer after the date of the first Court's decree will not entitle plaintiff to the right of pre-emption. Three dates have to be looked to in suits for pre-emption, *viz.*, the date of the sale, the date of the suit and the date of the first Court's decree.

K. N. Laghate—for Appellant.

Janaki Prasad—for Respondents.

Lindsay, J.:—We think this appeal must be allowed in view of the law as laid down in the case of *Baldeo Misir* v. *Ram Lagan Shukul* (1).

The relevant facts are as follows:—

The plaintiff, who is the appellant here, sued for pre-emption and apparently admitted that he was not entitled to any preference against the vendee unless he could show that he was a co-sharer in a certain *khewat* No. 152.

In the trial Court he produced evidence to show that he was a co-sharer in this *khewat* and he relied upon a deed of sale which had been executed in his favour by one Jawahir on the 10th January, 1919.

At the same time this pre-emption suit was being tried in the Court of the Munsif a suit had been brought by the sons of Jawahir to set aside this sale of the 10th January, 1919. The suit was pending but had not been decided at the time the Munsif gave his decree in the pre-emption suit.

The Munsif was of opinion that inasmuch as the plaintiff Umrao had shown that he was a co-sharer at the time of the sale sought to be pre-empted, that he was also a co-sharer at the time the suit was brought and that he was still a co-sharer at the time the suit was being decided, he was entitled to a decree.

It happened that on the 27th of April, 1921, that is to say, more than three months after the first Court's decree had been passed, Jawahir's sons succeeded in getting the sale of 1919 set aside. The decree setting that sale aside was afterwards affirmed in appeal.

When the appeal against the decree in the pre-emption suit was heard by the Additional Subordinate Judge of Banda on the 1st of August, 1922, he dismissed the claim of the plaintiff on the ground that the plaintiff was no longer a co-sharer That finding of course was based upon the judgment to which we have referred and which was passed on the 27th April, 1921 the judgment by which Umrao was deprived of the property at the suit of the sons of Jawahir.

We have held in the case which has been cited at the beginning of this judgment that in dealing with suits for pre-emption three dates have to be looked to, namely, the date of the sale sought to be pre-empted, the date of the suit and the date of the first Court's decree. We hold in that case, and we hold in this case, that it is not competent to Courts in appeal to pay regard to any events which may happen subsequent to the date of the first Court's decree; if on that latter date the plaintiff has a subsisting right to pre-empt he is entitled to succeed and his suit cannot be defeated because by reason of some event which has happened subsequent to the date of the first Court's decree he has lost the status of a co-sharer.

We therefore, allow this appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. The appellant is entitled to his costs both here and in the Court below.

Appeal allowed.

---

(1) 1924 All. 82.

1924 ALLAHABAD 449

LINDSAY AND SULAIMAN, JJ.

Sheo Prasad Dube and others—Defendants—Appellants.

v.

Sarjee Mahto and another—Plaintiffs—Respondents.

S. A. No. 211 of 1922, Decided on 6th July 1923, against the decree of the First Addl. Dt. J., Gorakhpur, D/- 21st November 1921.

(a) *Record of rights—Entries in—Basti and Gorakhpur—Special weight to be given but they are not conclusive.*

Although entries in the record of rights which were prepared in the Basti and Gorakhpur settlements in the year 1885 have a peculiar weight, the full Bench decision (25 A. 90 F. B,) does not lay down that such an entry is conclusive proof. Where there was no record of custom in the wajib-ul-arzes of 1833 and 1860 and it was proved to the satisfaction of the Court that in both those years the village was in the possession of a single proprietor.

Held: that there was evidence on the record which overturned the presumption founded upon the entry in the record of rights for the year 1885. [P. 450 C. 1]

(b) *Pre-emption — Contract—Plaintiffs not parties to it—They cannot enforce.*

Where plaintiffs first got a footing in the village by purchase, some 7 or 8 years after the settlement was made, they are not entitled to enforce a contract of pre emption which was entered into at the time of the settlement because, even assuming that the record in the wajib-ul-ary is a record of contract plaintiffs were no parties to the contract. [P. 450 C. 2]

N. Upadhiya—for Appellants.

Jang Bahadur Lal and *S. P. Sinha*—for Respondents.

Judgment.—The question in this case is whether the lower appellate Court was right in holding that the plaintiffs respondents were entitled to succeed in their suit for pre-emption.

The suit as framed was based on an alleged custom of pre-emption. The Court of first instance dismissed the suit on the ground that the custom was not proved. The Subordinate Judge was also of opinion that the plaintiffs could not rely on any contract for pre-emption inasmuch as no such case had been set up in the plaint.

The plaintiffs went up in appeal and that learned Additional Judge while agreeing with the first Court that there was no proof of custom nevertheless held that the plaintiffs were entitled to succeed on the ground of contract.

It is now argued before us on behalf of the defendants vendees that the Judge of the Court below ought not to have decreed the claim on the basis of contract, no such case having been set up in the plaint.

On the other hand the learned counsel who has argued the case on behalf of the plaintiffs respondents maintains that the decision of the Court below should be upheld on the ground that the evidence which was produced in the case conclusively proves the existence of custom.

We will deal with the second matter first. The learned counsel has laid great stress upon the *Full Bench* case reported as *Ali Nasir Khan* v. *Manik Chandra* (1). There it was pointed out with reference to certain entries in the record of rights which were prepared in the Basti and Gorakhpur settlements in the year 1885 that a peculiar weight must be assigned to entries of custom made in the settlement records of that time because special instructions had been issued by the Board of Revenue to Settlement Officers. Among other directions given was one regarding the record of a right of pre-emption. Such a record was to be made when the proprietor expressly demanded that it should be noticed and proved conclusively that a custom exists.

There can be no doubt therefore that when we find an entry of this kind, as we do find in the present case, we start with a very strong presumption in favour of the existence of custom.

But we do not understand he Full Bench decision to lay down that such an entry is conclusive proof and is binding on the Civil Court. It will be noted that in the case which was before the Full Bench the only evidence to be considered was a *wajib-ul-arz* of 1866 and an extract from the record of rights of the settlement of 1886-87.

(1) [1902] 25 All. 90 – (1902) A.W.N. 207. (F. B.)

In the present case there is other evidence to be considered and it is principally on this other evidence that the Courts below have decided against the plaintiffs. Documents were produced before the lower Court to show that there was no record of custom in the *wajib-ul-arzes* of 1833 and 1860 and it was further proved to the satisfaction of the Court below that in both those years the village was in the possession of a single proprietor.

We have further evidence in the shape of the statement of the patwari, which says that there was no transfer of property in this village up till the year 1894 when a sale was effected in favour of Ram Subhag who was the father of the first plaintiff Sarju Mahto. The next transfer which took place was in or about the year 1901 when a second transfer was made in favour of the same Ram Subhag.

In these circumstances we think it was competent for the Court below to say that there was evidence on the record which overturned the presumption founded upon the entry in the record of rights for the year 1885. We cannot therefore interfere with the finding of the Court below on this point.

There remains the question of contract. It has been laid down that where plaintiffs rely upon a contract in order to succeed in a suit for pre-emption the contract ought to be pleaded, for in such a case it would be necessary for the plaintiff to show that the person through whom he claimed was one of the contracting parties.

We think this objection, although a technical objection, is one which ought to prevail. However we do not find it necessary to decide this question on any mere technicality. We have already adverted to the fact that the first plaintiff got a footing in the village for the first time in the year 1894, that is, some 7 or 8 years after the settlement had been made.

If it be the fact, and it does appear to be the fact, that these plaintiffs first got a footing in the village by purchase, some 7 or 8 years after the settlement was made, we do not think that they are entitled to enforce a contract which was entered into at the time of the settlement assuming that the record in the *wajib-u-arz* is a record of contract. These people were no parties to the contract and we do not think they ought to be allowed to enforce it.

We have come to the conclusion therefore that this appeal ought to be allowed and we allow it accordingly. We set aside the decree of the Court below and restore the decree of the Court of first instance. The defendants appellants are entitled to their costs both here and in the lower appellate Court. The costs in this Court will include fees on the higher scale.

Appeal allowed.

✱ 1924 ALLAHABAD 450

BANNERJI AG. C. J. AND RYVES J.

Mohan and others—Plaintiffs—Appellants.

v.

Bishambhar Sahai and another—Defendants—Respondents.

A. S. No. 93 of 1922, Decided on 23rd July 1923.

Lim. Act Art. 32—Does not apply to suit for removal of increase of burden on servient tenement due to resting more beams on wall.

Where plaintiff's complaint was that by placing heavier and more beams for supporting a masonry roof on a wall instead of the lighter beams which previously supported the thatched roof and which had rested on the wall, the burden of an existing servitude had been increased, *Held* : that Art. 32 did not apply to the case. [P. 451 C. 1]

N. C Vaish—for Appellants.

Nihal Chand—for Respondents.

Judgment.—The question which arises in this appeal is whether the claim of the plaintiffs is barred by article 32, schedule I, of the Limitation Act. The facts are these. Between the houses of the parties lies a wall which in previous litigation between them was declared to be the property of the plaintiffs. The defendants have placed some beams on that wall and a masonry roof. The

plaintiffs' suit was instituted for the removal of the beams in so far as they rested on the plaintiffs' wall. The defendants claimed a right of support for the beams of their roof. The lower appellate Court, without finding whether the defendants had a thatched roof resting on the plaintiffs' wall, held that as the defendants had placed a much heavier burden on the wall than had existed before, the plaintiffs were entitled to have that burden removed, and decreed the claim. An appeal was preferred to this Court and for the first time in this Court it was contended that the claim was barred by article 32. This plea prevailed before a learned Judge of this Court and he held that the said article applied, and as the construction complained of had admittedly been made more than two years prior to the institution of the suit he dismissed the claim. The plaintiffs have preferred this appeal. The question is by no means free from difficulty; but after considering the matter we are of opinion that article 32 is not applicable to the present case. That article runs as follows:—"Against one who having a right to use property for specific purposes perverts it to other purposes.

It is admitted that the purposes for which the defendants could use the wall was the support which the wall could afford to their beams. We do not think that they have used the wall for a different purpose The only purpose for which they could use the wall was that of placing beams on it. They have carried out the same purpose but in a different way, that is to say, according to the finding of the Court below they have placed upon the wall heavier and more numerous beams than had existed before and instead of putting a thatched roof they have placed a masonry roof. The real purpose however is that of support for the beams upon which the roof now rests. Therefore it cannot be said that there has been a perversion of the purpose for which the defendants had a right to use the wall.

Article 32 cannot apply to a case of this kind. A common instance of the application of the article is that of a tenant who having a right to cultivate land digs a tank in it or builds a house on it. Our attention has been drawn to the ruling in *Juddu Ram* v. *Kanhaiya Ram* (1), in which a learned Judge of this Court held that article 32 had no application to a matter like this. That was a case which was much stronger than the case before us. We are unable to agree with the view which the learned Judge who decided this case has taken on the point. In our judgment the article in question does not bar the present suit. There was no other question to be considered in the appeal. We therefore allow the appeal, set aside the decree of the learned Judge of this Court and restore that of the lower appellate Court. The appellants will have their costs of both the hearings in this Court. We allow the defendants two months' time from this date for the removal of such portions of the beams in dispute as rest on the plaintiffs' wall.

Appeal allowed.

(1) [1916] 33 I. C. 90.

✱ 1924 ALLAHABAD 451

WALSH, J.

Darbari Singh—Applicant.

v

Emperor—Opposite Party.

Cr. Ref. No. 342 of 1923, Decided on 27th June 1923 by Sess. J. Azamgarh.

✱*Cr. P. C. S. 110—Private knowledge of Magistrate is not substantive evidence but is check or test to weigh evidence.*

Private knowledge of a Magistrate is not in itself substantive evidence which may be used against the accused, but it is a form of check which the trial Court may legitimately use in order to test the nature of the evidence with which it has to deal, and to negative, for example, a suggestion that the police investigation has been unfair. A finding for example that "inquiries about the accused satisfy me that he is a badmash," would be objectionable, but "the result of my inquiries in the neighbourhood, so far as they appear in the case of this accused tend to show that the case against him has not been got up without reason," would be quite legitimate. 1923 All. 596 Expl. (P. 453, C. 1.)

Piari Lal Banerji—for Applicant.

The Crown was not represented.

Order of Reference.

"The applicant Darbari Singh has made this application to revise the order of the learned District Magistrate, dated the 21st March 1923, confirming the order of the Sub-Divisional Magistrate of Mohammadabad binding him down to be of good behaviour by the order dated the 4th of February 1923. It appears that the applicant was reported against by the station officer of Cirayakot as a bad character who was habitually given to theft, that he was the leader of a gang of house-breakers and was dangerous. The applicant was accordingly called upon to furnish security. It is argued that the applicant should not have been bound down. From a perusal of the judgment of the learned District Magistrate I find that he took three points into consideration in dismissing the appeal preferred to him. The first is that the evidence of good and bad character was fairly evenly balanced on both sides ; the second is that the Sub-Divisional Magistrate made a private inquiry which in his opinion was proper and conclusive and the third is that the applicant has been a history-sheeter since 1906.

As regards the first point it is not necessary for me to enter into the evidence, for the learned District Magistrate himself admits that the evidence of good and bad character is fairly evenly balanced.

As laid down in *Emperor* v. *Angnu Singh* (1) this circumstance should be a point in favour of the applicant.

It may be true that the Sub-Divisional Magistrate can obtain some information about the bad characters living in his sub-division, but the question is whether the knowledge derived from such private information is legal evidence. The applicant had no source of information about the men who were the private informers of the Sub-Divisional Magistrate and it would be illegal and positively dangerous if the Sub-Divisional Magistrate is permitted to base his judgment on such knowledge derived from private information. This has been laid down by the Hon'ble Mr. Justice Walsh in an unreported judgment on a reference from this Court, No. 158 of 1923, dated the 2nd May 1923 (21 A. L. J., 513).

The third point dealt with by the learned District Magistrate is that the applicant has been a history-sheeter since 1906. The only evidence on this point is that of the sub-Inspector who said that the name of the man was down since 1906, No document was produced to prove this and the secondary evidence of the Sub-Inspector was under the law inadmissible. Besides, I do not think that the mere fact that the police thought of putting down a man's name in the history-sheet every year since 1906 should *ispo facto* show that the man was really a bad character. It is not shown that the applicant had ever been charged or convicted of any offence within these last 17 years and yet it is attempted to show that he is a bad character, a thief and a dangerous man.

It has not been shown that the applicant has to live on theft or other bad means of livelihood for his support.

Under the circumstances I recommend that the order of the Sub-Divisional Magistrate binding down the applicant, and the order of the learned District Magistrate confirming the said order, may be set aside. The usual explanation (if any be given) be asked for before the record is submitted to the Hon'ble High Court.

Walsh, J.—On the whole I am unable to accept this recommendation. The matter has been very fully argued, and I agree that the Sessions Judge had ground for referring the matter, but the explanation of the District Magistrate throws an entirely different light on at least two points, if not all of them. Further the case is clearly different one from that which has been referred to, decided by myself, namely the case of *Ashiq Ali* v. *Emperor* (2), and the report shows the danger of reporting cases which are really only decisions on particular findings.

(1) 1923 All. 35—45 All. 109—20 A. L. J. 881—24 Cr. L. J. 257—71 I. C. 865.

(2) 1923 All. 596—21 A. L. J. 513—L.R. 4 A. (Cr.) 126—73 I. C. 337.

Dealing first with the general observations contained in my previous judgment, although it is clear from the report that I was prepared to interfere on the single ground that the Magistrate had made private inquiries, it is equally clear to myself from the language which I used, that although the report in the Allahabad Law Journal, as is so often the case, fails to state the facts and does not give the judgment of the Magistrate which I was considering, the Magistrate in that case had made inquiries about the particular individuals who were subsequently brought before him before the trial, and had allowed the actual information against such individuals to influence his decision. I agree with the general observations of the District Magistrate on this question of making inquiries, and, although it is dangerous at all times to generalize, and people are much too apt in this Court to seize upon the slightest dictum as laying down some new rule of law, I compare the use which a Magistrate is bound to make, if he is conscientious, of knowledge which is already in his possession when he hears a case, with the examination of the police diary in a criminal charge. That is to say, it is not in itself substantive evidence which may be used against the accused, but it is a form of check which the trial Court may legitimately use in order to test the nature of the evidence with which it has to deal, and to negative, for example, a suggestion that the police investigation has been unfair. That is to say, a finding that "inquiries about the accused satisfy me that he is a *badmash*," would be objectionable, but "the result of my inquiries in the neighbourhood, so far as they appear in the case of this accused, tend to show that the case against him has not been got up without reason," would be quite legitimate.

As regards the first point dealt with by the Learned Sessions Judge and the Magistrate, all that the Magistrate did in dismissing the appeal was to say that the evidence was fairly evenly balanced, which referred to quantum, and a perusal of the judgment of the Magistrate who tried the case shows that he believed the prosecution evidence, and that the prosecution evidence was in fact stronger than the defence, and was called from the district or rather the village of the accused. In the case which has been cited, the prosecution evidence was vague, hearsay and unsubstantial, and none of it came from the village of the accused.

Thirdly, I think the Sessions Judge has really misunderstood the point about the history-sheet. It was not a question of the man being a history-sheeter only. It was definitely proved that he had been under surveillance, and the observation of the District Magistrate that there had recently been a large reduction in the history-sheets and that in the last cold whether tour at least 60 were closed after consultation, and this one was not, is at any rate evidence that a new chapter in relation to this man's reputation opened at that time unfavourably for him. After all, the *badmashi* section is a section of reputation and not of actual crime, and that is one reason why it is so unpopular. I am not disposed to encourage these references or revision applications, because so long as cases proceed regularly and fairly, the Magistrate is the best tribunal, in fact the only tribunal, who can satisfactorily decide them. I therefore decline to interfere and direct that the record be returned to the Sessions Judge.

Revision rejected.

✱ 1924 ALLAHABAD 453

STUART AND KANHAIYA LAL, JJ,

Ghanram Rai and another—Applicants.

v

King Emperor—Opposite Party.

Cr. Rev. No. 495 of 1923, Decided on 28th November 1923, against the order of the S. J., Ghazipur, D/-18th July 1923.

✱ *Criminal P. C., S. 476—Court passing order under, must apply its own mind to the merits of the case.*

It is absolutely essential to the validity of an order under S. 476 that the Court which passes the order should apply its mind to the

matter upon its merits. Merely acting on the remarks of the appellate Court is not enough. [P 454 C 2]

E. A. Howard—for Applicants.

The Asst. Govt. Advocate—for the Crown.

Stuart, J.—A certain Jado Rai was tried by the Sessions Judge of the Ghazipur district of an offence under Ss. 467 and 471 of the Indian Penal Code. He was convicted. He appealed to the High Court. He had called in his defence four witnesses whom the learned Sessions Judge disbelieved. When the appeal was heard in the High Court the learned Judge who decided it agreed with the Sessions Judge that the defence evidence was untrustworthy. He went further and considered it deliberately false. He took a grave view of the action of the witnesses and finally passed the order :—

"I direct that the record be returned to the Sessions Judge with a direction to him to take action under S. 476 of the Criminal Procedure Code and to sent these men to the nearest Magistrate to be charged with perjury."

Under the provisions of S. 476 of Criminal Procedure Code the learned Judge of this Court could have taken action himself and directed the prosecution of these four persons and then sent the case for inquiry and trial to a Magistrate of the first class in Allahabad. He did not take this action and we can only understand his order to mean that he brought to the notice of the Sessions Judge the circumstance that in his opinion there was cause for inquiry under S. 476 and suggested that the Sessions Judge who had actually heard those witnesses should himself proceed against them. But this order of course necessarily contained the implied conditions that the Sessions Judge should apply his mind to the matter and should himself take the initiative of ordering the prosecution. If the learned Sessions Judge on receint of this record had applied his mind again to the matter and ordered a prosecution on his own initiative there would be no cause for interference. But it is clear from the order that he did not apply his mind to the matter and considered that he had to obey an order of the High Court and prosecute without expressing any opinion as to whether he considered a prosecution justified. He refers to the statements to which the High Court takes exception and the following words show his attitude clearly. "The accused want to be let off but as Mr. Justice Walsh has ordered me to prosecute them I cannot help them. I therefore order the prosecution." The order of prosecution cannot be supported. It is absolutely essential to the validity of an order under S. 476 that the Court which passes the order should apply its mind to the matter upon its merits and this essential condition is wanting here. We accordingly set aside the order of prosecution.

Order set aside.

1924 ALLAHABAD 454

STUART, J,

Badlu Shah and others—Appellants

v

Emperor—Opposite Party.

Cr. A. No. 727 of 1923, Decided on the 20th November 1923, from the order of the S. J. Budaun.

Penal Code, Ss. 366 and 368—Offences in the two sections are not same,—Cr. P. C. S. 181 (4)

It is doubtful whether it is possible to read into the words "the offence of kidnapping or abduction" the words "wrongfully concealing or keeping in confinement a kidnapped person", and although the punishment under S. 368 is the same as that under S. 366 the offences are not the same. [P 455 C 1]

Sankar Saran—for the Crown.

Stuart, J.—This appeal has presented considerable difficulty owing to the fact that the Sessions Judge did not apply his mind to the question whether he had jurisdiction in respect of certain persons who were tried by him and owing to his having not considered with care the evidence in certain instances. The following facts are clear. Mt. Dulari a girl of under sixteen years of age was kidnapped from the lawful guardianship in the village at Rumasu in the

Budaun district by two men Dungar and Badlu Shah. These men took her by train to Kasganj, Etah district, where they met two other men called Hari Singh and Ahsan, and the four men took the girl to Karnal district in the Punjab to the house of a woman called Dallu. The Sessions Judge convicted Dungar of an offence under S. 366 on his plea of guilty. He convicted Badlu Shah of an offence under the same section. He convicted Badlu Shah, Hari Singh, Ahsan, Mt. Dallu and Ghafur of an offence under S. 368 of the Indian Penal Code. He did not consider the point that whereas Dungar's and Badlu Shah's offence had clearly been committed in the Budaun district within his jurisdiction, the offence of Hari Singh and Ahsan was committed in the Etab district over which he ordinarily had no jurisdiction and the offence of Musammat Dallu and Ghafur in the Punjab where neither he nor the High Court of this Province had any jurisdiction. I am not clear as to whether he had in his mind the provisions of S. 181 (4) of the Criminal Procedure Code of 1898. He makes no reference to it. It is doubtful and more than doubtful whether it is possible to read into the words "the offence of kidnapping or abduction" the words "wrongfully concealing or keeping in confinement a kidnapped person", and although the punishment under S. 368 is the same as that under S. 366 the offences are not the same. If the procedure had been strict and exact Dungar and Badlu Shah would have been tried in Budaun, Etah or Karnal, Hari Singh and Ahsan would ordinarily have been tried in Etah and Ghafur and Mt. Dallu would have beon tried in Karnal. S. 531 however operates clearly in support of the convictions of Hari Singh and Ahsan if the error has not occasioned the failure of justice. I am satisfied upon the evidence that Dungar who has not appealed and Badlu Shah kidnapped the girl and that Hari Singh and Ahsan knowing that she had been kidnapped were privy to restraining her movements while she was in Kasganj. I do not consider that the error of trying Hari Singh and Ahsan in Budaun has occasioned a failure of justice as against them. I do not find the sentences excessive and I dismiss the appeals of Badlu Shah, Hari Singh and Ahsan. I need not go into the question as to whether the provisions of S. 531 or of 181 (4) could be utilised to support the conviction of Ghafur and Mt. Dallu for, I find the evidence absolutely insufficient to justify the conviction of either, apart from the irregularity of the trial. I therefore allow the appeals of Ghafur and Mt. Dallu, set aside their conviction and sentences and direct that they be at once released from custody.

Conviction quashed.

1924 ALLAHABAD 455

STUART, J.

Kishun Singh—Appellant.

v

Emperor—Opposite Party.

Cr. A. No. 791 of 1923, Decided on the 29th November 1923, from an order of the S. J., Kumaun, D/-15th July 1923.

Whipping Act (IV of 1909) S. 5—Whipping is in lieu of any other punishment.

If the sentence of Whipping is passed, no other sentence can be passed, for, the whipping is considered to be in lieu of either a single punishment or a combined punishment. 16 Bom. 357 Appr. [P 455 C 2 & P 456 C 1]

M. L. Banerji and *U. S. Bajpai*—for Appellant.

M. Waliu'lah—for the Crown.

Stuart, J.—After examining the evidence I am of opinion that the conviction cannot be interfered with, but the sentence as passed by the Sessions Judge cannot stand. The appellant who is a boy of 12 was convicted under S. 436 of the Indian Penal Code for having committed mischief by setting fire to a cow-shed in the hills and was sentenced under the provisions of S. 5 (Act IV of 1909) to 15 stripes and also to a fine. Under S. 5 he could be punished with whipping in lieu of any other punishment to which "he may for such an offence be liable". If the sentence of whipping is passed no other sentence can be passed for the whipping is

considered to be in lieu of either a single punishment or a combined punishment. This is clear from the words of the section itself. A similar point arose in a Bombay case *Queen Empress* v. *Dagadu* (1). It arose under the old Act XL of 1860. The words of the head-note with some slight alteration will apply to the present case. When an accused person is "sentenced to whipping under S. 5 Act IV of 1909 the punishment of fine or imprisonment or both cannot be legally inflicted under the Indian Penal Code in addition to the whipping." The sentance of whipping can stand alone; the sentence of fine only if imprisonment is added to it. As far as I am instructed the boy is at present in custody in default of payment of the fine. The sentence of whipping has not yet been inflicted upon him. It is clear that the Judge intended the sentence of whipping to be the main sentence. The boy has thus been, as far as I can see, already for over four months in jail in default of payment of a fine which could not be exacted from him. I must make allowance for that fact. I therefore alter the sentence into one of one day's simple imprisonment and as that sentence has already been served I direct that the appellant be released from custody.

Sentence reduced.

---

(1) [1892] 16 Bom. 357.

1924 ALLAHABAD 456

LINDSAY AND SULAIMAN, JJ.

Bholai Pandey—Defendant—Appellant.

v.

Khiali Pandey and others—Plaintiffs—Respondents.

S.A. No. 1786 of 1921, Decided on 8th June 1923, from the decree of the District Judge of Gorakhpur.

Pre-emption— hissedar karibi—*Meaning depends upon context.*

The expression *hissedar karibi* by itself is ambiguous and may apply either to a co-sharer who is nearer in space or a co-sharer who is nearer in blood relationship. The particular meaning to be given to it depends upon context. [P. 457, C. 1]

Haribans Sahai—for Appellant.

Lakshmi Narayan Tewari—for Respondents.

Sulaiman, J.—This is a defendant vendee's appeal arising out of a suit for pre-emption. The plaintiffs alleged that there was custom of pre-emption in the nahal in which the shares sold were situated and according to it they had a preference against the defendant, who also was a co-sharer in the same mahal. The defendant denied the existence of the custom and also denied that the plaintiffs had any preference over him.

The Court of first instance found that the plaintiffs and the vendor were co-sharers in one and the same patti but that the defendant vendee was a co-sharer in another patti though situated in the same thok. It held that there was a custom of pre-emption in the village, and was of opinion that the plaintiffs being nearer in space had a preferential right over the defendant. That decree was affirmed by the lower appellate Court. The lower appellate Court, however, confused the meaning of thok with a "revenue-paying unit" as it calls it. It thought that the plaintiffs and the vendor were co-sharers in one and the same thok and the vendee was co-sharer in a different thok. This view obviously was incorrect. We have examined the khewat as well as the statement of the patwari on which the Court below relies and we have no doubt, whatsoevar, that all the three persons are co-sharers in one and the same thok though the plaintiffs and the vendor are also co-sharers in a sub-division of that thok.

There can be no doubt that the custom of pre-emption exists in this village. We have the waji-bul-arzes of the years 1833 and 1860 both of which recite the existence of such a custom. In addition to these the plaintiffs produced a judgment dated the 15th May 1914, in which a custom of pre-emtion was upheld. There is no contradiction in the terms of the wajib-bul-arzes of 1833 and 1860, the latter being a fuller one

and there is absolutely nothing else to rebut the presumption.

The learned Vakil for the appellant refers to certain matters in clause (5) of the waji-bul-arz of 1860 but those matters are not such as cannot possibly be records of custom. Under these circumstances we think the view taken by the Courts below that a custom of pre-emption exists in this mahal is correct.

Now remains the question whether the plaintiffs have preference over the defendant. Admittedly the defendant is a co-sharer in the same mahal. The plaintiffs had to produce unambiguous evidence to prove that under a custom which prevails in this mahal they, being co-sharers nearer in space, had preference over the defendant who is also a co-sharer in the same thok. In order to prove such a special custom they, relied on the waji-bul-arzes of 1833 and 1860 and a judgment of the year 1914. As to the judgment of the year 1914 we can dispose of it at once. In that case the ptaintiff claimant happened to be both a blood relation of the vendor as well as a co-sharer in a smaller sub-division. The Court accordingly held that in either view of the case, namely, whether the word *hissedar karibi* used in the wajib-ul-arz referred to a co-sharer nearer in space or to a co-sharer nearer in blood relationship he had a preferential right. That judgment, therefore is absolutely inconclusive.

According to the wajib-ul-arz of 1860 the right of pre-emption was given.

(1) to *hisseder karibi* (near co-sharers)

(2) to *dusre hissedaran thok* (other co-sharers in the thok)

(3) to *hissedar dusre thok* (co-sharers of other thoks).

In order to succeed the plaintiffs must show that the expression *hissedar karibi* necessarily means a co-sharer who is nearer in space with the vendor. It has been held in various cases that the word *hissedar karibi* by itself is an ambiguous expression and may apply either to a co-sharer who is nearer in space or a co-sharer who is nearer in blood relationship. Of course, if the context of the waji-bul-arz makes it quite clear that it has the one meaning and not the other then the plaintiffs would succeed. In the present case, however, we are unable to say that the expression *hissedar karibi* in the wajib-ul-arz necessarily means a co-sharer nearer in space and not nearer in blood relationship. The only evidence on which the plaintiffs rely is this ambiguous entry in the wajib-ul-arz of 1860 which in our opinion is not sufficient to establish the custom on which the plaintiffs came into Court, *viz.*, that a co-sharer in a patti has preference over a co-sharer in the same thok. In this view of the matter this appeal must be allowed with costs including in this Court fees on the higher scale.

Appeal allowed.

1924 ALLAHABAD 457

WALSH AND KANHAIYA LAL, JJ.

Parbhu Lal and others—Defendants Applicants.

v.

Firm Sheo Dial Mal Ram Saran Das—Plaintiff--Non-Applicant.

Rev. No. 20 of 1923, Decided on 29th May 1923, from the order of the Subordinate Judge, Meerut.

Civil P. Code Sch. II Para 1—Acceptance of submission by conduct is enough.

Where a reference was not signed by one of the parties, but it was signed by his son and verified by his pleader and he himself appeared before the arbitrator.

Held, that the award was valid. [P 457, C 2]

Gulzari Lal—for Applicants.

K. C. Mital—for Non-Applicants.

Walsh, J.—The main objection to the award here is that the reference was not signed by one of the parties, but it was signed by his son and verified by his pleader and he himself appeared before the arbitrator thereby ratifying the conduct of his pleader. The judgment complained of is really an admirable one and cannot be improved upon, and this application must be dismissed with costs including fees on the higher scale.

Application dismissed.

1924 · ALLAHABAD 458

BANERJI, AG. C. J. AND RYVES, J.

Sidhari Ram— Plaintiff—Appellant.

v.

Dr. Gargi Din— Defendant — Respondent.

L. P. A. No. 74 1922, Decided on 13th July 1923, from a decree of Gokul Prasad.

Limitation Act, S. 19—Acknowledgment of mortgagee right is sufficient proof of subsisting mortgage.

In 1908, G the mortgagee, his brother and his son executed a sale-deed in favour of the defendant, of mortgagee rights in a grove. In that sale-deed they stated that they were mortgagees of the grove of K and they purported to sell their rights as mortgagees to the defendant.

Held; that the very fact of G selling his mortgagee rights was an express acknowledgment of the existence of a subsisting mortgage and of subsisting rights which he was competent to sell and the very fact of defendant purchasing those rights was an acceptance on his behalf of an existing mortgage, a mortgage which was in force as a subsisting mortgage on the date of the sale to him, and therefore he cannot set up any defence inconsistent with mortgagee rights. [P. 458, C. 2 & P. 459, C. 1]

S. P. Sinha and *U. S. Bajpai*—for Appellant.

M. L. Agarwala—for Respondent.

Banerji, Ag. C. J.—This appeal arises out of a suit for the redemption of a mortgage. The mortgage is said to have been made by one Sahai in favour of Gaya Prasad and in the plaint it was stated that the mortgage had been made some time in 1870. Sahai's son was Kunji and the plaintiff claims to be the heir of Kunji. On the 28th of March 1908, Gaya Prasad, his brother and his son executed a sale-deed in favour of the defendant, Dr. Gargidin, of mortgagee rights in the grove now in dispute. In that sale-deed they stated that they were mortgagees of the grove of Kunji who was, as we have said above, the son of Sahai and they purported to sell their rights as mortgagees to the defendant Gargidin for Rs. 125. They stated in the sale-deed that they were in possession as mortgagees for a long time and that it was the mortgage under which they were in possession which they were transferring to Gargidin. The plaintiff in his plaint no doubt gave some particulars of the mortgage but in the fourth paragraph of his plaint he stated that the mortgage which he was seeking to redeem was the mortgage which the defendant Gargidin had purchased from Gaya Prasad in 1908, so that there can be no doubt that the mortgage which the plaintiff sought to redeem was the particular mortgage the rights in which were sold to the defendant Gargidin by Gaya Prasad, his brother and his son. Gargidin denied the mortgage set up by the plaintiff and denied every one of the allegations of the plaintiff. He even denied that the plaintiff was the representative of Sahai but it appears that he helped the plaintiff in getting his name entered in the revenue papers as the legal representative of Kunji, the son of Sahai. The Court of first instance decreed the claim but that decree was set aside by the lower appellate Court by a judgment which we cannot but regard as perverse. The learned Subordinate Judge who decided the case in the appellate Court did not give due effect to the allegations in the plaint. He was under the impression that the plaintiff sought to redeem a particular mortgage and that it was not the very mortgage which the defendant had purchased and he proceeded to find whether the particular mortgage which the plaintiff set up was established. He, in our opinion, misconceived the nature of the plaint. The plaintiff by this suit sought to redeem the mortgage which the defendant Gargidin had acquired by virtue of the sale-deed executed in his favour on the 28th March 1908, and for which he paid Rs 125. That mortgage was set forth in the sale-deed and that mortgage was accepted by the defendant. Therefore if the claim was not time-barred it was a claim which the defendant Gargidin had no ground for resisting. The very fact of Gaya Prasad selling his mortgagee rights was an express acknowledgment of the existence of a subsisting mortgage and of subsisting rights which he was competent to sell and the very fact of Gargidin purchasing those rights was an acceptance on his

behalf of an existing mortgage, a mortgage which was in force, as a subsisting mortgage on the date of the sale to him. He was not purchasing such property which was on the date of sale not in existence. Therefore the very fact of the execution of the sale-deed by Gaya Prasad and the acceptance of a sale from him by Gargidin was an admission of a subsisting mortgage of the property now in dispute. This being the mortgage which the plaintiff sought to redeem the suit which was instituted by the plaintiff was clearly within time computing limitation from the date on which the subsisting mortgage was acknowledged by the original mortgagee and by the purchaser from that mortgagee and was in substance accepted by the purchaser from that mortgagee. In this view the decision of the lower appellate Court cannot be regarded as a decision that the mortgage sought to be redeemed had not been proved or did not exist. We think that we cannot regard the decision of the lower appellate Court as a decision upon a question of fact and in view of the circumstances to which we have referred, the judgment of the learned Judge was clearly erroneous. We are unable to agree with the view of the learned Judge of this Court that the finding of the lower appellate Court was finding of fact which was binding on him. In our opinion the suit was rightly decreed by the Court of first instance.

We allow the appeal, set aside the decree of this Court and of the lower appellate Court and restore that of the Court of first instance with costs in all Courts.

Appeal allowed.

1924 ALLAHABAD 459

GOKUL PRASAD, J.

Hardial—Plaintiff—Appellant.

v.

Alam and others — Defendants — Respondents.

S. A. No. 103 of 1922, Decided on 14th May 1923, from the decree of Sub. J. Jhansi D/- 17th September, 1921.

Lambardar—Can grant lease of Zamindari land.

A lambardar has a right to give a lease of Zemindari property having regard to a particular season. 29 A. 554 Foll. [P. 460, C. 1]

Haribans Sahai—for Appellant.

Kumuda Prasad—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for recovery of certain crops, or, in the alternative, the value thereof. The plaintiff's allegation was that he had sown wheat, *lahi* and mustard in 4 *bighas* of alluvial land bearing No. 169, that the defendants Nos. 1 to 9, having colluded with the Patwari, the defendant No. 10, forcibly cut away the crops sown by the plaintiffs about the 20th of March 1921. The defendant No. 10 is the Patwari of the village and was to receive one-tenth of the crops to be appropriated by defendants Nos. 1 to 9. The plaintiff again sowed some wheat, *etc.* on another plot of 7 *bighas* but the defendants Nos. 1 to 9 in collusion with defendant No. 10 cut and removed the crops. The plaintiff, therefore, brings the suit for recovery of the grain removed by the defendants or Rs. 347 the value thereof.

The defence of the defendants Nos. 1 to 9 was that they had been ploughing and sowing the field in question as it emerged from the river every year and had always been reaping the crops, that in the year in dispute they ploughed and sowed it as usual under a lease of Bhadon Sambat 1977 given by Shah Qutubuddin, the *lambardar* and that the plaintiff had never sowed the field in question nor had he any right to the crops. They also contended that there was no collusion between them and the defendant No. 10.

Defendant No. 10 denied any collusion with the other defendants and alleged that the defendants themselves sowed the crops and reaped them.

The First Court came to the conclusion that Qutubuddin, the *lambardar*, had authority to grant the aforesaid lease and the defendants Nos. 1 to 9 did, as a matter of fact, cultivate the plot in dispute. It further found that the plaintiff had no right to institute suit and that the Patwari was not in collusion with the defendants. It did

not decide the question of the value of the crops alleged to have been removed and on these findings dismissed the suit.

The plaintiff went up in appeal. The learned Judge of the lower appellate Court has rightly found that the *patta* given by Qutubuddin was not for a period of more than a year and that the rent reserved could not be said to have been more than Rs. 100 in value. The *patta*, therefore, did neither require stamp nor registration (see, in this connection, Schedule I, Art. 35, Exemption A, of the Stamp Act of 1899, also Government Order No.048/VII—I—34—I dated the 3rd of December 1885 published in the N. W. P. Gazette of 1885, Part I, page 579). The *lambardar* has a right to give a lease of *zemindari* property having regard to the particular season [*vide* the case of *Muhammad Kazim* v. *Miyan Khan* (1). In this case, having regard to the words of the *patta* and specially to the fact that the land gained by alluvion was to be measured later on, this *patta* could not refer to more than that particular year. There was no certainty that the same land or the same quantity of land would emerge from the river the succeeding year. This *patta* could not, therefore, be said to be one for more than one year nor could it be said that the rent reserved was more than Rs. 100. This *patta* by the *lambardar* was, therefore, valid and the defendants were justified in cultivating the land. The lease was, therefore, admissible in evidence and required neither a stamp-duty nor registration. These were the only grounds pressed in the appeal. Under these circumstances, it is not necessary to consider the question whether a second appeal lies or not. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

---

(1) [1907] 29 All. 554—4 A.L.J. 538—(1907) A.W.N. 165.

1924 ALLAHABAD 460

KANHAIYA LAL, J.

Mata Ghulam—Plaintiff—Appellant.

v.

Sheo Mangal and others — Defendants—Respondents.

S. A. No. 349 of 1922, Decided on 21st June 1923, from a decree of Small Cause Court Judge, Allahabad.

Merger—Purchase of fractional share by tenant does not determine tenancy.

Where both the parties plfts. and defts. were admittedly co-sharers in the village by virtue of their purchase of certain fractional shares, but the plots in suit were held from before those purchases by the father of the defendants as a tenant from as far back as 30 years.

Held: that the purchase by the defendant of a fractional share in the village did not terminate their tenancy of the said plots, any more than the purchase of a fractional share by the plaintiff gave him a right to oust the defendants from that tenancy. P. 460 C. 2]

Kanhaiya Lal, J.—The question for consideration in this suit was whether the plaintiff was the proprietor of the plots in dispute. The defendants claimed to hold the same as occupancy tenants and alleged that the plaintiff was in cultivatory possession thereof as a sub-tenant on their behalf.

The Court below found that the plaintiff had failed to establish that he was the proprietor of the lands in suit. Both the parties are admittedly co-sharers in the village by virtute of their purchase of certain fractional shares but the plots in suit were held from before those purchases by Dwarka, the father of the defendants as a tenant from as far back as 30 years. The purchase by the defendants of a fractional share in the village did not terminate their tenancy of the said plots, in succession to Dwarka any more than the purchase of a fractional share by the plaintiff gave him a right to oust the defendants from that tenancy. They are co-sharers in the village and the plaintiff may have a right to sue for partition in which the proprietary right to the soil of the plots in dispute may be alloted to one party or another; but the tenancy itself would not be affected by that partition and would form a distinct entity by itself. The Courts below were therefore, right

in holding that the plaintiff did not occupy the disputed plots as proprietor notwithstanding his co-sharership in village. The appeal fails and is dismissed with costs.

Appeal dismissed.

1924 ALLAHABAD 461 (1)

DANIELS, J.

Joti Prasad—Applicant.

v.

Durga Prasad—Opposite Party.

Cr. Rev. No. 343 of 1923, Decided on the 13th July 1923, against the order of the S. J., Mainpuri.

Criminal P. C., S. 439—Procedings under S. 195—High Court will only interfere to prevent gross injustice.

In a case under S. 195, granting or revoking sanction, where the matter has already been before two Courts, the High Court can only interfere, if at all, in the exercise of its revisional jurisdiction under S. 439, and it will so interfere only in order to prevent a gross and palpable failure of justice 41 All. 649, 36 All. 403, Foll. [P 461 C 2]

S. N. Mookerjee—for Applicant.

Kumuda Prasad—for Opposite Party.

Judgment.—This is an application for revision of an order of the Sessions Judge of Mainpuri setting aside a sanction for the prosecution of Durga Prasad for perjury. Durga Prasad was arrested in possession of a battery said to have been stolen. He was the servant of Chaudhri Badan Singh, Honorary Magistrate. He had in his possession a letter which he said he had written at the dictation of Badan Singh showing that he was being sent to return the battery to one Joti Prasad. Joti Prasad was put on his trial under S. 411 I. P. C. but acquitted, the trying Magistrate being of opinion that the letter of Durga Prasad was not written at the dictation of Badan Singh and that Durga Prasad had sworn falsely in saying that it was so written. Badan Singh himself swore that the letter was genuine and this Court has already rejected an application for the prosecution of Badan Singh.

As this matter has already been before two Courts under S. 195, Criminal Procedure Code, this Court can only interfere, if at all, in the exercise of its revisional jurisdiction under S. 439, Criminal Procedure Code. Sir George Knox in *Chhoti* v. *Kacharu* (1), held that no revision lay in such cases. Mr. Justice Piggott in *Ahsan-Ullah Khan* v. *Mansukh Ram* (2), held that the Court could interfere but only in order to prevent a gross and palpable failure of justice. Whichever view is correct—and I incline to the view of Mr. Justice Piggott—this is not a case in which I shall be justified in disturbing the order of the Court below. The case against Durga Prasad stands on the same footing as that against Badan Singh. If Badan Singh's evidence was true that of Durga Prasad was true also. The Court below was of opinion that the evidence was not sufficient to justify a prosecution and I decline to interfere with this order. I, therefore, dismiss the application.

Application dismissed.

---

(1) [1920] 42 All. 649—18 A.L.J. 758—21 Cr. L. J. 746—58 I. C. 250.
(2) [1914] 36 All. 403—12 A.L.J. 511—15 Cr. L. J. 598—25 I. C. 350.

1924 ALLAHABAD 461 (2)

MEARS, C. J. AND PIGGOTT, J.

Bageshar Rai—Defendant — Appellant.

v.

Mt. Mahadei—Plaintiff — Respondent.

L. P. A. No. 83 of 1922, Decided on 26th February 1924, from the Judgment of Stuart, J., D/- 10th April 1922.

Hindu Law — Family Settlement— A clause providing for devolution of property of signatories on each other's survivor or survivors is good, but one providing for a rule of inheritance in derogation of rules of Hindu Law is bad.

It is perfectly open to the members of a Hindu family when partitioning certain property amongst themselves, to come to an agreement that on the death of any one of them his share should pass to the other or

others and that the right of inheritance should devolve on the last survivor after the death of all the others. What it is not competent for them to do is to lay down a rule of inheritance for the property in the hands of this last survivor, in derogation of the ordinary rule of Hindu Law. 18 W. R. 359 Ref. [P 463, C. 2. P. 464 C. 1]

S. N. Sen—for Appellant.

U. S. Bajpai—for Respondent.

Piggott, J.—In the suit out of which this appeal arises Mst. Mahadei claimed certain property as the daughter of one Ram Din Rai, alleged to have died as a separated Hindu. There were a number of defendants impleaded but the suit was contested only by one defendant viz: Bageshar Rai. He, we understand, was a half brother of Ram Din Rai, the two being the sons of one Jai Narain Rai, deceased, by different wives. In Bageshar Rai's written statement certain defences were set up which all the courts up to the present stage have found to have been false defences. Musammat Mahadei was put to proof of the fact that she was the daughter of Ram Din Rai and the finding is that she has established this fact. It was also pleaded that Bageshar Rai was joint with Ram Din Rai at the time of the latter's death. The finding in favour of the plaintiff on this point is no longer challenged. It so happened, however, that as part of her evidence on the issue of jointness or separation, the plaintiff put in a certain written agreement of the 5th of March 1902. We find that this agreement was of the nature of a family settlement between a number of persons, members of the same family, who having quarrelled amongst themselves about their rights in certain property desired to settle all disputes between them and to divide the property by partition amongst all of them. There were, if we may so express it, three groups of executants. One of these groups consisted of Jai Narain Rai and his two sons, Ram Din Rai and Bageshar Rai. One effect of the agreement was to assign certain property separately to Ram Din Rai and to Bageshar Rai. It is the property separately taken by Ram Din Rai under this agreement which is in issue in the present suit. There were three other clauses which have been set forth in the judgment now under appeal. When this document was put in evidence in the trial Court a new contention was founded upon it by the defendant Bageshar Rai. This is dealt with in the judgment of the trial Court, though the learned Subordinate Judge remarks that the contention was raised at a very late stage In effect this contention was that, by one of the clauses in this agreement of the 5th of March 1902, Bageshar Rai was entitled to succeed to the separate estate taken by Ram Din Rai under the agreement itself, to the exclusion of the plaintiff Mst. Mahadei. The trial Court having repelled this contention and decreed the plaintiff's suit, Bageshar Rai, in his memorandum of appeal to the District Judge, put this contention in the forefront of his pleading, though we regret to notice that he again raised the two defences which have been found to be false. The learned District Judge came to the conclusion that Bageshar Rai's plea based upon the deed of the 5th of March 1902 must prevail. It is evident that he arrived at this decision with some reluctance. He says that the defendant Bageshar Rai had purposely endeavoured to keep back this deed of the 5th of March 1902 because it was decisive against him on the issue of jointness or separation. He marked his sense of the improper manner in which the suit had been defended by depriving Bageshar Rai of the costs in both Courts. At the same time he felt compelled to dismiss the plaintiff's suit, holding that so far as Ram Din Rai was concerned his execution of the agreement of the 5th of March 1902 amounted to a bequest in favour of Bageshar Rai of the property taken by himself under that deed, in the event of Bageshar Rai surviving him The plaintiff came to this Court in second appeal and a learned Judge of this Court has allowed this appeal and has once more decreed the plaintiff's suit. As we understand the decision before us, the

earne Judge of this Court holds hat, although the provisions of the deed of 5th March 1902 were correctly interpreted by the learned District Judge and would confer according to their tenor a right of inheritance upon Bageshar Rai in the property in suit to the exclusion of Mst. Mahadei, or any other daughter of Ram Din Rai, nevertheless the agreement was inoperative as a testamentary disposition of property because it offended against the principles laid down in the Tagore case-vide *Jotindra Mohum Tagore* v. *Sanendra Mohan Tagore* (1), further affirmed and applied by their Lordships of the Privy Council in a later case *Purna Sashi Bhattacharji* v. *Kalidhan Rai Chowdhury* (2). The appeal before us under the Letters Patent is by the defendants. There are one or two subsidiary matters which we must clear out of the way. We have taken note of the manner in which the defence based upon the agreement of the 5th of March 1902 was introduced in the trial Court. We agree with the learned District Judge that the conduct of the suit by the defendant Bageshar Rai was reprehensible and that in any event the Court is bound to mark its sense of the nature of his conduct when it comes to pass its order in the matter of costs. At the same time we are bound to take account of the defence based upon the agreement of the 5th of March 1902 and that defence must prevail if it is well-founded in law, that is to say, if the provisions of the agreement are not repugnant to some such principle of law as the learned Judge of this Court conceived to be applicable to the same. In the second place, it has been contended that the terms of the agreement itself do not amount to a bequest by Ram Din Rai in favour of Bageshar Rai, or by Bageshar Rai in favour of Ram Din Rai, whichever should be the survivor. This contention turns in part upon the interpretation of the word "la-aulad", used in a certain paragraph of the agreement. The Courts below, and also the learned Judge of this Court, have held that in this particular context the expression la aulad can only mean without male issue". We have been asked to reconsider that decision, but in view of the terms of the document as a whole it seems to us clearly correct. As regards the precise terms of the clause prescribing the manner in which the property dealt with under this deed of agreement is to descend upon the death of the several executants, we are not bound to consider anything more than the application of those terms to the particular group of executants consisting of Jai Narain Rai and his two sons. So considering it, we have no doubt whatever that each of these three executants did agree, and intended to agree, that whichever of them died first the property taken by him under the deed should devolve in equal shares upon the other two, and that the last survivor of the three should inherit whatever was left in the hands of his father or brother, as the case might be. This being our interpretation of the agreement, we are left to determine only the question of law on which the learned Judge of this Court differed from the District Judge, viz; whether these terms are enforcible. The principle laid down in the Tagore Will case as applied to the facts now before us was in substance this. It was perfectly open to Jai Narain Rai, Ram Din Rai and Bageshar Rai-a Hindu father and his two sons-when partitioning certain property amongst themselves, to come to an agreement that on the death of any one of them his share should pass to the other two and, after the death of any two of them, the right of inheritance should devolve on the last survivor. What it was not competent for them to do was to lay down a rule of inheritance for the property in the hands of this last survivor,

(1) [1872] I.A Sup. 47—18 W.R 359 —9 B.L.R. 377—2 Sather. 692—3 Sar. 82 (P C.)

(2) [1911] 38 Cal 603—15 C.W.N. 693—8 A L.J. 681—13 Bom. L.R. 451—14 C.L.J. 1—11 I.C. 412—(1911) 2 M.W N 403—10 M.L.T. 361—21 M.L J. 1119 (P.C.)

in derogation of the ordinary rules of Hindu Law. There is nothing contrary to this in the second Privy Council case relied upon by the learned Judge of this Court. Their Lordships were there dealing with a document executed by two brothers. This document purported to prescribe a rule of succession for their property after the death of either or both of them. One of the two brothers having died, the property devolved upon his son. It would no doubt have done so under the ordinary Hindu law, but it seems to have been taken for granted that the son in question took under the terms of the will or agreement executed by his father and his uncle. The question for determination before the Court in that case was the devolution of the property after the death of the son who had so taken under the terms of the said agreement. It was held that he had not taken the property subject to any special rule of devolution laid down in the agreement; but that on the contrary after his death the property descended under the ordinary rules of Hindu law. That case would be directly in point if we were dealing with a dispute as to the succession to his property now in suit upon the death of Bageshar Rai. In our opinion it does not apply to the question actually in issue before us. On the other hand we have been referred to a case decided by a Bench of this Court which is almost directly in point that of *Kanti Chandra Mukerji* v. *Ali Nabi* (3). The learned Judges who decided that case enforced as between the signatories to the same, who were Hindu brothers, a family settlement providing for the devolution of property upon the death of any one of the signatories almost exactly similar to that embodied in the agreement of the 5th March 1902. In our opinon therefore the learned Judge of this Court was in error in reversing the decision of the lower appellate Court on the ground which he took. Allowing this appeal we set aside the judgment of the learned Judge of this Court and restore that of the lower appellate Court dismissing the plaintiff's suit. For reasons which we have sufficiently indicated we leave the parties to bear their own costs throughout.

Appeal allowed.

(3) [1911] 33 All. 414—9 I.C. 935—8 A.L.J. 199.

✱ 1924 ALLAHABAD 464

KANHAIYA LAL, J.

Mt. Rukka and others–Defendants & Appellants.

▼

Chhiddu and others—Plaintiffs & Defendants—Respondents.

S. A. No. 788 of 1922, Decided on 26th November 1923, from the decree of D. J. Pilibhit.

✱ *Hindu Law — Stridhan—Succession—Second marriage.*

The second marriage of a Hindu woman of the Mali caste does not affect the rights of the collaterals of her first husband to succeed to her stridhan property. [P. 464 C. 2]

Girdhari Lal Agarwala—for Appellants.

Kailas Chandra Mital—for Respondents.

Kanhaiya Lal, J.—There is no force in this appeal. *Mt.* Kausilya was a *malin* by caste. She was first married to Behari in one of the approved forms. That fact was admitted. On the death of Behari, she was married to Bidhi. On her death, there were two sets of claimants to her *stridhan*. One set comprised Chhiddu and Bidhi who are brothers of Behari. The other set comprised the sister of *Mt.* Kausilya and the husband of that sister and the husbands of certain other deceased sisters. The latter have clearly no title. Chhiddu and Bidhi were entitled to the *stridhan* of *Mt.* Kausilya by reason of her marriage to Behari in one of the approved forms. The second marriage does not affect the right to which the plaintiff became entitled by virtue of the 1st marriage. The appeal, therefore, fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

✱ 1924 ALLAHABAD 465

MEARS, C. J. AND PIGGOTT, J.

Anantoo Kalwar and another—Appellants.

v

Ram Prasad Tiwari and others—Respondents.

L. P. A. No. 102 of 1922, Decided on 4th January 1924.

✱ *Hindu Law—Joint family — Alienation by father as manager for antecedent debt binds sons but not other coparceners.*

There is a very clear distinction between cases in which an alienation for an antecedent debt is made by a Hindu father and is being contested by the sons and cases in which an alienation for an antecedent debt is made by the managing coparcener of a joint undivided estate and is being contested by other coparceners, not the sons of the person making the alienation. In the former case the sons are bound by the father's alienation to the extent of their interest in the joint family property; in the latter case the coparceners are not bound by the manager's alienation and their interest in the joint family property is unaffected by it. 21 A. L. J. 943 Foll. [P 466, C 1]

Ram Nama Prasad—for Appellants.

Kumuda Prasad and *Gadadhar Prasad*—for Respondents.

Piggott, J.—The essential facts to be considered may be stated thus. Two brothers, Sahdeo and Jagat were members of a joint Hindu family. We must take this fact as established by the findings which have been recorded although there has been some argument to the contrary before us. Jagat died first, leaving two sons Ram Das and Ram Prasad, of whom Ram Das was very considerably the older. Sahdeo has died since, leaving one son of the name of Ram Rup who is a major and another son named Lalji who was still a minor on the date of the institution of this suit. We may take it that after the death of Jagat there was in ... ... existence a joint Hindu family consisting of Sahdeo, his two sons Ram Rup and Lalji and his two nephews, Ram Das and Ram Prasad. On the 30th of June, 1910, two members of this joint family were majors and the rest were minors. The two major members of the family, Sahdeo and Ram Das, joined in executing a deed of sale by which they conveyed certain property to the defendants in this suit for a consideration of Rs. 699. Of this they took Rs. 39-12-0 in cash, and the balance went to pay off two mortgages previously contracted in the years 1900 and 1905. The former of these mortgages had been jointly contracted by the brothers Sahdeo and Jagat. The other mortgage was contracted by Sahdeo alone, though he purported to act for himself and his two nephews, who were then minors.

The present suit was brought in the year 1919 by Ram Rup and Lalji, sons of Sahdeo, and Ram Prasad, son of Jagat, to have this sale set aside. Ram Das refused to join in the suit and was impleaded as a defendant. Two Courts, after going into the facts at considerable length, dismissed the suit in its entirety.

A learned Judge of this Court came to the conclusion that, in view of the decision of their Lordships of the Privy Council in *Sahu Ram Chander's* case, the mortgages of 1900 and 1905 could in no event be relied upon as constituting antecedent debts, for the discharge of which Sahdeo and Ram Das, acting as the sole adult members of a joint Hindu family, could alienate property belonging jointly to themselves and to the minor members of the said family. He did not think it necessary to go further into the history of the transactions between members of this family and their creditors, and he seems to have overlooked the circumstance that he had before him a clear finding, whether right or wrong, that the sum of Rs. 39-12-0 taken in cash as part of the consideration for the sale was taken for family necessity. He has set aside the decrees of both Courts below and has decreed the claim of the plaintiffs for possession over the entire property specified at the foot of the plaint, including the share which Ram Das would have taken on a partition between himself and the other members of the joint family.

The case has been argued before us at some length; but it must be remembered that since the decision of the learned Judge of this Court

was passed their Lordships of the Privy Council have reviewed the entire question in the case of *Raja Bahadur Raja Brij Narain Rai* v. *Mangla Prasad Rai* (1). On the principles laid down in that ruling it seems to us beyond question that the sons of Sahdeo, are bound, to the extent of their interest in the joint family property, by Sahdeo's action in alienating the same in order to pay off antecedent debts incurred by himself. We think that Ram Das had a perfect right to join in executing this deed in order to pay off an antecedent debt incurred by his own father Jagat, although we do not think that the decision of their Lordships of the Privy Council goes the length of holding that Ram Das could for this purpose alienate the interest of his own brother in the joint family property. Their Lordships seem to us to draw a very clear distinction between cases in which the alienation is made by the father and is being contested by his sons, and cases in which alienations made by the managing co-parcener of a joint undivided estate are being contested by other co-parceners, not the sons of the person making the alienation. The conclusion, we come to, therefore, is that this suit should have been decreed only to the extent of the ¼th share which the plaintiff Ram Prasad would take in the joint family property on a partition. Setting aside the decree of the learned Judge of this Court, we give a decree in favour of the plaintiff Ram Prasad to the extent of a ¼th share in the property specified at the foot of the plaint. The parties will pay and receive costs throughout in proportion to failure and success. The costs of both hearings in this Court will include fees on the higher scale

Appeal allowed.

(1) 1924 P. C. 50.

1924 ALLAHABAD 466

STUART, J.

Lala Sunder Lal—Plaintiff—Appellant.

v.

Bhup Singh and another — Defendants—Respondents.

S. A. Nos. 1025 and 1029 of 1922, Decided on 21st January 1924 from the decree of D. J. Shahjahanpur.

Civil P. C., S. 11—Court competent to try.

A decision of an Assistant Collector of the Second Class about a certain Khudkhasht being owned by one party does not bar a suit in the Court of an Assistant Collector of the First Class. [P. 466, C. 2]

M. L. Agarwala—for Appellant.

S. P. Sinha—for Respondents.

Judgment.—The learned District Judge has dismissed these appeals on the ground that the suits were barred by *res judicata.* I do not agree with this view. It was decided by an Assistant Collector of the second class in a suit for arrears of rent that the land was the defendants' *khudkasht.* The question whether this land was or was not the defendants' *khudkasht* was directly and substantially in issue in a former suit between the same parties litigating under the same title but it was not in issue in a Court competent to try the subsequent suit. So the decision in the former case cannot operate as *res judicata* in the present case. It is unnecessary to say much more. The provisions of S. 199 of Local Act II of 1901 have no bearing on the matter. It is true that such a decision of an Assistant Collector of the second class would operate as a decision of the Civil Court in a subsequent suit in the Court of an Assistant Collector of the second class but it would have no effect in the Court of an Assistant Collector of the first class.

I, accordingly, allow these appeals and as I have reversed the decision of the learned District Judge on a preliminary point of law I send the appeals back to him to restore under their original numbers and decide on the merits. The costs will follow results.

Appeals allowed.

** 1924 ALLAHABAD 467

MEARS, C. J. AND PIGGOTT, J.

A. C. Mukerji—Defendant—Appellant.

v.

The Municipal Board, Benares—Plaintiffs—Respondents.

F. A. No. 50 of 1923, Decided on 28th November 1923, from the Decree of D. J. Benares.

(a) *U. P. Municipalities Act, S. 326—Waiver.*

Plea of want of notice under S. 326 can be waived. [P 470 C 2]

* (b) *Limitation Act Art, 90—Suit against executive officer by municipality.*

A suit by municipality against its executive officer for loss sustained by it owing to disregard of directions amounting to negligence or over confidence in the honesty of others is governed by Art. 90. [P 470, C 2 P 472 C 1]

** (c) *Master and servant—Negligence—Servant is liable for negligence in non-observance of instructions which resulted in embezzlement.*

Where it can be shown that a loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence, or over-confidence in the honesty of others, such misconduct on the part of an agent is clearly actionable. [P 471, C 2]

B. E. O'Connor and *Peary Lal Banerjee*—for Appellant.

Kailas Nath Katju—for Respondents.

Piggott, J.—The suit out of which this appeal arises was instituted by the Municipal Board of Benares against five defendants, the sons of one Jogesh Chander Banerji, deceased, a man who had been for many years in the service of the said Municipal Board as Head Accountant. The Plaint was signed and verified by Rai Bahadur A. C. Mukerji as Executive Officer of the Board. In the written statement filed by the defendants certain pleas were taken which involved the suggestion that, if any liability did attach to the late Jogesh Chander Banerji, that liability was at least shared by certain superior officials in the employment of the Municipal Board, and more particularly by its Executive Officer. Upon this A. C. Mukerji addressed to the Chairman of the Municipal Board a letter, dated August 27, 1922, which is to be found at page 199 of our record. He referred to the allegations made in the written statement of the defendants as allegations against himself, and asked the Board to place him in such a position that "I may appear before the Court to answer any charge that may be levelled against me." The Municipal Board thereupon relieved A. C. Mukerji of his duties as Executive Officer, appointing one Hari Prasad Paladhi in his place, and through this gentleman as officiating Executive Officer they filed an amended plaint, in which A. C. Mukerji was impleaded as defendant No. 6, and allegations were made putting forward a cause of action against him along with the defendants originally impleaded.

The suit was instituted in the Court of the Subordinate Judge of Benares, but the District Judge took it on to his own file and tried it out himself. He has decreed the Board's claim for a large sum of money jointly and severally against all the defendants. The appeal is by Rai Bahadur A. C. Mukerji only, and it may be convenient hereafter to refer to him simply as "the appellant."

In view of this fact, and taking into consideration the pleadings raised by the memorandum of appeal, we are entitled to treat certain facts found by the trial Court as no longer in controversy.

The claim is on account of money belonging to the plaintiff Board embezzled during the period commencing with the 14th of October, 1911 and ending on the 17th of December, 1919. These defalcations were committed by the late Jogesh Chander Banerji, whom we may conveniently refer to hereafter by the name of Jogesh Babu, ordinarily applied to him by the witnesses. The said Jogesh Babu went on leave about the date of the last defalcation, and he died on January 12th, 1920. The embezzlements alleged against him in this suit reached a total of Rs. 65,065-13-7. They were all taken from a single item of Municipal revenue; and it will be convenient to explain at once the nature of this item of revenue and the manner in which the defalcations were committed.

The City of Benares is visited by pilgrims in large numbers from all parts of India. This influx of visitors naturally entails on the Municipal Board of Benares a good deal of expenditure in various directions. It was, therefore, considered just, that the Board should be permitted to raise a substantial portion of its income by means of a visitors' tax. This was first imposed in the year 1909. It was realised by means of a small charge superadded by the Railway Companies concerned to the price of every ticket issued to their stations at Benares. There are two Railway administrations concerned, namely, the Oudh and Rohikhand Railway with its head office at Lucknow, and the Bengal and North-Western Railway with its head office at Gorakhpur. It was incumbent on the Railway administrations to keep proper accounts of the money collected by them as an extra charge on tickets issued to Benares and to remit that money from time to time to the credit of the Municipal Board. The two Railway Companies necessarily adopted different methods for remitting money. There are branches of what is now the Imperial Bank of India, and used to be Bank of Bengal, both at Lucknow and at Benares. The Oudh and Rohilkhand Railway, therefore, was in a position to make its remittances by cheque, and did so. The Bengal and North-Western Railway made the requisite payments either by hand or through the post. When convenient, a servant of the Railway, described as Railway pay clerk, attended in person at the Office of the Municipal Board and paid in the money under the prescribed form of tender, and subject to all the procedure which would govern a payment made to the Board by any private individual The procedure adopted when money was sent through the post, needs to be explained in detail. If, for instance, a sum of Rs. 744-12-8 had to be remitted, the bulk of the money, that is to say, Rs. 740 would be sent in the shape of Government currency notes by registered letter, the small balance of Rs. 4-12-8 being remitted by money order. It would seem that the currency notes were sometimes sent entire by registered post, insured, and sometimes the first halves of the notes were sent by registered-letter, the second halves following after receipt of the first had been acknowledged. With regard to the currency notes thus received through the post the proper form of procedure was for a Municipal clerk, usually the Head Accountant, to draw up in duplicate a form of tender such as would have been used if the payment had been made by a private individual in person. These forms of tender are known as *chalans*, and one of the *chalans* drawn up in connection with each payment would remain in the Municipal Office for record, while the other, having been signed by an official empowered to sign receipts on behalf of the Board, would be returned to the Railway administration and would serve as a formal receipt for payment made. Every *chalan* was required to have endorsed upon it a serial number, to be reproduced in the daily cash book maintained at the Board's office, which would serve as a means for identifying the particular payment and checking the entry in the cash book by comparison with the file of *chalans*. There was also maintained a register in which the *chalans* were entered by their numbers, presumably with particulars sufficient to identify them. The defalcations committed by Jogesh Babu were practically confined to the misappropriation of money remitted by the Bengal and North-Western Railway through the post in the manner above described. There was one defalcation in connection with a cheque received from the Oudh and Rohilkhand Railway, to which we shall refer again later. There was no embezzlement of any money tendered in person at the Board's Office by a Railway pay clerk from the Bengal and North-Western Railway. The above remark may appear to need some qualification with reference to a sum of one anna, which appears in the schedule appended to the record as having been embezzled out of a remittance of over Rs. 1,100 made by a Railway pay clerk on the 25th of July, 1912: but as a matter of fact there is no claim in respect of this item of one anna, and what probably happened was nothing more

than a slight clerical error in the accounts. With regard to the embezzlements of money sent through the post office, we propose to examine these presently in considerable detail; but we may explain at once that the *modus operandi* was, broadly speaking, simplicity itself. Having got the currency notes, and as a general rule the small sum remitted by money order as well, into his hands, Jogesh Babu prepared *chalans* in the usual form, but assigned to the said *chalans* wholly fictitious numbers and never recorded them in the register of *chalans* at all. He sent a receipt for the money to the Railway Company over his own signature on the duplicate form of *chalan*, but now and then on a special receipt form sent by the Railway Company itself along with their remittance. He then pocketed the money, making no entry whatsoever in the daily cash book, or in any other Municipal account of its having been received. The Railway filed their receipt and entered the money in their account as payments duly made and acknowledged. The auditors who examined the accounts of the Municipal Board were quite helpless against this form of fraud. The *chalans* drawn up by Jogesh Babu had been made away with, and were not traceable in any register, and there was no hint to be discovered in the daily cash book, or anywhere else, of such payments having ever been made. In so far as the above remarks are subject to any qualification with regard to particular items, this will be duly noted presently; but in general outline, the above is a correct statement of the nature of the frauds perpetrated on the plaintiff Board.

We have now to consider the nature of the claim preferred by the Municipal Board as against the appellant A. C. Mukerji, with whom alone, we are now concerned The case against him was preferred in the alternative. In the first place, it was alleged that the appellant had knowingly participated in the frauds committed by Jogesh Babu and had presumably shared with him the proceeds of those frauds. In the second place, the case against him is that, if he was not a participant in the frauds committed by Jogesh Babu and cognizant from the first of that gentleman's operations, then he had so facilitated those operations by negligence in the discharge of his duties and disregard of rules laid down for his guidance, as to make him civilly liable for the consequences of his own negligence and misconduct. The learned District Judge has found that the appellant was from the first cognizant of Jogesh Babu's proceedings and a participator in his acts of embezzlement. He has rightly remarked that, on this view of the case, the question raised in the alternative as to the appellant's liability on the ground of negligence does not really arise; but he has recorded his opinion that, if he had not held the appellant liable on the ground of active participation in the fraud, he would certainly have found him liable on the ground of negligence. It seems to us that the points for our determination in appeal can best be stated in the form of three issues.

(1) Is the trial Court right in its finding that the defalcations alleged in the plaint were the result of a conspiracy between the appellant A. C. Mukerji and the late Jogesh Chander Banerji, and that the appellant was throughout cognizant of and a participant in the embezzlements committed? (2) If this first issue be found in favour of the appellant, then, were those embezzlements the result of such negligence and breach of duty on his part as to make him liable to account to the Municipal Board for the money? (3) If this second issue be found in the affirmative, then is the appellant liable for the whole of the money proved to have been embezzled or for some part only of the same, and if so for what part?

The whole case has been argued out before us in a thoroughly competent manner by the learned counsel engaged on both sides, and in dealing with the mass of evidence on the record, we have enjoyed one advantage over the learned District Judge. There will be found appended to our record certain schedules, in which the information available from the record itself recording all remittances made by the two Railway companies on

account of visitors' tax, and all the embezzlements committed by Jogesh Babu, are set forth in detail and classified in various ways. There is no information in these schedules which was not before the learned District Judge, and we do not suggest that any particular fact set forth in the schedules was not present to his mind; but it has been undoubtedly a great advantage to us to have the history of the case under our eyes in this particular form. We think it quite possible that the learned District Judge himself might have modified the conclusions at which he arrived, if he had been able to review the entire case in the manner in which we have done.

It will perhaps be convenient for us to state at once in concise form the conclusions we have arrived at on the three issues. Our reasons for these conclusions will be sufficiently indicated in the comments we propose to make on the evidence in the course of our view of the same.

On issue No. 1 our finding is that it is not proved that the appellant A. C. Mukerji was a participant in, or cognizant of any one of the acts of embezzlement committed by Jogesh Chander Banerji.

Issue No. 2. The appellant was negligent in the discharge of his duties and did contravene rules laid down for his guidance, which rules must in our opinion be treated for the purposes of this case as instructions given by a principal to an agent. By reason of this negligence and breach of duty, the appellant is, in our opinion, liable to account to the plaintiff for a number of embezzlements, in respect of which it can be held with certainty that the loss of the plaintiff's money is traceable to negligence or breach of duty on his part.

We reserve our precise finding on the third issue as this can only be arrived at in the course of a detailed discussion of the evidence. We may, however, dispose at once of a question of law raised in respect of the second issue. It was of course conceded that, in so far as the action against the appellant was founded upon fraud, the suit was well within limitation; but it was contended that, if once the question of fraud be found in favour of the appellant, then any claim against him based upon misconduct, or alleged breach of duty, is doubly barred, both under article 2 of the Indian Limitation Act, and also by the special provisions of S. 326 of the Municipalities Act, No. 2 of 1916. We find no force in either contention. This branch of the suit is, in our opinion, governed by Article 90 of the Schedule to the Indian Limitation Act, and there is no need even to invoke the provisions of S. 18 of that Act in order to make the suit within time. We very much doubt whether the provisions of S. 326 of the Municipalities Act apply at all to a suit by a Municipal Board against one of its own servants. But, in any case, any plea as to want of notice was in our opinion definitely and conclusively waived by Mr. Mukerji's letter of the 27th August, 1922, already referred to. It has been sought in argument to represent that letter as meaning nothing more than that the writer desired to be put in the witness box and examined on oath; but this is futile. When that letter was written the appellant's position on the record was virtually that of plaintiff. He could have gone into the witness box in that capacity, and would indeed have been obliged to do so at some stage or other of the hearing. We agree with the learned District Judge that the only possible interpretation of the appellant's letter is to treat it as a request to be impleaded as defendant in the suit.

The first point we have to make is, that the visitors' tax was introduced after the appellant's appointment as Secretary of the Municipal Board, that is to say, it was a new thing in his time. The arguments addressed to us, as to his having merely followed a vicious system already in existence at the time when he entered upon his duties, can only be accepted with some reservation when they are applied to this matter of the visitors' tax. Not only was the tax a new one, but it was of a peculiar character. The work of collection was being done by the two Railway Companies, who would necessarily have to maintain

proper accounts of their own. The income was of such a nature as to preclude the possibility of maintaining a demand register, which is always a powerful check upon the dishonesty of subordinate officials. One would have expected an officer holding the responsible position of Secretary of the Municipal Board to have been vigilant in a matter of this sort, and to have set himself, not merely to keep a watchful eye over the accounts as regards this source of income, but even to devise, if possible, additional safeguards. The most obvious of these would of course have been to ask the Railway Companies to submit quarterly returns, showing at least the total sums which they respectively claimed to have paid into the Municipal Board under this head in the course of the quarter. To us, who are wise after the event, this seems so simple and obvious a precaution that it is difficult to understand why it was never suggested either by the Secretary himself, or by any chairman, or other member of the Municipal Board. The responsibility for the omission must, we think, be shared between the appellant and his employers. We mention the matter chiefly as showing how easy it is to be wise after the event. It may serve as a warning against pressing too far against the appellant any argument based upon the suggestion that it appears incredible that he should have honestly neglected some particular precaution.

[Here the judgment further discussed evidence and proceeded as follows :—]

In the course of this review of the evidence, we think we have sufficiently indicated our reasons for finding in favour of the appellant on the issue of fraudulent conspiracy, or wilful connivance in the frauds perpetrated by Jogesh Babu. We are satisfied, on the whole, that active participation in these frauds, or even guilty knowledge of the same, is not brought home to the appellant by that evidence. There is certainly not one proved fact in the case on which the Court can lay its hand and say that this could not have occurred as it did if the appellant had not been in collusion with Jogesh Babu. There are, on the contrary, a number of circumstances which suggest that Jogesh Babu was afraid of detection by the appellant and was taking precautions against such detection. We may note also that there is an entire absence from this record of the sort of evidence which one frequently finds in cases of embezzlement, and which one would expect to find in a case like the present in which the sums embezzled were so considerable. We refer to evidence tending to suggest that the appellant was living beyond his means, or was otherwise accumulating resources in money or in any species of property, not to be accounted for by his ostensible sources of income. Nor when the appellant was in the witness box, was there any cross-examination directed towards making good any such point against him.

Coming to the issue of negligence, it seems to us that we have already given abundant reasons for imputing to the appellant negligence of a very serious character. We need not go over the ground which is sufficiently covered by the judgment under appeal in order to lay stress upon the various rules and regulations by which the appellant was bound. The cardinal point to our minds is his responsibility for the entries in the daily cash book. It was certainly never intended that the signature of the Secretary, and later that of the Executive Officer, appearing at the close of each day's receipt entries in this cash book, should be a mere formality. The Municipal Board relied upon these responsible officers exercising a real and effective supervision over the preparation of this most important register. This fact was emphasised in the rules and regulations laid down for the guidance of these officials, and as against the appellant in this particular case we regard those rules as being of the nature of instructions issued by a principal to his agent as to the manner in which the said agent was to discharge the duties assigned to him. Where it can be shown that a loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued

to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence, or over-confidence in the honesty of others, such misconduct on the part of an agent is clearly actionable. That the appellant is liable to account to the Municipal Board for at least a substantial part of the money embezzled by Jogesh Babu, while the latter was working under the direct supervision of the appellant, we hold, to be quite beyond doubt.

The precise assessment of that responsibility in respect of every item in the schedule before us is a matter of some delicacy. On behalf of the respondent it was argued that, even on the basis of negligence alone, the appellant was liable for the entire amount of Jogesh Babu's defalcations. We could only accede to this contention on one or other of two alternative views. The first would be that, if the appellant had strictly observed the rules laid down for regulating the discharge of his duties, the frauds committed by Jogesh Babu would have been wholly impossible, or would have been immediately detected. The alternative would be, to hold the appellant liable for all defalcations committed after some specified date, on the ground that, but for gross and actionable negligence on his part, the detection of the frauds which were going on must have taken place at least by the date so specified. There is a good deal to be said for both these contentions and more especially for the latter; but on the whole they fall short of satisfying us. Looking more particularly at the cautious manner in which Jogesh Babu embarked upon his career of fraud, we are not prepared to say that due diligence on the part of the appellant would have precluded him from making the attempt, or would have resulted in his immediate detection. With reference to the second contention, our real difficulty would be, to fix any one definite date from which it could be given effect. We are gravely conscious of the responsibility which attaches to us in determining this issue, in view of the large number of Government officials, employees of railways, of corporations, of business concerns of all sorts, on whom it has been laid, frequently, as a part only of multifarious duties to bear the responsibility of checking and certifying to the correctness of accounts, the actual maintenance of which is necessarily on the shoulders of lower paid subordinates. We can certainly commit ourselves to no conclusions which would reduce the responsibility of such superior Government servants or other officials, to a mere farce. On the other hand, we feel that a too stringent insistence upon their responsibility in the matter of the observance of all rules and regulations laid down for their guidance might result in making it practically impossible for some of them to carry on the work laid upon their shoulders. In the present case our decision is actually influenced to a considerable extent by the knowledge we have, of the multifarious nature of the duties laid upon the appellant as Secretary, and afterwards as Executive Officer, of the Municipal Board. We have decided to hold him liable in respect of those items only where the evidence affects him with personal notice of the arrival of a remittance, the embezzlement of which he failed to prevent, or where, in our opinion the embezzlement would have been prevented by the most ordinary and casual scrutiny of the entries in the daily cash book before he appended the signature by which he certified to their correctness. On this basis we have drawn up the following schedule, which shows the appellant as liable for the total sum of Rs. 21,439-4-7, shown at the foot of the same.

In the result, therefore, we modify the decree of the Court below as follows: that the decree will stand in its entirety, including the order for costs, as against the defendants other than Rai Bahadur A. C. Mukerji. As against this defendant the decree will provide that he is jointly and severally liable along with the other defendants for the sum decreed, up to a limit of Rs. 21,439-4-7 and that he will bear his own costs in the trial Court.

Decree modified.

✱ 1924 ALLAHABAD 473

MUKERJI AND DALAL, JJ.

Md. Abbul Hasan—Plaintiff—Appellant.

v

Fida Husain and others—Defendants—Respondents.

F. A. No. 341 of 1921, Decided on 29th April 1924, from the decree of the Subordinate Judge of Budaun.

✱ *Registration Act, S. 28 — Actual real title of mortgagor does not affect the question of validity—Intention of parties to defraud is necessary.*

Where a small grove which was the only part of the mortgaged property within the jurisdiction of the Sub. Registrar did in fact exist and was believed by both parties to belong to the mortgagor and where both parties intended to deal with it.

Held: that there was no fraud on the Registration Act and that the actual existence of the mortgagor's title did not affect the question. [P. 473, C. 1 & 2]

Iqbal Ahmad—for Appellant.

Surendra Nath Sen and *Ajudhia Nath*—for Respondents.

Mukerji, J.—This was a suit for sale and on its dismissal the plaintiff has appealed. The mortgagee is the plaintiff Abbul Hasan. The defendants are one mortgagor, the representatives in interest of two deceased mortgagors, and two other defendants Nos. 10 and 11 who are subsequent mortgagees. One plea raised by the subsequent mortgagees was that the registration was a fraud on the registration law and, therefore, invalid. This plea was accepted by the learned Subordinate Judge who held the document to be invalid for want of registration. We do not agree with this finding of the lower Court. The property, a grove situated within the jurisdiction of the Sub-Registrar of Budaun, did exist and mortgagor and mortgagee had reason to believe that it belonged to one of the mortgagors, Baqar Husain. There was no collusion between the mortgagor and the mortgagee and a fictitious property was not entered with a view to obtain registration in a registration office where it would not otherwise have been possible. In *Pahladi Lal* v. *Mt. Laraiti* (1) a Bench of this Court considered the Privy Council judgment reported in 41 Calcutta at page 972. As in that case, the facts here are, that the parties intended to deal with the property that is, the grove situated in Ujhani; so the condition of the mortgagor's real title does not affect the question of registration.

The appeal, however, must fail on the point of limitation. This plea was not taken in the first Court but it is one which may be taken by the defendants at any stage of the litigation. The learned Counsel for the plaintiff-appellant submitted that we should not permit this plea to be taken in appeal. We, however, see no reason to disallow it. Obviously the legal advisers of the defendants made a mistake in not raising it in the first Court, and there is no bar to the defendants raising it here. Of course, the question of costs will be considered when we come to deal with it.

The document was executed on 30th October, 1905. The translation of the document given at page 42 is fairly correct. The relevant portion may be quoted:

"We agree to pay the aforesaid amount in 9 years, with interest at 12 annas per cent per month. We shall pay the amount of interest annually. Should we fail to pay the interest annually, the unpaid amount of interest shall be added to the principal and the total shall carry interest at the aforesaid rate. This stipulation shall continue till the payment of the entire amount due under this bond. The mortgagee shall, in case of default, be competent to recover from us the amount due to him within the period stipulated."

It is admitted that interest was never paid, so the amount of the bond became recoverable on 30th October, 1906, and the last day of limitation was the 30th October, 1918. The suit was instituted on 14th September, 1920, and was, therefore, time-barred. It was argued by the appellant's learned Counsel that the "default"

(2) [1918] 16 A. L. J. 871.

in the last sentence quoted above, meant not only default of payment of interest but also default of adding that interest as compound interest to the principal sum. As pointed out by one of us during arguments, this was not a matter within the control of the mortgagor. The interest according to the stipulation would be added automatically and run at the compound rate on non-payment. The default obviously meant the default of payment of interest and that default was made on 30th October 1906. The matter in our opinion is covered by the Full Bench ruling in *Shib Dayal* v. *Maherban* (2). The suit when instituted was, therefore time-barred.

We dismiss the appeal, but having regard to the circumstances of the case, direct that parties shall bear their own costs here.

Appeal dismissed.

(2) 1923 All. 1 — 45 All. 27 — 20 A. L. J. 819—L. R. 4 A. Civ. 3.

✱✱ 1924 ALLAHABAD 474

KANHAIYA LAL AND MUKERJI, JJ.

Kishori Ramanji Maharaj and others—Plaintiffs—Appellants.

v.

Pandit Duley Ram and others—Defendants—Respondents.

S. A. No. 1709 of 1921. Decided on 3rd January 1924, from the decree of D. J. Agra.

✱ *Civil P. C., S. 11—Assignee before suit is not barred by decision against assignor.*

N a minor on attaining majority repudiated a mortgage of his property executed by his mother S in favour of K as his certificated guardian and himself mortgaged a portion of the property to D. K brought a suit against N and S for a declaration that his mortgage was binding on N and obtained a decree. He then brought a suit for sale on the mortgage.

Held: (1) that D who claimed under N was entitled to repudiate the mortgage of K (2) that the decision in the declaratory suit operated as *res judicata* in the mortgage suit and was binding on all persons claiming through him under transfers made after the suit but not on D because the mortgagee rights of D having come into existence before the declaratory decree were not affected by it and the property could only be sold in execution of decree on K's mortgage subject to these rights.

[P. 475, C. 1 & P. 476, C. 1.]

✱✱ (b) *Guardians and Wards Act, S, 30—Failure of transferee to see that conditions are complied with invalidate transfer.*

When a minor's certificated guardian transfers the minor's property with the sanction of the District Judge the person intending to take the property must see that the terms imposed upon the transfer by the District Judge are complied with. It is not open to him to say that the conditions were impossible of compliance and therefore he took the minor's property without complying with them.

[P. 475, C. 2]

N. P. Asthana and K. N. Katju—for Appellants.

S. K Dar—for Respondents.

Mukerji, J.—The suit out of which this appeal has arisen was instituted by the plaintiffs who are the appellants in this Court. It is based on a mortgage, dated the 21st of February, 1910. It was executed by one Musammat Sohan Dei, as the certificated guardian of her minor son Naunit Lal. Naunit Lal at the date of the mortgage was about 19 years old. Subsequently on attaining majority he repudiated the mortgage and transferred a portion of the property mortgaged to the plaintiffs-appellants to several persons including the respondent Duley Ram. The present plaintiffs then brought a suit in 1914 against Naunit Lal, his mother and her agent to obtain a declaration that the mortgage of the 21st of February, 1910, was binding on Naunit Lal. The suit succeeded. The mortgage in question was executed on an alleged sanction given by the District Judge for the transfer. On the suit out of which this appeal has arisen, being instituted, 16 persons were impleaded as defendants. They were Naunit Lal, his son, Duley Ram and some subsequent transferees. Six written statements were filed and the question was raised whether the mortgage in suit was binding on Naunit Lal and his transferees. It was urged that the mortgage was not executed in accordance with the sanction of the District Judge and hence was not binding on anybody. The Court of first instance held *inter alia* that the decree passed in the suit of 1914 operated as *res judicata* against all the transferees of Naunit Lal. The suit

was decreed *in toto* by the Court of first instance. Duley Ram alone appealed and the point was taken before the lower appellate Court that the mortgage was not executed in accordance with the sanction of the District Judge. The lower appellate Court found that the contention was right and it held that the mortgage was not binding on the appellant (Duley Ram). The lower appellate Court thought that it could proceed on a point which was common to all the defendants and it, accordingly, dismissed the whole suit.

The plaintiffs have, accordingly, appealed. The points raised for our determination are (1) whether the mortgage in suit substantially complies with the terms of the sanction granted by the District Judge; (2) what is the effect of the decree made in the suit of 1914 ? and (3) whether it is open to Duley Ram to raise an objection as to the validity of the mortgage ?

The third point might be taken first. It is clear that the decree made in the suit of 1914 is not binding on Duley Ram. He had taken his mortgages prior to the institution of the suit of 1914. He had, therefore, acquired an interest in the property prior to the litigation and it cannot be said that Naunit Lal or his mother represented the interest which had been created in favour of Duley Ram. But the question is, whether Duley Ram can repudiate the mortgage by taking advantage of the provisions of S. 30 of the Guardians and Wards Act. We have already stated that Naunit Lal repudiated the mortgage in suit, and granted certain mortgages in favour of Duley Ram. As Naunit Lal was certainly entitled to repudiate the mortgage of 1910, the mortgagee who claims under him is entitled to assert in accordance with the assertion of Naunit Lal that the mortgage of 1910 is not binding on him. This question, therefore, must be decided in favour of Duley Ram.

As to the first point it appears to us that the sanction granted by the District Judge has not been substantially complied with. The finding of the Court below which is a finding of fact is that at least a substantial portion of the mortgage money did not find its way to the hand of the guardian or to the creditors of the minor. Apart from that finding which is binding on us it seems clear that the District Judge laid down as a condition precedent to the validity of the mortgage certain terms. They were, that the satisfaction of the decrees which were to be filed before him, on account of the expenditure of the sum sanctioned by him for the marriage of the minor should be submitted to him. He ordered that 40 acres out of the minor's property should be mortgaged. He fixed a date for the compliance of the conditions. The date expired and subsequently further time was granted for the compliance of the terms imposed by him. Finally as the terms were not complied with, the District Judge revoked the sanction. Without entering into the question whether in all cases revocation of the sanction will affect or not a transfer made previously to the revocation, it seems to us to be clear on the facts of the present case that, the person who intended to take the transfers was bound to see that the terms imposed upon, were complied with. The District Judge was the guardian of the minor. The certificated guardian could not transfer the property of the minor without the sanction of the District Judge. If the District Judge laid down certain terms which could not be complied with by the intending transferee, his remedy was, to go to the District Judge and to say that under the conditions imposed, he could not take the transfer. The District Judge may or may not have varied the terms. But it is not open to the transferee to say that the conditions laid down were impossible of compliance and, therefore, he would take the minor's property without complying with the restrictive terms imposed. In this particular case instead of 40 acres of the minor's property the whole property which belonged to him, namely, 169 acres was mortgaged. The transfer, therefore, made in favour of the appellants was not the transfer sanctioned by the District Judge. The result is that the mortgage is not binding on Naunit Lal and his transferees.

The second question is what is the effect of the decree in the suit of 1914? It appears to us that the result of the decree was a declaration that the mortgage created in favour of the plaintiffs was binding on Naunit Lal. Naunit Lal or any person claiming under him after the said decree cannot now go behind it. The judgment operates as *res judicata*. Thus any person who took transfer from Naunit Lal after the suit of 1914 was instituted could not contend that the mortgage of 1910 was not binding on Naunit Lal or themselves.

The result of all these findings seems to be this. The appellants are entitled to sell the property mortgaged to Duley Ram subject to mortgages created in his favour. In other words the property mortgaged to Duley Ram is liable to sale but the mortgage rights of Duley Ram will remain unaffected. The rest of the property in the hand of Naunit Lal and the remaining defendants, none of whom appealed against the decree of the Subordinate Judge, is also liable to be sold. We allow the appeal and modify the decree of the lower appellate Court accordingly. The respondent Duley Ram will have his costs in this Court including fees on the higher scale. The appellants will have their costs of this appeal as against the remaining defendants but these costs will come out of the property. The costs allowed to the appellants will include fees in this Court on the higher scale. The decree of this Court will be drawn up in the terms of the Order 34, Rule 4, Schedule I, of the Code of Civil Procedure.

Appeal allowed.

1924 ALLAHABAD 476

WALSH, AG. C. J. AND RYVES, J.

Khub Singh and others—Plaintiffs—Appellants.

v

Mohan Singh and others—Defendants—Respondents.

L. P. A. No. 147 of 1922, Decided on 14th October 1924, against the judgment of Mr. Justice Stuart.

Agra Tenancy Act, S. 177—Bona fide *plea of jurisdiction.*

It is the business of the trial Court to decide whether the plea is *bona fide* or not. If however the Court chooses to treat it seriously it is not for the Court of appeal to treat it as *mala fide* when nobody in the trial Court or in the appellate Court ever suggested it to be so. [P. 476, C. 2]

Shankar Saran and *Harnandan Prasad*—for Appellants.

Iqbal Ahmad—for Respondents.

Walsh, Ag. C. J.—In this case there has been a mis-description, the names of the appellants having been substituted for the respondents. We order that to be put right.

In our opinion our brother Stuart was bound, on the facts stated, to follow the decision of the Full Bench in *Gokaran Singh* v. *Ganga Singh* (1). The point of difficulty in this particular case cannot be better put than it was put by Mr. Justice Piggott in the sentence which is quoted at page 97 in the passage beginning with the words "with regard to this I think it sufficient to remark....."

It is the business of the trial Court to decide whether a plea is *bona fide* or not. If it chooses to treat it seriously, it seems to us that it is not for the Court of appeal to treat it as *mala fide*, when nobody in the suit in the Courts below has ever suggested it. Once it is treated as a serious *bona fide* issue, and it takes its place among the framed issues, and the Assistant Collector, or whoever he may be, gives a decision upon it, we cannot deny that a question of jurisdiction has been decided. If a question of jurisdiction has been decided, S. 177 applies and there is an end of the matter. In this case Mr. Justice Stuart points out that the defendants did plead over and allege certain matters which raised a so-called question of jurisdiction. He seemed to think that that was not sufficient. That is the point on which we disagree with him and on which we think he failed to follow the Full Bench.

We allow the appeal, set aside the decree of the learned Judge of this Court and restore that of the District Judge dismissing the suit with costs in all Courts.

Appeal allowed.

---

(1) [1920] 42 All. 91—52 I. C. 779—17 A. L. J. 1072.

✱ 1924 ALLAHABAD 477

MUKERJI, J.

Ali Husain and others — Defendants—Appellants.

v

Syed Mazahir Husain—Plaintiff—Respondent.

S. A. Nos. 1246-48 of 1922, Decided on 18th February 1924, from a decree of Subordinate Judge of Muzaffarnagar.

✱ (a) *Civil P. C., S. 100—Custom.*

It is always open to the High Court in second appeal to see whether an opinion on custom which has been pronounced was based or not on sufficient evidence. 31 A. 557 ; Dist. 30 A. 311 (F.B.) 19 A.L.J. 104, Foll.

[P. 477, C. 2]

(b) *Landlord and Tenant—Abadi.*

A custom of transfer of the sites of the houses by ryots can be recognised only when there is absolutely clear evidence to that effect. [P. 478, C. 1.]

(c) *Aquiescence—Extinction of right.*

If a man has been negleotful of his rights in certain cases that does not mean that he should be compelled to forego his remaining property. [P. 479, C 1]

M. A. Aziz and *E. A. Howard*—for Appellants.

S. A. Haidar and *Iqbal Ahmad*—for Respondent.

Mukerji, J.—This appeal and the connected appeals Nos. 1247 and 1248 of 1922, are concerned with only one question, namely, whether the evidence that was adduced in the Court of first instance by the appellants should have been held to be sufficient to prove the custom set up by the appellants, namely, one in the village of Datiana by which a ryot could transfer not only the materials of his house but also the site over which the house stood.

The case has been ably argued on both sides. Mr. Agha Haidar has taken a preliminary objection to the hearing of the appeal. He argued on the authority of a sentence to be found in the case of *Muhammad Kamil* v. *Imtiaz Fatima* (1), that a question of custom was a question of fact and this Court could not go into it in second appeal. It appears that in the case before their Lordships of the Privy Council a custom had been set up and had been negatived by both the Courts in India. It is a practice with the Privy Council not to allow a question of fact to be re-opened on which the Courts in India have agreed to pronounce the same opinion. It was with respect to such a matter that their Lordships remarked that they would not go into the question of custom. The question did not arise with reference to S. 100 of the Civil Procedure Code with which I have to deal in this case. A regular string of authorities in this Court has held that it is always open to the High Court in second appeal to see whether an opinion on custom which has been pronounced was based or not on sufficient evidence. The case of *Ram Bilas* v. *Lal Bahadur* (2), distinctly held this. There are subsequent cases too and one of them is that of *Faiyaz Ali* v. *Rekhab Das* (3). I, therefore, overrule the preliminary objection and allow the appeals to be argued on the merits.

To begin with, the village in question has been found by the lower appellate Court to be a purely agricultural village. On this point nothing has been addressed to me to indicate that this was not a correct finding. Indeed, this finding has not been challenged in the memorandum of appeal. I have ascertained with reference to the Census Statistics of the last Census of 1921, that Datiana has a population of 2,499 souls. Evidently there is a very large population of ryots in the village as all these 2,500 souls could not be the proprietors. When a question of custom arises, one, in the first instance, likes to look into the wajib-ul-arzes to see whether it has anything to say or not on it. The wajib-ul-arzes in the present case are two in number, namely, one prepared in

(1) [1909] 31 All. 557—36 I. A. 210—10 C. L. J. 297—11 Bom. L. R. 1210—4 I. C. 457—14 C. W. N. 59—19 M. L. J. 697—130 O.C. 183 (P. C.)

(2) [1908] 30 All. 311—5 A.L.J. 456—4 M. L. T. 169—(1908) A. W. N. 112. (F.B.)

(3) [1921] 19 A.L.J. 104—61 I.C. 24.

1873 and the other in 1863. The wajib-ul-arz of 1863 in para 14 clearly lays down that the abadi or the village site is the property of the zamindars alone. It shows that when a ryot comes to live in the village he has to pay a present (Rasum). When he goes away he can take away the materials provided these have not been supplied to him by the landlord. The wajib-ul-arz of 1873 does not specifically say anything on the position of the ryots but it declares that they render such service as their caste would permit.

It has been urged that these wajib-ul-arzes are really the handiwork of the zamindars and that there is no binding authority on the ryots. This is, however, not a correct view of the matter. They are supposed to have been prepared by authorities who are anxious to note down all the customs prevailing in the village.

It is conceded that the names of the ryots are not to be found in the khewats. The ryots are certainly not proprietors of an inch of the soil of the village. There was a partition in the village in 1895, and as would be expected the ryots were no party to that partition. The question then is whether in the circumstances of this particular case, the appellants have succeeded in proving that there is such a custom in the village by which they are entitled to sell the property of another set of persons, namely, the zamindars. There can be no doubt that there have been cases in which the existence of such a custom has been recognised; but such a custom can be recognised only when there is absolutely clear evidence to that effect.

As I have said, there was a partition in the village in 1895 and the village was divided up. All co-sharers would not be as careful to guard their rights as some of them. Some may be neglectful and others may be on their guard. If some of the co-sharers have neglected to take steps to avoid transfers made by people who are nothing but ryots in the village, their laches cannot affect the rights of the other co-sharers in the village. These are matters which must be borne in mind before we examine the evidence in this connection. The remarks of Stanley C. J., in the Full Bench case of 30 All. 311 are very very instructive. A man may say "well in such and such cases I have been neglectful of my rights but why should I not keep an eye over my rights in future." That is exactly an attitude which may be lawfully taken by the co-sharers of the village.

In this case there are 36 sale-deeds 46 were produced but 10 of these were not proved. 20 out of these 46 related to transfers which took place within 12 years of the suit. Thus they were transfers of recent times and transfers which could yet be impeached and the transferees ejected by the landlords. Who knows but the present three cases may be only test cases brought; before suits should be brought in respect of the other cases? Out of the 46 cases of sale, 15 were made by persons who were either zamindars or muafidars in the village. Thus we are left with only, as the learned Subordinate Judge has remarked, 11 sales, which are more than 12 years old. I have already remarked that the village is a very large one. It has a population of about 2,500 souls. Which among these ryots have been transferring their houses, is a matter, which would not always come to the knowledge of the landlords. The learned Munsif got prepared a statement in a tabulated form as to how these sale-deeds stood. He found that in 10 cases the sale-deeds affected the property of absentee landlords. This may account for some of the sales. Now the question remains whether these 11 sale-deeds which undoubtedly relate to transfers made more than 12 years before the institution of the present suits should be taken as sufficient evidence to establish a custom in the village in question. Having regard to the largeness of numbers of the ryots, I am clearly of opinion that these instances are wholly inadequate. Mr. Aziz who has taken great pains over these cases has pointed out to me that in several of the cases some of the co-sharers attested the sale-deeds. Now this attestation does

not necessarily signify that the attesting co-sharers believed that the ryots had under a custom the authority to transfer zamindars' property, namely, the sites of the house. On the other hand, that attestation may show and probably does show that the purchaser was anxious to have the consent of the landlord so that in future, trouble might be avoided. If the village had been small and if there had been 11 ancient sales something might be said as to the sufficiency of the evidence. But where there are about 2 500 ryots 11 ancient sales will not establish a custom which is supposed to take away another man's property. As I have already said if a man has been neglectful of his rights in certain cases that does not mean that he should be compelled to forego his remaining property. There are two judgments but none of these judgments show that any custom of transfer of the sites of the houses by ryots was recognised by them. The sale certificate and Dakhalnama only prove that a ryot made a mortgage and his property was sold.

Two learned Judges of the Courts below in thoroughly painstaking judgments have discredited the custom and my reading of the evidence leads me only to support their opinions.

I hold that the evidence adduced in the circumstances was not sufficient to establish the custom contended for.

The appeal fails and is dismissed with costs.

Appeal dismissed.

1924 ALLAHABAD 479

SULAIMAN, J.

Chaudhari Har Sarup—Defendant—Appellant.

v

Brijnandan Lal and others—Plaintiffs—Respondents.

S. A. No. 135 of 1924, Decided on 28th February 1924, from the decree of S. J. Muzaffarnagar.

(a) *Civ. P. C., S. 11—Decision by revenue Court.* A decision by the revenue Court that defendant was not plaintiff's tenant does not bar a plea that a party was a rent free grantee. [P. 479 C. 2]

(b) *Agra Tenancy Act, S. 79—Rent free grantee's suit for possession lies in Civil Court only.*

Rent free grantee cannot sue in the Revenue Court for restoration of possession on wrongful eviction by the Zamindar. He must sue in the Civil Court. [P. 479 C. 2]

M. A. Aziz—for Appellant.

Judgment.—The only point raised in this case is that the present claim is barred by the principle of *res judicata*. The plaintiffs claimed to be the *doblidars* of the plot in dispute. Mr. Aziz admits that '*doblidar*' is the local name for a rent-free-grantee. Previous to this suit the plaintiffs had brought a suit in the Revenue Court against the defendant alleging that the defendant was their tenant. The Revenue Court held that the defendant was not the plaintiff's tenant at all and directed that the plaintiffs should sue the defendant for possession in the Civil Court. The only point on which the judgment of the Revenue Court is conclusive is that no relation of landlord and tenant subsisted between the parties. That judgment did not decide as to whether or not the plaintiffs were the rent-free grantees.

In the present civil suit the plaintiffs in no way tried to get round the finding of the Revenue Court that there was no relation of landlord and tenant between the parties. They claimed to be rent-free-grantees and not tenants, nor do they allege that the defendant is their tenant. I do not, therefore, see, how any question of *res judicata* arises in this case. I may note that under S. 4, sub-clause (5), of the Agra Tenancy Act a tenant does not include a rent-free-grantee. It follows, therefore, that if a rent-free grantee has been wrongfully ejected by the zamindar no suit under S. 79 of the Agra Tenancy Act can be brought in the Revenue Court. The only remedy open to a rent-free-grantee is, therefore, to sue in a Civil Court. I am accordingly of opinion that this appeal is without any force. I dismiss it under Order 41, rule 11, of the Code of Civil Procedure.

Appeal dismissed.

✱ 1924 ALLAHABAD 480

MUKERJI, J.

Tota Ram and others—Defendants—Appellants.

v.

Gauri Shankar — Plaintiff — Respondent.

S.A. No. 1309 of 1922, Decided on 29th January 1924, against the decree of Sub. J. Bulandshahar.

✱ *Civil P. C., O. 21, R. 66—Decision under, is not* res judicata *in a later suit.*

Proceedings under O. 21, R. 66 are ministerial proceedings or to be more accurate they are non-judicial or quasi-judicial proceedings. The Court has to decide the properties to be sold and the incumbrances on the property. A decision on any such point is no *res judicata* in a later regular suit. [P 480 C 2]

M. A. Aziz and *G. L. Agarwala*—for Appellants.

Panna Lal—for Respondent.

Judgment.—The facts of this case are these. The plaintiff, who is the respondent in this Court, with his brother Shib Sahai, obtained a usufructuary mortgage from the ancestors of the appellants on the 29th August 1905. On the same date, the mortgagors executed a rent note, by which they agreed to pay to the mortgagors Rs. 7-12-0 per month as rent of the house mortgaged. Sometime later, the mortgagees obtained a simple money decree against the Mortgagors. In execution of that decree they attached the interest of the judgment-debtors in the house, *viz.*, the right to redeem. The judgment-debtors objected and said that it was wrong to describe them as mortgagors and that they were the full owners of the house. They added that they apprehended that if they were described as mere mortgagors the property might fetch a small value. Notice was given to the decree-holders but they were not present when the application was disposed of. The execution Court held by decision dated 29th April 1920, that the words "mortgagor's interest" should be expunged. The house, however, was never brought to sale. I am told by the parties that some other property of the appellants was sold and that sale satisfied the simple money decree.

After, all this had happened the suit out of which this appeal has arisen was instituted by the respondent for recovery of the rent on foot of the registered rent note. The suit was decreed by the lower Appellate Court and two points have been urged in appeal.

The fourth point in the grounds of appeal is, that the lower Court was not justified in coming to the conclusion that the mortgage-deed of 1905 and the rent note were not mere colourable transactions but were substantial ones. Mr. Aziz, however, conceded that the plea could not be urged as it went counter to the finding of the lower Appellate Court.

Mr. Aziz, however, urged that the finding of the execution Court, dated 29th April, 1920, operates as *res judicata* in the present suit and he cites the case of *Dambar Singh* v. *Kalyan Singh* (1).

Mr. Aziz has conceded that there is nothing on the record to show that the respondent mentioned the mortgage of 1905 as the mortgage by virtue of which his judgment-debtors were in the position of the mortgagors and the property was being sought to be sold subject to the mortgage of 1905. To start with, therefore, there is no decision that the mortgage of 1905 and the rent note of that date were fictitious transactions.

Assuming that all the necessary facts were found in favour of the appellants, it is clear to me that the plea of *res judicata* cannot be sustained. The proceedings in which the objection was raised were under Order 21, rule 66 of the Civil Procedure Code. They were ministerial proceedings. More correctly speaking, they were non-judicial or quasi-judicial proceedings. The Court had to determine what were the properties to be sold and what were the encumbrances on the same. Any decision come to in those proceedings cannot operate as *res judicata* on the very point raised in a regular suit later on. In the case quoted the question that subsequently arose, arose in the very execution proceedings in which the former finding had been arrived at.

The appeal fails and is dismissed with costs which will include fees in this Court on the higher scale.

Appeal dismissed.

(1) 1922 All. 27—20 A.L.J. 117.

✱ 1924 ALLAHABAD 481

Full Bench

WALSH, AG. C. J., SULAIMAN, RYVES, MUKERJI AND DANIELS, JJ.

Sheo Ghulam—Plaintiff—Appellant.

v.

Salik Ram — Defendant — Respondent.

S. A. No. 761 of 1922, Decided on 17th April 1924, from a decree of District Judge of Shahjahanpur.

✱ (a) *Lambardar and Co-sharer—Liability of Lambardar arises on date of ascertaining the amount due except in case of any legal provision—He is also liable for negligence or wilful mischief.*

For the purpose of collection and distribution, a *lambardar* is undoubtedly the agent of the co-sharer and that legal relationship, when a question arises with regard to the accounting by the lambardar for the rents and profits for which he is responsible on behalf of his principal, sets in motion two recognised principles of contract law. The first is this :— An agent who collects money for his principal subject to a proper deduction for commission, expenses, outgoing and so forth, is a debtor to his principal for the balance in his hands. The liability to pay arises when the amount is ascertained, subject to this, that if there is a customary period or a period fixed by some notification having the force of law, it becomes payable in the eyes of the law on that date. The delay in such a case is neither the fault of the lambardar nor the fault of the co-sharer. It is the fault of the tenant and cannot affect the contractual rights of the parties. The second principle is this :— An agent who neglects his duty, that is to say, who is guilty of a breach of contract, is ordinarily liable to pay compensation or what is called damages, which directly follow from his breach. If a lambardar does not collect from solvent and willing tenants, if he squanders the cash, and generally fritters away profits which might be realised if he were ordinarily diligent, he is, in the eyes of the law, apart from anything in the Tenancy Act, liable for breach of contract. To these two just claims recognised by the Contract Act, there can be only two defences. The first is satisfaction either by cash payment or contra account. The second is limitation, by which the law prohibits the co-sharer from enforcing his claim. [P. 489 C. 1 2]

(b) *Agra Tenancy Act, Ss. 163 and 164—Subject to not getting twice, share in gross rental as well as actual realisation can be claimed by co-sharer if it is not barred—Cause of action for share of arrears collected in a subsequent year arises on 1st August following the year of collection.*

There is nothing in the N. W. F. P. Tenancy Act, and particularly in Ss. 163 and 164, which professes to modify or qualify, or in any way cut down the fundamental contractual rights of a co-sharer as against his lambardar. It is true to say that in one year a co-sharer cannot have both the gross rental and the actual collections, subject to his not getting anything twice over, he is entitled to ask the Court for his share of actual collections arising out of one set of circumstances, and gross rental arising out of the other. There is equally nothing to prevent, in a suit against a lambardar by a co-sharer for the arrears claimed in respect of three years, the co-sharer from recovering from the lambardar, not only the gross rental on the ground of negligence for each of the three years in suit but in addition such amount as he can show or the lambardar admits, that the lambardar has in fact received in respect of rents which were due from the tenants in the years preceding those in suit, but received by the lambardar in the years in suit, in spite of his negligence, always of course provided that no claim made against the lambardar for arrears is barred by statute as against him. As between the co-sharer and the lambardar, the statute begins to run in respect of arrears collected no matter in what year the rent became due as between the tenant and the zamindar, in the year in which they have been revived by the lambardar. The date in that year is fixed by rule namely, the 1st of August. No co-sharer is entitled in respect of the demand for a particular year to recover more than his share of the gross rental for that year. But subject to this, there is no reason why he should not join a claim to the gross rental of a particular year in which negligence is alleged against the lambardar, with a claim for collections made by the lambardar in that year in respect of previous years where profits of the previous years had been awarded on the basis of actual collections. Where in a suit gross rental is claimed on a plea of negligence, the cause of action arises on the 1st of August following the close of the Fasli year to which the claim relates, but where the claim is for arrears collected on account of past years the cause of action arises on the 1st of August following the year in which those arrears are collected.

[P. 490 C. 1,2 ; P 491 C. 2].

M. L. Agarwala and *Harnandan Prasad*—for Appellant.

Uma Shankar Bajpai—for Respondent.

The following are the Orders of Reference :—

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for profits under S. 164 of the Agra Tenancy Act against the defendant lambardar. The body of the plaint mentioned the year 1327 Fasli only but the account of the amount claimed attached to the plaint shows that the claim was one for arrears collected in respect of the years 1324, 1325 and 1326 Fasli and for the gross profits of

1327 Fasli. The Court of first instance found that the defendant had collected certain arrears for previous years and that he was grossly negligent in the year 1327 Fasli, having collected less than one-third of the gross rental for that year. Nevertheless, in view of the ruling in the case of *Chhabraji Kunwar* v. *Ganga Singh* (1) it felt bound to disallow the claim for the arrears of previous years and only granted a decree on the basis of the gross rental for the year 1327 Fasli. The learned District Judge, when confronted by the same ruling, remarked: "I must confess that I have not quite grasped the reasoning on which the reported decisions are based. For they seem to lay down the proposition that if a plaintiff fails to prove negligence or misconduct and his suit is decreed for a particular year on the basis of actual collections, he is ever debarred from claiming anything more even if the arrears outstanding are collected in the following year for which the decree is given on the total demand." He, however, felt bound to follow the ruling referred to above and dismissed the appeal.

Now, independently of all authorities, I would have no hesitation in my mind in holding that the plaintiff's claim for arrears of the previous years actually collected in 1327 Fasli has been wrongly disallowed.

S. 164 contains two clauses. The right given in clause (2) is not a substitute for but in addition to that given by clause (1).

Clause (1) entitles a co-sharer to sue the lambardar for his share of the profits of a mahal, or of any part thereof. I think that the word "profits" in this clause means not only the rental for a particular year but also the arrears of rents remaining outstanding on account of the previous years.

In the case of *Nand Kishori* v. *Ram Ratan* (2). Mahmud, J. pointed out that under clause (h), S. 93 of the Rent Act, the word "profit" meant "not only rent in respect of the years to which the rent relates, but also to such arrears of rent as are actually realised by the *lambardar* during the year to which such suit may relate .... What has to be seen is whether in any particular year the *lambardar* has or has not with due diligence realised such rents as were due for the years to which the suit relates, or also in respect of the arrears of rent for past years." In *Sham Lal* v. *Raj Bahadur* (3). Piggott and Reves, JJ. said: "the divisible profits of an agricultural year meant ordinarily the balance remaining in the hands of the *lambardar* after deducting the land revenue, cesses, village expenses and *chaukidar's* dues from his total realisation made during the year whether on account of the payment of the year itself or on account of the payment of the previous years." In fact suits for profits under clause (1) are decreed every day on this basis.

Clause (2) entitles a co-sharer to get not only a share of the profits actually collected, but also of such sums as the plaintiff may prove to have remained uncollected owing to the negligence or misconduct of the defendant. Thus under clause (1) the co-sharer is entitled to have his full share of the amount actually collected whether on account of previous years or for the year in suit and then under clause (2), in addition to what he is entitled to under clause (1), he can get his share of the entire amount that has remained uncollected owing to the *lambardar's* negligence or misconduct. It follows, therefore, that it is open to a co-sharer to obtain a decree for his full share of the arrears of profits of past years collected in a subsequent year as well as of the actual collections made for that year, and in addition to these amounts, his share of the amount which has remained uncollected on account of the subsequent year in suit owing to the *lambardar's* negligence or misconduct. The result will be that he will get his full share of the arrears on the basis of actual collec-

(1) [1921] 43 All. 29—60 I.C. 643—18 A.L.J. 863.
(2) [1887] A.W.N. 250.
(3) [1921] 43 All. 31 & 32. (*Foot Notes.*)

tions and his full share of the rents for the year on the basis of the gross rental, in case he proves either negligence or miscondu t.

It seems to me that this interpretation of the section is the only one which is consistent with the existing rights of the co-sharers. If a suit is brought on the basis of actual collections or if a suit is brought on the basis of the gross rental but a decree is passed on the basis of actual collections only, I am aware of no sound principle on which the co sharer must be debarred from claiming the remainder of the arrears even if it is actually collected in a subsequent year. Neither the principle of *res judicata* nor Order 2, rule 2 of the Code of Civil Procedure can be a bar to such a claim As in the absence of any proof of negligence or misconduct the decree is based on actual collections only, the claims for the balance mu t be deemed to have been for the time being premature. Every co-sharer has a legal right to get his full share of the entire profits after the necessary deductions which have been collected. If the entire profits are not collected in one year I see no adequate reason for holding that he cannot get it again if collected in the following year. To hold so would be to penalise co-sharers for no fault of their own. If such a rule were to be enforced, I am afraid, *lambardars* would make a point of leaving rents to be collected in subsequent years, and even co-sharers would hardly think of trying to prove the *lambardar's* negligence or misconduct at the peril of losing all their claim for previous arrears even though actually collected.

That there can be no principle of law or procedure compelling a co-sharer to sue either on the basis of actual collections only or on the basis of gross rental for the period in suit excluding arrears, can be perceived at once by considering the case of an assignee of the profits for one year. If such an assignee gets a decree for his share of the profits actually collected in one year, is there any reason to debar him from recovering the balance of the profit, if collected afterwards, provided of course limitation does not come in?

I cannot conceive of any reason why, if the *lambardar* is negligent in one out of three years, the co-sharer should not sue on the gross rental basis for that years and on actual collections for the other two years. I am altogether unable to appreciate the argument that even though a co-sharer has got his share of only the amount actually collected in the last year, and has not got a single farthing out of the rents for the last year collected subsequently, he cannot get a decree for those arrears simply because the defendant has been proved to be guilty of such negligence or misconduct in the subsequent year as to make him liable to account for the rents remaining uncollected also.

Coming to the case law on the question, I have already referred to the case of *Nand Kishore* v. *Ram Ratan* (2), where Mahmud, J. pointed out that under the corresponding section of the Rent Act, the word profits meant " not only rent in respect of the years to which the rent relates but also to such arrears of rent as are actually realized by the *lambardar* during the year to which such suit may relate. "

In *Ram Dayal* v. *Seth Janki Prasad* (4) decided by Stanley, C. J. and Burkitt J., a second suit to recover the balance of arrears subsequently collected by the *lambardar* was entertained. The case can, however, be distinguished on the ground that the first suit had been referred to arbritration and the award had declared that the plaintiff should recover in future any arrears if they were realised.

After this came *Sham Lal* v. *Raj Bahadur* (3). In this case the plaintiffs in addition to claiming their share of the profits for 1315, 1316 and 1317 Fasli, also claimed their shares of the arrears of rent remaining outstanding for 1312, 1313 and 1314 fasli which were realised in the years in suit. The claim for arrears was altogether disallowed. The judgment was based on the supposition

(4) S. A. No. 996 of 1906, decided on 3-1-1908.

that the claim for the arrears of 1312, 1313 and 1314 Fasli was barred by time and it could not be properly included in the claim for 1316 and 1317 Fasli. Towards the end of the judgment the learned Judges conceded that the divisible profits of an agricultural year meant ordinarily the net balance remaining in the hands of the *lambardar* after deducting the land revenue, cesses, village expenses and *chaukidar's* dues from his total realization made during the year, whether on account of the payment of the year itself or on account of the payment of the previous years. They, however, went on to add that if it is desired to invoke the provisions of S. 164, clause (2) of the Tenancy Act, the co-sharers could not do more than claim an account on the gross rental payment for that agricultural year. This remark, however, must be understood with reference to the assumption made in that case that the claim for the years 1312, 1313 and 1314 Fasli was barred by time. The learned Judges were much influenced by that circumstance because they remarked that to hold otherwise would be to avoid the law of limitation and going beyond the intention of S. 164 of the Tenancy Act.

In the case of *Chhabraji Kunwar* v. *Ganga Singh* (1). Ryves and Gokul Prasad, JJ., purporting to follow the ruling in *Sham Lal* v. *Roj Bahadur* (3) held, that in a suit for profits by a co-sharer against a *lambardar*, the decree must be based either on the gross rental or on the actual collection. It could not be based partly on the one and partly on the other. In that case, although the claim for the arrears of 1320 Fasli had not become time-barred, it was disallowed. This case was followed by the same Bench in the case of *Jodhi Ram* v. *Mt. Kaunsilla* (5) and was again followed by Ryves and Daniels, JJ., in *Chhammi Lal* v. *Mt. Sukhrani Kunwar* (6) But before the last mentioned Bench, the case I am going to refer presently was not referred to at all.

In S. A. No. 1478 of 1920, decided on the 15th May 1922, reported in the Supplement to Vol. V of the Unpublished Decisions at page 162 (*Asad Ali* v. *Faiyaz Ali*). Lindsay and Kanhaiya Lal, JJ., referring to the principles laid down in the rulings reported in 18 A. L J. 863 and 20 A. L. J. 313, did not feel inclined to accept them as being principles of universal application. They were, however, able to dispose of the case on an altogether different ground. With great respect I say that I have grave doubts as to the correctness of the rule laid down in 43 All, 29, 20 A. L J. 313 and 74 I. C., 19 and feel that such a rule would affect the rights of the co-sharers unjustly.

Of course the limit to a claim for arrears is imposed by the rule of limitation prescribed in the Fourth Schedule, Group B, which fixes three years from the date "when the share of the profits becomes payable" and not from the date when they are actually realised. But when no question of negligence and misconduct arises, the share of arrears of rents cannot be said to become payable by the *lambardar* to the co-sharers before those arrears are realized. The 1st of August fixed by the Local Government, under S. 1 3, must. therefore, be the 1st of August next after the realization and not necessarily the 1st of August following the agricultural year to which the arrears relate. This is the necessary conclusion if the word 'profits' in S. 164 includes past arrears. The right to recover a share of the arrears arises after the arrears are collected, and it is difficult to see how limitation can begin to run before the cause of action has arisen. Suppose the *lambardar* has had to sue a defaulting tenant for arrears of rent. The suit is brought after two years, the litigation takes a year and the decree remains in execution for several years, and then the decretal amount is realized. Is the co-sharers' right to get their share of this amount barred by time? I am satisfied that it cannot be. For these reasons, I think, with great respect, that the case of *Nazir-ud-ain* v. *Achhi Begam* (7) also does not lay down the correct law.

(5) 1922 All. 111.
(6) 1923 All. 537.
(7) 1922 All. 348.

In view of the fact that the two questions raised in this case are of great importance to this Province, as suits for profits are filed by the thousand every year, and the fact that the rights of co-sharers are affected adversely, I feel constrained, in spite of the successive rulings, to refer the questions to a higher Bench.

Mukerji, J.—This appeal raises a question of far-reaching consequence and requires careful consideration of the law.

The appellant in this Court was the plaintiff in the Court below He brought the suit, out of which this appeal has arisen, for recovery of profits for the year 1327 Fasli, against the respondent who is the *lambardar* of the village. The appellant's share in the village is ½. Although the suit was described as one for the year 1327 F., the suit included a claim for sums of arrears for the years 1324 to 1326 F, recovered by the *lambardar* in the year 1327. The plaintiff alleged that the respondent had been negligent in the matter of collection in the year 1327 F. and the Courts below have accepted this allegation as correct.

The defence in the suit was, *inter alia*, that the claim in respect of the year 1326 F. was barred under Order 11, rule 11 of the Code of Civil Procedure. At the time of the argument, a further plea was raised that it was not permissible to the plaintiff to claim arrears of the previous years, if he was disposed to claim his share of the gross rental, on an allegation of negligence on the part of the *lambardar* during the year or years in suit. That is to say, the plea was taken that the plaintiff should content himself either with taking what was collected for the year 1327 F. (negligence or no negligence on the part of the *lambardar* for the year 1327 F.) and the arrears for the previous years collected in 1327 F. or he should content himself with his share in the gross-rental of the year 1327 F. *foregoing* all claim for the arrears of the previous years *although collected in the year* 1327.

The Court of first instance allowed the plea of the defendant on both the points and decreed the claim on the basis of the gross-rental of the year 1327 F. and held that the claim for the arrears of 1326 F. was barred under the provisions of Order 11, rule 11 of the Code of Civil Procedure.

The Court of first appeal found itself bound by the rulings of this Court and dismissed the appeal of the plaintiff. It did not enter into the question whether the claim for the year 1326 was or was not barred by the provision of the Code of Civil Procedure. Evidently the question did not arise after it was held that claim for only 1327 F. could be considered.

In this Court, it has been urged by Dr. Agarwala that the Courts below were wrong in interpreting the rulings of this Court and that, if the rulings of this Court have been rightly interpreted, the rulings did not lay down correct law.

It must be noted that, if this contention of the appellant be allowed, the other question as to the application of Order 11, rule 11 of the Code of Civil Procedure will have to be also considered either by this Court or by the lower appellate Court.

Now let us consider the question before the Court. It has been formulated before. But it will be better to re-state it for the sake of clearness. It is:

"Whether a plaintiff suing for the profits of any particular year, can claim or not the arrears in respect of the previous years but collected in the year under suit, if the plaintiff should allege that the *lambardar* has been negligent in the year in suit and has not collected all the rents etc. that could have been collected by him and that, therefore, the plaintiff is entitled to recover the profits of the year in suit not on the basis of actual collections but on the basis of the gross amount that could have been collected?"

I will consider the principles and the law before examining the authorities on the point.

To start with, the question itself, in my opinion, involves a wrong statement of the rights of the co-sharers. The *lambardar* is only an agent for the co-sharers, and he is bound to hand

over to the co-shares their shares of the profits after deductions of the just expenses and his own remuneration and share of the profits. This is the *substantive right and liability* of the co-sharers and the *lambardar*. But, for the purposes of working out this right and liability, it is necessary to fix the date for the distribution of the profits. For, otherwise, any co-sharer may bring a suit at any time and there would be a multiplicity of suits Further, as in the case of other suits, it is necessary to fix a limit to the time within which a suit for profits may be allowed to be instituted. The law accordingly fixed that the profits should be distributable at the end of each year. The year expires on 30th of June and the authorities have laid down that the profits for any year would be payable after the expiry of that year, on 1st of August. For example, the agricultural 1327 F. expired on 30th June 1920 A. D. and it would not be permissible to the co-sharers to claim the profits of that year before 1st August 1920. The period within which the suit must be brought has been laid down as 3 years, and any suit for the profits for the year 1327 brought after 1st August, 1923 would be barred by limitation.

Thus it will be seen that, for the calculation of the profits, the time has been divided into years. A year is, therefore, a unit for the purposes of calculation. A year is again usually divided into halves, the *kharif* and *rabi* halves. This is so where the property yields two definite harvests. In the case of other crops, an arbitrary division is made and some crops are regarded as *rabi* crops and others as *kharif*. Thus a co-sharer may sue for the profits of only the *kharif* crop of a year, but he cannot sue till the date for division fixed for the distribution of the profits has arrived.

The division of the period during which the profits have accrued into units of years would be a proper division as the rent payable by tenants is calculated by the year. The profit for any particular year, therefore, is the income from the property that has accrued (whether realized or not) in the course of that year. If a rent payable by a tenant for the year 1326 be realised in 1327 F, a co-sharer would get his share of it as the profit of the year 1326 and not as of the year 1327. Suppose a co-sharer sells his property at the end of 1326, and the arrears of that year are collected in 1328; he would still be entitled to recover it.

It follows that although a co-sharer has an absolute right to all the profits accruing from his share of the property, he has to specify for which unit or half unit he claims, when he makes a demand. He has to say that he claims the profits which accrued in such and such year. If this be correct, it is not right to say that a claim for the profits of 1327 F. would include all the arrears that *accrued due in the past years* but which were *collected* in the year 1327 F. Thus the claim of the appellant before us is virtually a claim for the years 1324 to 1327 F. His claim includes his share in the monies that fell due to him and the other co-sharer, in the years 1324, 1325 and 1326 respectively although these monies were not collected till 1327 F.

Incidentally it may be pointed out that there can be no bar to the maintenance of more than one suit for the profits of one particular year, though, except in certain cases, the second suit would also include a claim for a subsequent period. Suppose a co-sharer sells his share in a village at the end of 1324 F. He sues for recovery of his share in the profits of 1324, and it is found that the collections have been less than the amount that accrued due in the course of the year and this without any negligence on the part of the *lambardar*. The co-sharer would get his share of the money actually collected. There is nothing in the law, nor in justice to prevent him from suing the *lambardar* again for the balance of the profits when the same may have been collected provided his suit is within time. He did not omit anything from his claim in the first suit, and hence Order 2, Rule 2 will not be a bar. The principle of *res judicata* will not apply. The suit was partially decreed on the simple ground that only a smaller sum had been collected. If we do not permit a second suit, we

shall put a premium to a *lambardar's* not collecting the full amount of the dues.

To go back to the subject. The profit for a particular year is, therefore, *only what accrued due in that year* and does not include the sums that fell due in the earlier years but were collected in that particular year.

If this view of the law be correct, it would follow that the plaintiff's claim splits itself up into distinct portions. One portion relates to arrears for 1324, collected in 1327, another to arrears for 1325, collected in 1327, a third to arrears of 1326 collected in 1327 and, lastly, to profits for 1327. These are distinct claims, based on distinct causes of action and but for the permission to combine causes of action, separate suits would be necessary subject, however, to the provisions of Order 2, rule 2 of the Code of Civil Procedure.

If then the causes of action be distinct, there would be no bar statutory, or on general principles, to the plaintiff claiming the arrears of the previous years and the profits of the year just ended, simply because with respect to the last item of the claim he says that the *lamlardar* has been negligent in making collections. The *lambardar* may not have been negligent in the earlier years or his negligence may be made no ground for complaint.

Now, if we examine the language of the statute, we can discover no bar to the maintenance of such a suit. S. 164, clause (2) says that the Court may award to the plaintiff not only his share of the profits collected but also of such sums as have remained uncollected owing to the negligence or misconduct of the *lambardar*. The *lambardar*, thus, may be held liable for the distribution of the monies collected by him on account of the previous years and for the year just ended and also for sums which accrued due in the year just ended and which remained uncollected owing to the negligence or misconduct of the *lambardar*.

Now let us examine the authorities. The first reported case is that of *Chhabiraji* v. *Ganga Prasad* (1). In this case, Ryves and Gokul Prasad JJ., following an unreported case decided by Piggott and Ryves, JJ., came to the conclusion that a plaintiff, in a suit for profits against a *lambardar*, could either claim on the basis of the actual collections (in this case he may include arrears collected *for previous years* in the course of the years in suit) or on the basis of the gross rentals, for the years in suit, foregoing in such a case his share in the arrears collected for the previous years. In both the cases, the ground given was, as understood by me, this. The rule of limitation is that a suit for profits must be brought within 3 years of the month of August following the close of the year (No. 16 of the 4th. Schedule to the Tenancy Act). If the arrears, say 4 years old, be collected by the *lambardar*, a suit for the arrears would ordinarily be time barred for the recovery of the same. But if the plaintiff treats the arrears as the profits of the years for which he has sued, being the sum actually collected by the *lambardar*, the question of limitation may be waived. But if the plaintiff should claim both the arrears collected and the gross rental of the years in suit he will be claiming both the items barred by time and the profits of the years in suit. He cannot have both ways. With utmost respect. I have not been able to appreciate the argument. If the claim with respect to the collected arrears be really time-barred, I fail to see how the question of limitation can be got over by giving the plaintiff the arrears *on his waiving to claim on the basis of gross rental.*

In the case of *Nazir-ud-din* v. *Achchi Begum* (7) Ryves and Gokul Prasad, JJ. held that the starting point of limitation for a suit for profits, under S. 164 of the Tenancy Act, was 1st August following the close of the year (agricultural) and that a suit for recovery of arrears of profits. even if instituted within 3 years of actual collection, would be time-barred if the suit has been instituted more than 3 years from August following the close of the year on account of which the arrears have been collected by the *lambardar*. If this really be the law, it must be said

that it is extremely unfair to the co-sharers and extremely partial to the *lambarbar*. I would respectfully dissent from this view. I will examine this ruling of their Lordships presently. But assuming this to be sound law, all that will follow in the suit before us now is that only so much of the suit should be dismissed as would fall beyond time, and would not justify the rule that if the plaintiff should claim on the basis of gross rental for certain years, he should give up his claim for the arrears undoubtedly collected by the *lambardar* for the benefit not of only himself but also of all the co-shares.

In the present case,
year' 24 F ended on 30-6-1917 A. D.
" '25 F do do do 1918.
" '26 F do do do 1919.
" '27 F do do do 1920.

The suit was brought on 17th January 1921. The starting point for limitation for the claim for 1324 would be 1-8-1917 and for 1325 would be 1-8-1918. Thus only the claim with respect to 1324 would be time-barred. There would then be no justification to disallow the claim with respect to the years 1325 and 1326, on the mere apprehension of limitation. The Courts can examine each case and dismiss only so much of the claim as would be barred. There is, therefore, no ground for laying down a very broad rule without regard to the actual facts of a case.

If we examine the question of limitation, we shall find that the starting point is given in wide language. Column 5 of the 4th schedule No. 16 says that the period begins from "When the share of the profits becomes payable". This date is fixed by the Local Government as 1st August in cases where no date has been fixed by the settlement officer or by the co-sharers themselves. If a suit for, say 1324 F., has to be brought, the starting point would ordinarily be 1-8-1917. But suppose such a suit is brought and it is found that out of the net profits divisible of, say Rs. 1000, only 600 have been collected, and the plaintiff gets his ½ share in it, if the balance be not recovered till (as alleged in this case) 1327, must the plaintiff lose his share of it for the simple reason that the money could not be realised earlier and although no blame attaches to him? But it will be argued, 'well the law says so, and we cannot help it.' But does the law really lay down such an absurd rule? The law starts the period from the time when the profits become payable. A share of rent not realised *cannot be payable till it has been recovered by the lambardar*. Suppose in a suit brought before the co-sharer claimed on the basis of gross collection and the Court held that there was no negligence. Then the arrears for 1324 are collected in 1327. Why should it not be said that this sum of profits became payable after the end of 1324 and on 1-8-1920? This would be the natural meaning of the words. All that the law says is that the plaintiff must claim within 3 years of the date, when according to the rules the amount should have been paid to him. The amount realized in 1320 could not have been payable to him on 1-8-17.

I am, for the above reasons, of opinion that he suit is maintainable and the Courts below should find out on what dates the arrears for 1324 1326 were actually recovered.

On the question of the application of order 2 rule 2 of the Code of Civil Procedure, it does not appear how it can apply. All that has been urged is that there was no previous suit for the year 1326. If not, it does not matter. If the arrears of 1326 were not realised till 1327 F., could any claim for the money now claimed have been made earlier. The facts disclosed do not justify a dismissal of the suit for the year 1326.

I would remand the suit to the Court below under order 41, rule 23 of the Code of Civil Procedure and ask the District Judge to dipose of the appeal according to law. The costs in this Court to abide the result, the costs including the fees of counsel on the higher scale.

Judgment of the Full Bench

Walsh, Ag. C. J.—The reference was laid before, what is called, a Full Bench, because of the great importance of securing that there should be

no misunderstanding in the minds of the Courts below who have to deal with thousands of these suits year by year as to the principles which ought to regulate the decision of claims by co-sharers against their *lambardars*. I think I am expressing the view of the whole Bench when I say that no Bench of this High Court ever intended to lay down a principle which would effect a change in the law. The difficulty has arisen over the use of language which, when separated from its context, may be understood to mean more than was really intended. The questions which have been referred to this Bench are as follows:—

1. Whether in a suit under S. 164 of the Agra Tenancy Act, a co-sharer is entitled to a decree for his share of the arrears collected on account of previous years, as well as his share of the gross rental for the year in suit in case the negligence or misconduct of the *lambardar* is proved.

2. Whether the period of limitation for a suit under S. 164 for a share of profits in respect of arrears collected subsequently, begins to run (*a*) from the 1st of August immediately following the year to which these arrears relate, or (*b*) from the 1st of August following the year in which the arrears are realised.

In my view Dr. Agarwala in opening the argument this morning was right in enforcing what he called the fundamental principles underlying the question of adjusting accounts between a co-sharer and his *lambardar*. For the purpose of collection and distribution a *lambardar* is undoubtedly the agent of the co-sharer and that legal relationship, when a question arises with regard to the accounting by the *lambardar* for the rents and profits for which he is responsible on behalf of his principal, sets in motion two recognised principles of contract law. The first is this:—An agent who collects money for his principal subject to a proper deduction for commission, expenses, outgoing and so forth, is a debtor to his principal for the balance in his hands. The liability to pay arises when the amount is ascertained, subject to this, that if there is a customary period, or a period fixed by some notification having the force of law, such as in this case the 1st of August, or as in England the ordinary quater-day, it becomes payable in the eyes of the law on that date. The fact that it fell due, for example, in the years 1321, 1322 or 1323 could not affect the co-sharer's right to it if it was not received and ascertained till the year 1324. The delay in such a case is neither the fault of the *lambardar* nor the fault of the co sharer. It is the fault of the tenant and cannot affect the contractual rights of the parties. This, I take it, is a correct statement of the contractual relationship as laid down in S. 217 and 218 of the Contract Act. The second principle is this:—An agent who neglects his duty, that is to say, who is guilty of a breach of contract, is ordinarily liable to pay compensation, or what is called damages, which directly follow from his breach. If a *lambardar* does not collect from solvent and willing tenants, if he squanders the cash, and generally fritters away profits which might be realised if he were ordinarily diligent, he is, in the eyes of the law, apart from anything in the Tenancy Act liable for breach of contract. This is provided by S. 214 of the Contract Act In that case the mischief is different from the one to which I referred under the first principle. He is liable for his own default and not for the default of the tenants. But in each case his legal liability, when brought before the Court, is a matter of account. He has knowledge of the materials in his hands which enables him to lay before the Court the true state of accounts. The co-sharer has no more than a general knowledge of the rental which ought to be forthcoming and of the actual failure which has taken place. Now to these two just claims recognised by the Contract Act, there can be only two defences, if the legal relationship is admitted, as of course it must be in the case of a *lambardar* and a co-sharer. The first is satisfaction either by cash payment or contra account. The second is limitation, by which the law prohibits the co-sharer from enforcing his claim. I think we are

all agreed, I hold strongly that, there is nothing in the N. W. F. P. Tenancy Act, and particularly in Ss. 163 and 164 which deal with these matters, which professes to modify or qualify, or in any way cut down the fundamental contractual rights of a co-sharer as against his *lambardar*. It is always dangerous to use language outside the statute, but, in my opinion, S. 164, with which we are immediately concerned, deals only with machinery. That is to say, it provides that on the revenue side a co-sharer may sue in the Revenue Court his *lambardar* for his share of the profits, and he also may ask the Court in such suit to deal with a negligent *lambardar* in the manner prescribed in sub-S. 2 of S. 164.

I do not wish to say anything which will tend to obscure the question, or create misunderstanding in the minds of the lower Courts with reference to their method of dealing with such a claim as this, but I will take the simplest possible illustration.

There is a *lambardar* who has been grossly negligent, and who, if nothing else appeared, would be liable for a decree for the gross rental. It so happens that, say half a dozen tenants desirous of discharging their liabilities, in spite of his negligence, have handed over to him their rents so that he is in possession of the rents of six of the tenants. If the co-sharer knew this fact, I can see nothing in the Act which would prevent him from doing what he might do in an ordinary Court of law, namely, from suing the *lambardar* for his share of these six tenants, and in addition for the gross rental in respect of the failure of the *lambardar*, owing to his negligence, to collect anything beyond anything that the tenants had voluntarily paid. It seems to me that so long as the co-sharer does not get anything twice over, under S. 164, the Court could decree the suit in that way. It could also adopt the alternative method of decreeing what would produce the same result, namely, of awarding the gross rental for the whole zamindari in respect of the *lambardar's* negligence. allowing the *lambardar* credit for, that is to say, recognising the *lambardar's* right to retain in his hands the actual collections which he happened to have made owing to the voluntary act of the tenants. In that sense it is true to say that in one year a co-sharer cannot have both the gross rental and the actual collections but so far as I can see that is the only true sense. Subject to his not getting anything twice over, he is entitled to ask the Court for his share of actual collections arising out of one set of circumstances, and gross rental arising out of the other. I have only taken that as the simplest illustration which I could think of. It follows, of course, from that, that in my opinion there is equally nothing to prevent, in a suit against a *lambardar* by a co-sharer for the arrears claimed in respect to three years, the co-sharer from recovering from the *lambardar*, not only the gross rental on the ground of negligence for each of the three years in suit, but in addition such amount as he can show, or the *lambardar* admits, that the *lambardar* has in fact received in respect of rents which were due from the tenants in the years preceding those in suit, but received by the *lambardar* in the years in suit, in spite of his negligence, always of course provided that no claim made against the *lambardar* for arrears is barred by statute as against him. I am inclined to think that the difficulty, which has created obscurity as to these principles which I have endeavoured to state, has arisen more from misunderstanding than from actual deliberate decision by any Bench of this Court, but I agree with the District Judge, who decided the case which has come up to this Court in appeal, that he was confronted with decisions which he was bound to follow as he did. The cases I refer to are *Chhabraji Kunwar* v. *Ganga Singh* (1), and the report of a decision by my brothers Piggott and Ryves incorporated in a foot-note in the report of the case above-mentioned, decided by them in a second appeal in July 1917, where it may be said that they indicated that collections of arrears preceding the years in suit could not be recovered in the same suit as a suit for gross rental in

respect of the years in suit. I am inclined to think that the Bench treated the arrears which were claimed in that suit as being already statute-barred. If they did, I agree with their decision or dicta. If, on the other hand, the claims were not in fact statute-barred, I feel myself unable to agree with the opinion they expressed.

That brings me to the second question. I am of opinion that as between the co-sharer and the *lambardar*, the statute begins to run in respect of arrears collected, no matter in what year the rent became due as between the tenant and the zamindar, in the year in which they have been received by the *lambardar*. The date in that year is fixed by rule, namely, the 1st of August. The agricultural year ending on the 30th of June, the 1st of August provides a convenient margin for settling up accounts, and I will just state shortly my reason for holding that the statute runs from the 1st of August following the agricultural year. The word used is "divisible". Now you cannot divide what you have not received. You may apportion it, but you cannot divide it. When the *lambardar* receives the rents, no matter out of what year they arise, under the contract of tenancy, he is entitled to deduct from the gross the expenses of collection, revenue, cesses, out-goings, and his own commission. Having done so, he arrives at what is called "the nett". Until the nett is ascertained, no one can say what is the share due to any particular co-sharer. It is the nett which is divisible, because the account is dealing with profits, and, in my opinion, when the statute talks of "divisible," it means divisible on the 1st of August. It is the profits which he has to pay and divide, not the rents. Thus if he collects rent due in 1922, and collects them and receives them in 1924, he brings them into his 1924 account, debiting them against himself. On the credit side, as I have said, should appear all his expenses and charges. The difference between the debit and the credit is the nett, which is divisible on the 1st of August, 1924, and becomes payable on that date, and the statute runs from that date. I agree with my brother Daniels that when, and in so far as, the claim is based on negligence, the statute runs from the 1st of August next following the period in which the negligence occurred. In my opinion the two questions submitted to the Court must be answered in that way.

I am not prepared to say that the decision in the case of *Naziruddin* v. *Achchi Begam* (7), is necessarily wrong. My brother Ryves thinks that it should not have been reported, and it certainly does not state the facts clearly as unfortunately is too often the case in the reports.

In my opinion the answer to the first question is "Yes", and the answer to the second question is: "the 1st of August following the year in which the arrears were realised".

Sulaiman, J.—I agree. My views with reasons are fully set forth in my order of reference which I adopt. I have nothing more to add.

Ryves, J.—I agree generally.

As I was a party to the three cases which have been discussed, I think I should add a few words. The case reported in *Chhabraji Kunwar* v. *Ganga Singh* (1) is really irrelevant, because the decree was based on "actual collections". The judgment, however, perhaps unfortunately, reproduced a dictum contained in the earlier decision (reproduced in the foot-notes). That dictum was based on the assumption that the arrears of which it speaks of the previous years were time-barred. While, therefore, neither case is really an authority for the general proposition that if a decree is given against a *lambardar* under the 2nd clause of S. 164, on the gross rental of a particular year, he cannot also be held responsible for the profits of previous years collected in that year, I know it has been generally believed that both these decisions do support the proposition. I am glad that this mistake is now corrected.

The third ruling *Nazir-ud-din* v. *Achhi Begam* (7) refers to S. 163. The judgment does not set out all the facts. There was no discussion of the point in the judgment, and it

seems we accepted the opinion of the District Judge. I find, however, on examining the record of that case that the report does correctly represent what we hold. After hearing the elaborate argument in this case, I am satisfied that it was wrongly decided, and I entirely agree with the view now propounded. I think that the referring orders of my brothers Sulaiman and Mukerji are unanswerable.

Mukerji, J.—I have already written my judgment dealing with the two questions now before us. I do not wish to add anything to what I had already written before the case was referred to the Full Bench. My answer, for the reasons already recorded, are on point No. 1 in the affirmative, and on point No. 2 that the limitation begins to run from the 1st of August following the year in which the arrears are collected.

Daniels, J.—I concur in the answers given by my learned brothers to the questions referred to us. It is obvious that no co-sharer is entitled in respect of the demand for a particular year to recover more than his share of the gross rental for that year. But subject to this, there is no reason why he should not join a claim to the gross rental of a particular year in which negligence is alleged against the *lambardar*, with a claim for collections made by the *lambardar* in that year in respect of previous years. In the present case profits of the previous years had been awarded on the basis of actual collections.

I also agree that the second question should be answered in the affirmative. Where in a suit gross rental is claimed on a plea of negligence, the cause of action arises on the first of August following the close of the Fasli year to which the claim relates-but where the claim is for arrears collected on account of past years, the cause of action arises on the 1st of August following the year in which those arrears are collected,

By the Court.—The answer to the first question is, 'yes.'

The answer to the second question is 'from the 1st of August following the year in which the arrears are realised.'

Answered in the affermative.

1924 ALLAHABAD 492

DANIELS, J.

Sohan Ahir—Applicant.

v.

King Emperor—Opposite Party.

Cri. Rev. No. 47 of 1924, Decided on 13th February 1924, from an Order of Sess. J. Benares. D/-13th December 1923.

Criminal trial—Concurrent sentences.

The phrase "I pass sentence under Ss. 326—148" or whatever the sections may be must be interpreted to mean that the Magistrate intended to pass concurrent sentences.

A Sanyal—for Applicant.

The Crown was not represented.

Judgment.—The point taken in this revision is this. The applicant Sohan was charged with two offences under Ss. 326 and 148 I. P. C. The learned Deputy Magistrate convicted him on both charges and sentenced him to 18 months rigorous imprisonment under Ss. 326 and 148 of the Indian Penal Code. The learned Sessions Judge in appeal acquitted the accused of the offence under S. 148 but maintained the conviction under S. 326 of the Indian Penal Code. Holding that the sentence passed was not excessive for the offence under S. 326 he upheld it.

The argument in revision is that where a judgment is framed in the form in which the Deputy Magistrate's judgment is framed it must be taken that the Magistrate intended to impose a separate sentence of nine months under each charge. In my opinion this is not what the phrase used means. Where a Magistrate convicts under two sections and intends to pass concurrent sentences it is a very common though somewhat slovenly method of expressing the conviction, to say, "I pass sentence under Ss. 326 and 148" or whatever the sections may be. In my opinion the sentence must be interpreted as meaning that the Magistrate passed concurrent sentences under each section. Seeing that the case was one of an attack with a *gandasa* the sentence was clearly not excessive on the merits. There is no reason to interfere and I reject the application.

Application rejected.

✱ 1924 ALLAHABAD 493

DANIELS, J.

Munesher Lal and others—Defendants—Appellants.

v.

Amar Nath alias Chhotey Lal—Plaintiff—Respondent.

S. A. No. 1198 of 1922, Decided on 25th February 1924, against the decree of the Second Additional District Judge of Gorakhpur.

✱ (a) *Hindu Law—Joint family-Alienation—Sons must prove illegality or immorality only in case of antecedent debt or execution sale.*

It is only where property has pssed out of the joint family under an alienation in lieu of antecedent debt or in execution of the creditor's remedies for such debt that it lies on the sons to prove that the debt was illegal or immoral. In other cases, for example, of alienation for cash alienee must prove legal necessity. [P. 491, C. 2.]

✱ (b) *Hindu Law—Joint family-Alienation-*

Alienation otherwise invalid cannot be enforced even against the father's own share in the joint family property in U. P. 6 I. A. 88; 39 A 437; Fol. 1934 P. C. 50 Expl. 1924 All. 24. foll.

Surendra Nath Sen and Verma—for Appellants.

S. A. Haider—for Respondent.

Daniels, J.—This is an appeal by the defendants in a suit in which the plaintiffs sought to recover possession of the property sold by their father Sham Lal, defendant No. 9, to Musammat Phul Kunwari in 1902 for a sum of Rs. 1,455. It is stated in the judgment of the trial Court that the vendee was the wife of Sham Lal's cousin. The property was joint family property and the plaintiff's case was that the sale was executed without legal necessity. The sale was the subject of a pre-emption suit and the defendants are transferees from the successful pre-emptor. The pre-emption suit was decreed on payment of the full sale price. The sale in dispute was for cash paid in presence of the Sub-Registrar at the time of the execution of the deed to the extent of Rs. 1,301. The remainder of the consideration was left with the vendee for payment of three prior debts.

1. A mortgage debt due to Raghubar Dayal ... ... Rs. 20.
2. Another mortgage ... Rs. 25
3. To pay off a pronote due to Ganga Prasad ... ... Rs. 109

The trial Court found that legal necessity was established to the extent of Rs. 109 only and decreed the suit for possession subject to payment of this amount. The defendants 1 to 8 appealed and the plaintiffs filed cross-objections objecting to the order directing them to pay Rs. 109. The Court below dismissed the appeal and allowing the cross objections gave the plaintiffs an unconditional decree for possession. The defendants 1 to 8 have filed a second appeal to this Court.

As regards the first two items of Rs. 20 and Rs. 25 the trial Court found that they were not due from Sham Lal but from his cousin. This finding was not assailed in appeal to the Court below and is final.

As to the item of Rs. 109 the finding of the Court below is that it is not proved that there was any such debt due to Ganga Prasad. The Subordinate Judge who tried the case had said in his judgment that the pronote was not proved but added, without referring to any evidence on the point. "I take it that Sham Lal borrowed that money and the transfer of the property for that amount would be to pay up antecedent debt." The Court below holds that the Subordinate Judge was not justified in making any such presumption. It holds that the debt is not proved. This is a finding of fact which must be accepted in second appeal.

The appellants' case as to Rs. 1,301 paid in cash was that it was borrowed to pay off arrears of *theka* money due from Sham Lal to the Hathwa Raj. Both the Courts below have held that this is not proved. The trial Court held that it was at least possible that the whole transfer was collusive and made in order to save the property from liability to sale in case of the Hathwa Raj obtaining a decree. In the sale-deed it is said that this amount is borrowed to pay off lease money *and for other necessities*. There was a suit for arrears of lease money,

pending when the transfer was made. The claim was for Rs. 2,049 but it was ultimately decreed for a sum of Rs. 484 only apart from costs. The sum of Rs. 1,301 was certainly not applied in payment of lease money. The amount due was not realised until 1904 and 1905 (between two or three years later) by attachment and sale of Sham Lal's property. The Additional Judge considers that this throws great doubt on the story put forward by the defendants. After detailing the circumstances the learned Judge says;

"The inference is irresistible that the money borrowed Rs. 1,301 was not borrowed for the purpose of paying off the arrears."

This again is a finding of fact which it is not open to the appellants to challenge in second appeal.

The learned Advocate for the appellants has pressed his case on two grounds:—

1. That the vendee advanced the money on the faith of a representation which she in good faith believed, and was justified in believing, that the money was borrowed for this purpose and it is, therefore, immaterial whether it was really so applied or not.

2. That as the property has passed out of the family the sons cannot recover it except by showing that the consideration was obtained for an illegal or immoral purpose.

The first plea may be disposed of on the simple ground that no case based on a respresentation was set up in either of the Courts below. I am asked to arrive at a finding of fact that such a representation was made though the question was never agitated before the Court of first appeal. If it were open to me to go into the question, the close relationship existing between the vendor and vendee might be a material point in deciding it. No plea as to representation was made in the written statement nor was any issue framed upon it. It is glanced at in one sentence in the trial Court's judgment where the learned Subordinate Judge in dealing with the plea that the money was borrowed to pay up arrears of lease money says that the transferee should have satisfied herself that that suit was not a fictitious suit and that the money was actually due from Sham Lal In the sequel, as I have already noted, he thought it possible that the whole transfer made by Sham Lal in favour of his cousin's wife was a collusive transaction. In the grounds of appeal to the Court below the only ground which can possibly be treated as bearing on this question is para. 5 which runs:—

"That the lower Court has regarded the fact that the consideration was really spent for legal necessity as not proved is irrelevant. The lower Court ought not to have relied on this fact."

This, however, is not a plea of representation. It asserts that the plaintiffs ought not to have relied on the omission to pay up the theka money as an argument against the money having been borrowed for this purpose. It does not assert that a representation of the existence of legal necessity was made to the vendee or that she advanced the money after due enquiry under an honest belief of the truth of that representation. It is clear from the detailed judgment of the learned Additional Judge that no such plea could have been argued before him.

The second plea is entirely untenable. It is only where property has passed out of the joint family under an alienation in lieu of antecedent debt or in execution of the creditor's remedies for such debt that it lies on the sons to prove that the debt was illegal or immoral. This was laid down in the leading case of *Suraj Bunsi Kuer* v. *Sheo Parsad Singh* (1), and was re-affirmed in *Sahu Ram Chandra's* case (2), and in the very recent case of *Brijnarain* v. *Mangla*

(1) [1880] 5 Cal. 148—6 I. A. 88—4 C. L. R. 226—4 Sar. 1 (P. C.)
(2) [1917] 39 All. 437—44 I. A. 126—21 C. W. N. 698—1 P. L. W. 557—15 A. L. J. 437—19 Bom. L. R. 498—26 C. L. J. 1—33 M. L. J. 14—39 I. C, 280—(1917) M. W. N. 439—22 M. L. T. 22—6 L. W. 213 (P. C.)

Prasad Rai (3). The distinction between an alienation incurred in lieu of prior debt and an alienation entered into for cash was the basis of the decision in *Chandradeo Singh* v. *Mata Prasad* (4), which was subsequently affirmed by their Lordships of the Privy Council. The principle has been explicitly re-affirmed by this Court in the case of *Sahib Singh* v. *Girdhari Lal* (5).

At the conclusion of his argument the learned Advocate, relying on a passage in the recent case of *Brijnarain* v. *Mangla Prasad Rai* (3), suggested that if the alienation was otherwise invalid it could at least be enforced against the father's own share in the joint family property. This has never been the law in these provinces and in my opinion their Lordships did not intend in the passage relied on to change what has long been settled law so far as these provinces are concerned. The passage is, in my opinion, only applicable to those provinces in which the right of a co sharer to dispose of his own share is recognised.

The appeal, therefore, fails on all the grounds urged and it is, accordingly, dismissed with costs including in this Court fees on the higer scale.

Appeal dismissed.

---

(3) 1924 P. C. 50—46 All. 95—51 I.A. 129—21 A. L. J. 934—L. R. 5 P. C. 1—28 C. W. N. 253—46 M. L. J. 23—5 Pat. L. T. 1—2 Pat. L. R. Civ. 41—19 M. L. W. 72—(1924) M.W.N. 68—33 M. L. T. 457 (P. C.)

(4) [1909] 31 All. 176—1 I. C. 479—6 A. L J. 263.

(5) 1924 All. 24—45 All. 576—L. R. 4 A. Civ. 284.

✱ ✱ 1924 ALLAHABAD 495

Full Bench

SULAIMAN, KANHAIYA LAL AND MUKERJI, JJ.

(*Bohra*) *Sobha Ram*—Plaintiff—Appellant.

v.

Tursi Ram and others—Defendants—Respondents.

F. A. No. 245 of 1921, Decided on 1st May 1924, from a decree of the Subordinate Judge of Muttra.

✱ ✱ (a) *Civil P. C., O. 21 R. 95—Application under R. 95 can be made even before resistance while one under R. 97 can't be made before resistance—O. 21 R. 97.*

If there is some person other than the judgment-debtor, who is not his representative and not holding the property on his behalf and who resists or obstructs his possession there are two remedies open to the auction-purchaser; *viz* either to bring a regular suit for possession against that person, or to have recourse to a summary remedy by way of an application as provided in order 21 rule 97 It is well settled that the auction-purchaser is not bound to have recourse to the second remedy. Of course, if he does and fails then his remedy to bring a regular suit is curtailed and the period of time is prescribed by Article 11-A of the Limitation Act. It may be that no thorough inquiry need be made under rule 95, but there is nothing under that rule which prevents the Court from being satisfied on *prima facie* evidence as to whether this other person is holding property on behalf of the judgment-debtor and claiming title under him or not. An application under rule 97 cannot be made until the decree-holder or the auction purchaser has been resisted or obstructed in obtaining possession of the property. An application under rule 95 asking for possession against a person alleged to be holding the property on behalf of the judgment-debtor is not necessarily an application complaining that resistance or obstruction has been offered by such a person. The provisions of rule 97 come into operation only when either the delivery of possession has been ordered by the Court, or, at any rate an attempt to obtain possession has been made by the decree-holder out of Court. (P. 497 C. 2 P. 498 C. 1, 2)

Per Mukerji J.—Rules 95 and 96 for the matter of that, does not contemplate any inquiry whatsoever. The words "resistance" and "obstruction." have not the same meaning. Obstruction is a physical act. Resistance is moral and may sometimes be physical. There may be a resistance to the auction-purchaser obtaining delivery of possession without there being any necessity for the auction-purchaser going to the spot. When the auction-purchaser makes an application against some persons who are in possession and those persons come up and say that they are not liable to be ejected and the decree-holder asks for an inquiry he really asks for an inquiry against the resistance (not obstruction) caused by the persons in possession. Decision in an application under rule 95 is one under rule 98 and rule 103 applies. (P. 503 C. 2

✱ ✱ (b) *Civil P. C., O. 21 R. 103—Order under rule 95 is not one under rule 97 and therefore, rule 103 does not apply—O. 21 Rr. 95 and 97.*

Order passed under rule 95 is not an order under rule 98 dismissing an application complaining of resistance or obstruction. If the

order is not under that rule then rule 103 will not apply, nor will Article 11-A of the Limitation Act, apply. P. 499 C 1]

Gulzari Lal—for Appellant.

Surendro Nath Sen and Narayan Prasad Asthana—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for recovery of possession of immoveable property and mesne profits. The plaintiff also offered to let the defendants Nos. 1 and 2 redeem him if they chose to do so.

The facts of this case are as follows:- On the 5th July 1889 a mortgage-deed was executed by one Dharamjit ostensibly in favour of Tursi. It is not now disputed that this Tursi was benamidar for Sobha Ram, the real mortgagee. On the 27th July 1896, Dharamjit sold the equity of redemption in the mortgaged property to Ganga Ram and Dhanwant. It may be stated that although the sale deed stood in the name of these transferees, the mutation of names was subsequently effected in favour of the sons of these persons. It is not necessary at this stage to state all the circumstances under which the mutation of names was effected in that way as that question has not been gone into by the Court below.

On the 20th December 1909, Sobha Ram, the real mortgagee, brought a suit for sale against the mortgagor, Dharamjit, as well as his transferees, Ganga Ram and Dhanwant. He also impleaded a prior mortgagee, Badri. The sons of Ganga Ram and Baru Mal were, however, not impleaded. It appears from the judgment in that case that the position taken up in defence by Ganga Ram and Dhanwant was to put the plaintiff to strict proof of his allegations. It does not appear that there was any suggestion thrown out that the suit was defective on account of any non-joinder. The suit terminated in a decree for sale on the 6th June, 1910 and the appeal preferred to the High Court by Ganga Ram and Dhanwant was also ultimately dismissed. On the 20th August 1913, in execution of the mortgage decree for sale, the property was put up for sale and purchased by the decree holder Sobha Ram himself. The sale was confirmed and the sale certificate was granted to the decree-holder purchaser later on. The record of that proceeding is not before us but it appears that after the sale had been confirmed, the auction purchaser put in an application, which however, is not on the record, purporting to be under Order 21, rule 95. In this he impleaded Tursi Ram and Chhedu, the sons of Ganga Ram and Dhanwant, judgment-debtors, alleging that these latter persons were in possession of the property on behalf of their respective fathers. Objections were raised by the sons mainly on the ground that they were in possession of the property on their own account and were holding it under some sort of partition with their fathers. The learned Subordinate Judge, who had this application before him, came to the conclusion that Tursi Ram and Chhedu were in possession on their own account and not on behalf of the judgment debtors. He accordingly dismissed the application on the 3rd July 1914.

The plaintiff made an attempt to appeal from that order but his appeal was dismissed on the technical ground that no appeal lay from such an order.

After the expiry of more than one year from the date of the order passed by the Subordinate Judge, the present suit has been instituted by Sobha Ram for recovery of possession against Tursi and Chhedu as well as other defendants. The claim was principally contested by these two persons and the main defence put forward on their behalf consisted of a plea that the order passed on the 3rd July 1914, was an order under O. 21, rule 99, and that, therefore, the present suit was barred by Article 11—A of the Limitation Act, as it had been brought more than one year after that order. It was also pleaded that the defendants were holding possession of this property under a private partition on their own account, and the claim was also barred by the 12 years' rule of limitation.

The learned Subordinate Judge did not record evidence in this case but took down the statements of the pleaders for the parties. These statements are printed at pp. 18 and 19 of the paper book. The pleader for the plaintiff admitted that after the auction-purchase the plaintiff had filed an application in the execution Court for delivery of possession impleading therein Tursi Ram and Chhedu, sons of Ganga Ram and Dhanwant respectively, that both the sons filed objections which were allowed on the 3rd July 1914 and that the application for delivery of possession was disallowed against Tursi Ram and Chhedu He alleged, however, that the two sons were either members of a joint Hindu family with their fathers and therefore, bound by the decree against them, or, if they were separate, then there could be no transfer of property in their favour in the absence of a registered document. The pleader for the defendants stated that he had two objections to the suit The first was the bar of order 21, rule 99 read with rule 103 of the Code of Civil Procedure, and the second was that the property in question had fallen to the share of the contesting defendants by a private partition effected between them and their fathers in 1901, and the claim, therefore, was barred as against them.

The learned Subordinate Judge has dismissed the suit on the preliminary ground that the suit, having been filed more than one year after the order of the 3rd July 1914, was barred by Article 11-A of the Limitation Act.

There can be no doubt that after an auction-sale has taken place and it has been confirmed, the property vests in the auction-purchaser. The auction-puchaser can obtain delivery of possession against his judgment-debtor. For this, remedy is provided under the Code. If, however, there is some person other than the judgment-debtor, who is not his representative and not holding the property on his behalf and who resists or obstructs his possession, there are two remedies open to the auction-purchaser, namly, either to bring a regular suit for possession against that person, or to have recourse to a summary remedy by way of an application as provided in order 21, rule 97. It is well-settled that the auction-purchaser is not bound to have recourse to the second remedy. It is open to him to do so if he wants to save time. Of course, if he does not and fails, then his remedy, to bring a regular suit is curtailed and the period of time is prescribed by Article 11-A of the Limitation Act. It is clear, therefore, that unless the defendants can satisfy us that there is an order which falls under rule 99 of order 21, which operates as a bar to the present claim; the regular suit certainly is not barred. The main question which we have to consider, therefore, is whether there was or was not an application made under order 21, rule 97 and an order passed under rule 99 rejecting that application.

It may be noted that although the application filed by the auction-purchaser is not on the record, yet the reference to it in the order passed by Mr. Moore shows clearly that the allegation of the auction-purchaser was that Tursi Ram and Chhedu were in possession of the property on behalf of their respective fathers Ganga Ram and Dhanwant. The application itself purported to be one under order 21, rule 95. It is clear that when an auction-purchaser wants possession not only against the judgment-debtor but also against some person holding property on his behalf, or claiming title under him, he can apply under order 21, rule 95 and ask the Court, if need be, to remove the other person who refused to vacate the same. In substance and in designation the application which was filed by the auction-purchaser was an application under order 21, rule 95. In that application there was no express assertion that the auction-purchaser had made any attempt to obtain possession of this property, either through Court or out of Court, nor was there any suggestion that any obstruction or resistance had been offered to him while he was trying to obtain possession. It might, however, be infer-

red that Tursi Ram and Chhedu were impleaded because the auction-purchaser had an apprehension that, when he goes to take delivery, obstruction or resistance would be offered by these persons. I may also note that in written statement which has been filed in this case by the two contesting defendants, there is no suggestion that prior to the making of that application there had been any attempt by the auction-purchaser to obtain possession or that there had been any obstruction or resistance offered by the defendants to the auction-purchaser's obtaining possession.

It cannot, however, be disputed that Tursi Ram and Chhedu did object and that Mr. Moore investigated into the matter and came to the conclusion that their objections were well-founded.

It has been strenuously contended by Dr. Sen, on behalf of the respondents, that a Court has no jurisdiction to make any inquiry when an application under order 21, rule 95 is made. His argument is that the Court while acting under that rule is simply acting in its administrative capacity and not a judicial one, and that the order passed by the Court must be passed automatically. Examining the rule, however, one is bound to hold that the Court cannot pass an order delivering possession of the property to the auction-purchaser as against a person other than the judgment-debtor who is holding property on his behalf or claiming title under him, unless the Court is satisfied that he is such a person. I fail to see how an order can be passed under that rule against such a person unless either that person admits that he holds the property in that capacity or the Court is otherwise satisfied that he is holding as such. It may be that no thorough inquiry need be made under rule 95, but there is nothing under that rule which prevents the Court from being satisfied on *prima facie* evidence as to whether this other person is holding the property on behalf of the judgment-debtor and claiming title under him or not. If the Court is satisfied that he is so holding the property, the order can be passed forthwith. If, however, the Court comes to the conclusion that he is holding the property on his own account, there is no option to the Court but to dismiss the application under rule 95. Rule 97, however, contemplates that where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction. It is clear to my mind that an application under rule 97 cannot be made until the decree-holder or the auction-purchaser has been resisted or obstructed in obtaining possession of the property. It is only then that he files an application complaining of such a resistance or obstruction. Of course no resistance or obstruction can be said to have taken place before any attempt to obtain possession has been made. It follows, therefore, to my mind that an application under rule 95 asking for possession against a person alleged to be holding the property on behalf of the judgment-debtor is not necessarily an application complaining that resistance or obstruction has been offered by such a person. In my opinion the provisions of rule 97 come into operation only when either the delivery of possession has been ordered by the Court, or, at any rate, an attempt to obtain possession has been made by the decree-holder out of Court. Unless either of these contingencies has occurred, it is difficult to see how it can be said that the auction-purchaser or the decree-holder has been resisted or obstructed in obtaining possession.

I have already stated that in the application filed before Mr. Moore, all that was alleged by the decree-holder was that the sons were holding the property on behalf of the judgment-debtors, that there was no suggestion that they had obstructed or resisted his possession. The order of Mr. Moore was not that an attempt had been made by the decree holder out of Court to obtain possession and he had been resisted, but

that the allegation of the decree-holder that the two sons were holding the property on behalf of the judgment-debtor was not correct but that they were actually holding the property on their own account. The application was within the scope of order 21, rule 95, and in spite of any additional observations made by Mr. Moore, I am bound to say that his order must be deemed to be one dismissing the application made to him under order 21, rule 95. It is impossible to say that the decree-holder's application was an application under order 21, rule 97 when he did not make it under that rule, nor did he allege the facts of resistance or obstruction which are necessary to bring the application under that rule.

Under rule 103 a party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish his right within the short period prescribed by the Limitation Act. I have, therefore, to see whether the order passed by Mr. Moore was an order under rule 99. That rule requires the Court to be satisfied that the resistance or obstruction was occasioned by any person other than the judgment-debtor claiming in good faith on his own account or on account of the judgment-debtor. There was no finding by Mr. Moore that any resistance had been occasioned by any person at all. A reference to S. 74 of the Code of Civil Procedure also indicates that the Court proceeds after the purchaser has been resisted or obstructed in obtaining possession of the property by some persons holding it on behalf of the judgment-debtor. The application under rule 97 is separate and distinct from that under rule 95, and has to be filed within 30 days of the resistance or obstruction as provided in Article 167 of the Limitation Act. I am, therefore, satisfied that it is impossible to hold that the order passed by Mr. Moore was an order under rule 99 dismissing an application complaining of resistance or obstruction. If the order was not under that rule, then it is obvious that rule 103 would not apply, nor would will Article 11-A of the Limitation Act apply. It is important to note that under Article 11-A of the Limitation Act, the period of one year begins to run from the date of the order made upon an application by the purchaser of the property, complaining of resistance or obstruction to the delivery of possession thereof. Before, therefore the defendants can defeat the plaintiff's claim, they have got to show that there is an order against the plaintiff, more than one year old, under which an application complaining of resistance or obstruction to the delivery of possession was dismissed. In my opinion there is no such application or order on the record. The order passed was really an order under order 21, rule 95. Even if Mr. Moore went beyond the scope of that rule, which I am by no means prepared to admit, his order would not come under rule 99.

The learned Subordinate Judge has not decided the other questions which arose in the case and has thrown out the suit on this preliminary ground alone. I am, therefore, of opinion that this appeal should be allowed, the decree of the lower Court set aside and the case sent back to the Court below for disposal according to law.

Kanhaiya Lal, J.—The simple question for consideration in this appeal is whether the suit was barred by order 21, rule 103 of the Code of Civil Procedure read with Article 11-A of the Indian Limitation Act. The plaintiff was the auction-purchaser of certain property which had been sold in execution of his decree to which Ganga Ram and Dhanwant, the fathers of the contesting defendants respectively, were parties. The plaintiff sought to obtain possession over the property purchased by him by an application made under order 21, rule 95 of the Code of Civil Procedure to the Court which held the sale. In that application he impleaded the present defendants, suggesting that they held possession on behalf of the judgment-debtors. The Court made some sort of an inquiry into that allegation and came to the conclusion that they were in possession in their own right and not

on behalf of the judgment-debtors and rejected the application.

The present suit was filed by the plaintiff for possession of the disputed property with mesne profits; and it was also prayed that if the defendants wanted an opportunity to redeem the property, they may be ordered to pay to the plaintiff the money due to him on the mortgage in satisfaction of which the property was sold within such time as the Court may allow. So far as the latter relief is concerned, it was clearly outside the scope of the enquiry contemplated by rule 95, and Order 21, rule 103 of the Code of Civil Procedure has, therefore, no application.

In regard to the claim for possession, it is urged on behalf of the defendants that the order of the Court, refusing to deliver possession against the defendants, was an order passed under order 21, rule 99 of the Code of Civil Procedure and that rule 103 was, therefore, applicable. Rule 99 contemplates that there must be a previous complaint under rule 97 of a resistance or obstruction offered to the auction-purchaser in obtaining possession of the property purchased by him. Judging from the terms of the application, recited in the order above referred to, no such complaint appears to have been made by the auction-purchaser at the time. All that he had suggested was that the defendants held possession on behalf of the judgment-debtors, their fathers, and that they were liable to be ejected by an order under Rule 95. Rule 95 authorises the Court, which held and confirmed the sale, to order delivery to be made to the auction-purchaser, on his application by putting such purchaser, or any person whom he may appoint to receive delivery on his behalf, in possession of the property purchased, and, if need be, by removing any person who refuses to vacate the same. The person who refuses and is to be removed may be the judgment-debtor or a person holding possession on his behalf, or a person claiming under a title created by the judgment-debtor subsequently to the ejectment which resulted in the sale. Before a Court can pass an order for his removal, the Court has, however, to be satisfied that he belongs to one or other of the categories above mentioned; and in order to satisfy itself that he does belong to one or othar of these categories, the Court may have to make such *prima facie* enquiry as the circumstances of the case may require. That was the nature of the enquiry which the Court appears to have made in the above proceeding; and though it went on to say that the defendants appeared to hold the property on their own behalf, the order passed cannot be treated as an order passed on a complaint of resistance or obstruction within the meaning of rules 97 and 99 of the said order. Article 167 of the Indian Limitation Act, provides a limitation of 30 days from the date of the obstruction or resistance for making a complaint under rule 97. The filing of the complaint is a condition requisite to give the Court jurisdiction to make an enquiry under rules 98 and 99 and to pass an order which may have the effect ascribed to it by rule 103. Article 11-A of the Indian Limitation Act is in terms applicable only when an order has been passed in terms of the above provisions upon an application by an auction-purchaser for the possession of immoveable property sold in execution of a decree, complaining of the resistance or obstruction to the delivery of possession thereof. There was no actual resistance or obstruction in this case; in fact there was no allegation of any such resistance or obstruction having been offered by the auction-purchaser for possession. It was merely suggested that the defendants were holding possession on behalf of the judgment-debtors, their fathers, and that allegation was enquired into and found against the auction-purchaser with the result that his application was thrown out. Order 21, rule 103 of the Code of Civil Procedure has, in these circumstances, no application to the case.

Even where an auction-purchaser is resisted in obtaining possession by a person claiming to hold possession in his own right, it is open to the

auction-purchaser either to file a complaint under O.21, rule 97 or to recover possession by a suit or otherwise, as he may be advised. A complaint under order 21, rule 97 is not his sole or exclusive remedy. Rule 95 contemplates a refusal by a person of the class described before a process in execution is issued. Rule 97 contemplates an actual resistance or obstruction offered to the auction-purchaser in obtaining possession by such process. The object of the former provision is to uphold the authority of the Court as against the judgment-debtor or any other person holding on his behalf. The object of the latter provision is to protect the public peace by authorizing a summary enquiry into the rights of the contending parties, other than the judgment-debtor, in order to determine what should be immediately done, leaving the dissatisfied party, not being the judgment-debtor, to seek his remedy by a regular suit. If the auction-purchaser does not choose to adopt that course or, in other words, to file a complaint of actual resistance or obstruction by a third person, no bar of the kind suggested can stand in operation against him. "As pointed out in *Hargu Lal* v. *Chandu Lal* (1), if an auction-purchaser is resisted by a person who claims the right to hold possession in his own right, the execution Court is bound to stay its hands unless and until the decree-holder makes an application under order 21, rule 97 of the Code of Civil Procedure, complaining of the resistance within the time allowed by law; and it is only when such a complaint is filed that an investigation can be made, resulting in the consequences contemplated by rule 103. There is nothing in the circumstances, so far as they have been disclosed in the present case, to indicate that any complaint was filed under order 21, rule 97, or that an order was passed on such a complaint. The order was merely an order under order 21, rule 95 by which the auction purchaser was refused relief because the conditions precedent to give the Court jurisdiction to pass an order against a person, who was not the judgment-debtor, were not found to exist. I agree, therefore, with the order proposed by my learned brother Sulaiman. J.

Mukerji, J.—I find myself in the unfortunate position of being unable to agree with my learned colleagues. I shall briefly indicate the reasons of my dissent out of respect for my learned brothers.

The facts which are necessary for the disposal of the point of law raised are briefly these. The appellant, in execution of a decree for sale obtained by himself, purchased the property mortgaged. Among the judgment-debtors were two persons, namely, Ganga Ram and Dhanwant. After obtaining a sale certificate, the appellant put in an application before the learned Subordinate Judge of Muttra apparently making two more persons, Tursi and Chhedu, also parties to it. Tursi and Chhedu were the respective sons of Ganga Ram and Dhanwant. They came and said that they were in possession in their own right and not as claiming under their fathers. The learned Subordinate Judge held that Tursi and Chhedu were real claimants on their own account and accordingly disallowed the application for delivery of possession made by the appellant. This was on the 3rd July 1914. Within one year of this order, no suit was brought by the appellant. On the present suit being instituted on the 8th June 1920, the plaintiff was met with a plea that the suit was barred under the provisions of Article 11-A of the Indian Limitation Act. The question is whether the suit was really so barred as found by the lower Court.

Having given the case my anxious consideration, I have come to the conclusion that the suit was barred.

If we look to the provisions of rules 94 to 103 of order 21 of the Code of Civil Procedure, we will find this Under rule 94 an auction-purchaser gets a certificate for sale which declares his title to certain properties. Rules 95 and 96 lay down the method by which the auction-purchaser is to

(1) 1923 Lah. 145.

be put in possession of the property. Rule 95 says that where the judgment-debtor himself is in possession or where some person claiming under him is in possession, *i. e.* where a person bound by the decree and liable to be ejected physically is in possession, delivery of possession would be made by removing the person in possession. Rule 96 provides that where a person like a tenant is in possession, *i. e.*, a person who is not liable to be ejected on account of the sale, delivery of possession should be made by several modes referred to therein. Naturally the question would arise how is the Court to know which method would be applicable and whether the person who is actually in possession is liable to be removed or not. This machinery is provided, not by the rules 95 and 96, but by the rules 97 to 100. The machinery is this. The person who is in possession is found either to *resist or obstruct in the delivery of possession.* The auction-purchaser says that those persons who are resisting or obstructing are not entitled to do so and asks the Court to remove the resistance or obstruction and to put the auction-purchaser in possession. The Court thereupon hears the parties and decides one way or the other. If it decides that the person in possession is so on account of the judgment-debtor, or the judgment-debtor himself is in possession, it would order the removal of such person from the property. If, on the other hand, the Court finds that the person in possession is so on his own behalf and not on behalf of the judgment-debtor, the Court would disallow the application of the auction-purchaser. The auction-purchaser would then have a remedy by a suit but such a suit must be brought within a short period of limitation as provided in Article 11-A of the Limitation Act.

It is argued that in this case there is no application or complaint by the decree-holder to remove the sons of the judgment debtor, namely, Tursi and Cheddu, from the property and, therefore, there was no inquiry under rule 97, and, therefore, there was no order under rule 97. It is further alleged that whatever inquiry was made, it was made under rule 95. I am afraid I cannot agree. I have already stated that rule 95, and rule 96 for the matter of that, does not contemplate any inquiry whatsoever. It has been urged by the learned counsel for the appellant that the Court made no inquiry under those rules, and if, as a matter of fact, an inquiry has been made, the result of that inquiry cannot have the same effect as the result of an inquiry under rule 97 and rule 99. In the first place, I would say that it is not expedient and proper to assign an adjudication which undoubtedly took place, as having been made under no provision whatsoever of the law. If an inquiry can be referred to it, that inquiry must be taken to have been made under the provisions of law. Presumably the Court knew that the parties had legal assistance. There is, therefore, no warrant for urging that the inquiry that was made was made under no provision whatsoever of the law. I would not, however, rest my judgment simply on this. I am clearly of opinion that the case did come under rule 97. In rule 97 two words have been used, namely, "resistance" and "obstruction". Those words have not the same meaning, otherwise the legislature would be guilty of tautology. Obstruction is a physical act. Resistance is moral and may sometimes be physical. We speak of resisting an appeal. A respondent's counsel resists an appeal. This does not imply that he stands up to fight physically the learned counsel for the appellant. Referring to Murrey's English dictionary, we find that the word "resist" is used in the sense of striving against a moral and mental influence and against something proposed to be done or likely to happen, a law or command &c. Thus, the word "resistance" has been used in order to show that there may be a resistance to the auction-purchaser obtaining delivery of possession without there being any necessity for the auction-purchaser going to the spot. When the auction-purchaser makes an application against some persons who are in possession and those per-

sons come up and say that they are not liable to be ejected and the decree-holder asks for an inquiry, he really asks for an inquiry against the resistance (not obstruction) caused by the persons in possession. When it was proposed by the auction-purchaser, in this particular case, that the Court should remove Tursi and Chhedu from possession on the allegation that they were in possession on behalf of their fathers, the judgment-debtors, he really called upon them to say whether they submitted to the auction-sale or they proposed to resist it. They came and resisted the applicant. What they did, therefore, was fully within the meaning of rule 97 to resist the auction-purchaser in obtaining delivery of possession. As I have already said, it was not necessary for resistance on the part of Tursi and Chhedu that the decree holder should have gone to the spot previously. The further fact that the application was made for delivery of possession against these persons shows that resistance was anticipated. When these men came up and lodged a protest, what they did was actually to resist the applicant, or, in other words, to resist the decree-holder in obtaining possession of the property. When the decree-holder invited the Court to adjudicate upon the question whether he should get possession or whether the application for possession should be disallowed, the Court did adjudicate and hold that these persons in possession were in possession on their own account. Thus the spirit of the law and the letter of the law were both satisfied.

In the circumstances, in my opinion, the appellant was bound to bring his suit within one year of 3rd July 1914. He has not done so His suit was rightly dismissed by the Court below. I would, therefore, dismiss the appeal.

By the Court.—The appeal is allowed, the decree of the lower Court set aside, and the case is sent back to the Court below for disposal according to law. The costs of this appeal will abide the event.

Appeal allowed.

✱ 1924 ALLAHABAD 503

WALSH AND RYVES JJ.

Pitambar Lal—Opposite Party.

v.

Dodee Singh—Petitioner.

Civ. Rev. No. 7 of 1923, Decided on 29th January 1924, from the order of Munsif, Fatehpur.

✱ *Civil P. C., O. 9 R. 9—Application to set aside ex parte decree being dismissed for default—Fresh Application lies only within 30 days of decree.*

An application for restoration which was dismissed for default, that application itself being one for the restoration of a suit which was decided *exparte* might be treated as an original application to set aside the exparte decree. However such an application must be made within 30 days of the decree or the date when the decree became known. If the application was treated as an application to restore a previous application, Order 9 rule 9 could not be construed so as to apply to such an application. 4 P. L. J. 287 Exp; 44 Cal. 950 Foll.

[P. 503, C. 2; P. 405 C. 1.]

Damodar Das—for Applicant.

Opposite Party was not represented

Walsh, J.—This revision has been referred to a Bench of two Judges by Mr. Justice Mukerji. The reasons for his referring it are contained in the revision order of the 9th of January, 1924, and are as follows:—

"The question raised in this revision is whether an application, which was dismissed for default, that application itself being one for the restoration of a suit which was decided *ex-parte*, can lie.

"On this point there seems to be no authority of this Court. The Calcutta High Court, in the case of *Bipin Behari Shaha* v. *Abdul Barik* (1), and the Patna High Court, in the case of *Ramghulam* v. *Sheodeo Narain* (2), have taken contrary views.

"In view of the importance of the question I refer it to a larger Bench. The second question involved in this application is much easier to decide. But as the more important question is to be decided by a larger Bench, both the questions may be put up before that Bench."

We prefer the Calcutta view on this simple ground. Although the application is called an application to restore the application to set aside the *exparte* decree, which application had itself been dismissed for defaults, it really is an application to set aside the *ex-parte* decree, and it may be trea-

(1) [1916] 44 Cal. 950.
(2) [1919] 4 P. L. J. 287.

ted as such. To quote the judgment in *Bipin Bihari Shaha* v. *Abdul Barik* (1), "the application may be treated as an original application although no fresh parties are interested in the case. The proceeding is initiated by an application which has to be numbered as a separate miscellaneous case." If it is treated as an application to restore a previous application, we agree with the Patna view that Order 9, rule 9 cannot be construed so as to apply to such an application. The practical objection raised to the view which we take, namely, that in this event a litigant may go on for ever and apply to restore in an uninterrupted stream of unsuccessful applications is met by the fact, as Mr. Damodar Das points out, that such an application must be made within 30 days of the decree or the date when the decree becomes known, and that if it is not so made, it is barred by statute. It may be that if this point had been taken, this application would have been so barred. But that is not the point or which it was referred to us. On the second question, it is obvious from the arguments of the plaintiff's vakil, that the application, of which complaint is now made, was notified to the plaintiff. The defendant has been put on terms. It is a small matter of Rs. 55 and we are satisfied that no injustice has been done by the order which would require the case to be reheard. The application is dismissed,

Application dismissed.

1924 ALLAHABAD 504

SULAIMAN AND KANHAIYA LAL, JJ.

Thakur Sri Gat Ashram Narainji—Plaintiff—Appellant.

v.

Jaishth Madho Acharia and others—Defendants—Respondents.

F. A. No. 401 of 1921, Decided on 15th April 1924, from the decree of the Subordinate Judge of Muttra.

– (a) *Hindu Law—Religious endowment—Position of Shebaits—Suit by one co-trustee against another for excess realised by the other is maintainable.*

A certain income of a trust property was specifically allotted for specific purpose namely the maintenance of the service connected with the temple and distribution of the income amunt the heirs of the founder of the trust in a certain manner and was put in charge of the Raja of Avagarh.

The Raja however gave a larger share to some of the heirs of the founder who were also trustees. The co-trustees brought a suit for the recovery of the excess so got.

Held: that the dispute virtually was between different persons claiming income of the trust property and that the plaintiffs were entitled to the excess. [P 506, C 2]

Held: further that the fact that the manner indicated in the trust was not followed regarding the payment for some years did not destroy or prejudice the plaintiffs' right. [P 507, C 1]

Held: further that it was not a voluntary payment by the Raja as he did not pay out of his personal fund. [P 507, C 1]

(b) *Civil P. C. S. 11—Parties and Representatives—Suit by one trustee on behalf of the trust, against co-trustees for protection of the trust property or accounts binds all interested in the trust.*

The Shebaits of a trust form a continuing respresentation of the property of the idol. A decree obtained on behalf of the trust by co-trustee against other co-trustees for the protection of the property either in a suit for rendition of accounts or in a suit for declaration that the property in dispute is trust property, binds not only the trustees who are parties to the suit but also all persons interested in the trust. [P 506. C 2]

B. E. O'Conor, *S. C. Das* and *Ram Nama Prasad*—for Appellant.

Kailash Nath Katju, *Girdhari Lal Agarwala* and *Narain Prasad Asthana*—for Respondents.

Kanhaiya Lal, J.—The dispute in this appeal relates to the income derivable from the village Khasrai Bhajanpura and the question for consideration is whether the right to receive an eight annas share of the the said village belongs to the temple of Thakur Shri Gat Ashram Narainji at Muttra.

The temple in question was constructed by Pandit Pran Nath Shastri a learned divine, a long time ago. He died in 1830. The income derived from the temple and the endorsements appertaining thereto used to be applied after his death to the maintenance of religious services at the temple and the support of the Acharis or heirs of the founder. For a conside-

rale time the endowed property was under the management of Raja Pitambar Singh, then the proprietor of the Ava estate. Sometime in 1850 disputes appear to have arisen between the heirs of the deceased founder and a reference was made to arbitration which resulted in an award by which the proportion of the income to be applied to the maintenance of religious services in the temple and to be distributed among the heirs of the deceased founder was determined. In pursuance of that award an agreement was executed by the heirs of the deceased founder on the 26th of March 1850, which provided that an eight anna share of the income of the entire property shall be applied towards the expenses connected with the temple and the support of *Vaishnavas Acharias* and servants of the temple and the payment of a certain allowance to two other persons named therein, and the balance was to be distributed among the heirs of the deceased, the founder. By a subsequent agreement executed on the 2nd November 1874, the heirs agreed that a half of the total income which was then estimated to amount to Rs. 3, 200 per annum was to be applied to the maintenance of worship and other services at the temple and the other half was to be appropriated by the heirs personally. The proportion in which each of the heirs was to contribute the expenses of the worship and services at the temple was also specified. The agreement further provided that none of the heirs shall have any power to transfer the half of the property and income aforesaid which belonged to the Thakurji. But they would have power to transfer their share of the remaining half of the property and income.

The agreement of the 26th of March, 1850, expressly mentioned the village Khasrai Bhajanpura as a part of the property, the income of which was to be dealt with in the manner therein specified. There was no express reference to that village in the agreement of the 22nd November 1874, but a reference was made therein to the award of the 26th March 1850, and it was provided that all the conditions entered therein shall be maintained and be enforceable among the heirs of the deceased founder.

The plaintiff claims to be one of the trustees of the temple in question. The defendants are the other trustees or heirs of the deceased founder. The allegation of the plaintiff was that the village Khasrai Bhajanpura was under the management of the Raja of Ava and that the temple was entitled to the income thereof to the extent of an eight anna share. The complaint was that the defendant No. 1 had received a larger portion of that income than he was entitled to, thereby depriving the temple of that portion which he had received in excess of his share. In the plaint a reference was made to a previous suit said to have been filed by the plaintiff through Musammat Sundar Kuar against the present defendants in the Court of the Subordinate Judge of Agra for the rendition of accounts in respect of the said property from the 5th November 1902, till the 15th November 1906, and it was mentioned that that suit had been decreed on the 8th December 1909, and the appeal filed by the defendants against the decree had been dismissed in 1910. Those facts were admited by the principal contesting defendant respondent Jaishth Madho Acharia. He contested the suit mainly on the ground that whatever was paid to him was paid voluntarily by the Raja of Ava and that the temple was not entitled to recover the same from him. The Court below accepted his contention and dismissed the claim.

In doing so it appears to have entirely disregarded the decision in the previous suits, in which the nature of the title held by the plaintiff in the villages in question and the right to receive the income thereof was in issue. One of the suits was brought by Musammat Sundar Kuar, the widow of Parshadi Lal one of the heirs of the deceased founder in her capacity as one of the trustees of the temple afore-said against the present defendants-respondents on the 14th November 1904, in the Court of the Subordinate Judge of Agra for a declaration that the property in dispute including the village now in question belonged to the said temple

and was a public and charitable endowment, that the idol was the absolute owner of the said property, and that the parties to the suit had no personal interest therein. That suit was decreed after a prolonged contest by the Subordinate Judge of Agra and his decree was upheld by this Court on the 28th October 1909. The finding of this Court in that suit was that the whole property in question appertained to the temple and that its income was intended for the expenses of the temple and the support of the *Acharis Vaishnawas*, worshipping there. Subsequently there was another suit instituted by Mt. Su ndar Kuar against the present defendant-respondent Jaishth Madho Acharia for the rendition of accounts. Musammat Sundar Kuar sued in her capacity as one of the trustees of the temple jaishth Madho Acharya and other trustees were impleaded as defendants. Jasihth Madho Acharicya ontested that suit on various grounds amongst others that the temple was only entit'ed to one-fourth of the income of village Khasrai Bhajanpura. One of the issues framed by the learned Subordinate Judge was whether one-half of the income of the village Bhajanpura formed the share of Thakurji and should go to it. His finding on that issue was that the Thakurji was entitled to one-half of the income and that the defendant honestly wanted to reduce the share of Thakurji to one-fourth and to appropriate the remaining one-fourth to himself. He pointed out that the Ava estate collected the rent of the village and paid the income to the *mutawallis* of the temple. The decision was upheld on appeal, the finding being that the *wakf* was a public one and the temple was entitled to receive half of the income of the said village from the Raja of Ava.

It is not open to the defendant Jaishth Madho Acharya to go behind those findings In the previous suit all the trustees were impleaded and the effect of the decree of this Court was that the entire property then in question including the village now in dispute was declared to be a public endowment for religious and charitable purposes connected with the temple and in favour of the idol. In the latter suit the effect of the decree was that one-half of the income of the village now in question was declared to be the share of the property of the idol and the defendant Jaishth Madho Acharya was found to have no right to receive any portion of the same from the Raja of Ava or to appropriate it to his own use. A decree obtained by one of the trustees on behalf of the trust against the other trustees either for a declaration that the property in dispute was a trust property or for rendition of accounts in a suit brought in the interests of the trust or for the protection of the property is binding as much on the trustees who are parties to the suit as on all persons interested in the trust; for as observed by their Lordships of the Privy Council in *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1), the Shebaits of a trust form a continuing representation of the idol's property. Each of the above suits was instituted by Musammat Sundar Kuar not in her private right but on behalf of the trust and as such the decision arrived at in those suits is conclusive between the parties there to within the meaning of exception VI of S. 11 of the Code of Civil Procedure.

It is urged on behalf of the defendants-respondents that the payment which is sought to be challenged was made to him voluntarily by the Raja of Ava and that the plaintiff was one entitled to claim a refund. But the payment formed part of the distribution of the entire income derived, from the villages in question. The Raja kept no part of the income himself. He distributed the income in a particular manner between the persons who were considered by him to be entitled to receive the same. The dispute is virtually one between the different persons claiming a title to it and if one party has received a larger portion than he was entitled to and has thereby deprived another party of that which he ought to have received, the latter is entitled to claim from

(1) [1837] 2 I. A. 145—4 B. L. R. 450—23 W. R. 253—3 Sar. 449—3 Suther. 102.

the other to the extent to which he was entitled. The Raja did not purport to make any payment to the defendant respondent, Jaishth Madho Acharya out of any personal fund of his own. The income of the village in question was earmarked for a specific purpose, namely, for the maintenance of the services connected with the temple and distribution of the income among the heirs in the manner settled in the previous case. The defendant-respondent Jaishth Madho Acharya was not entitled to receive payment in excess of what he was declared entitled to in the previous proceeding and the mere fact that for some years the payments had not been made precisely in the manner in which they ought to have been made would not destroy or prejudice the right of the plaintiff to receive it in the manner he was entitled to receive. The proceedings of the Court of Wards filed show that there was some dispute between the heirs of the deceased founder as to the manner in which the income was to be distributed by the Ava estate. The Court of Wards proposed to act only as a stake holder and they did not undertake any liability for anything beyond what was payable by them on account of the said villages. That dispute having been settled by a decree of the proper Court the rights of the parties should now be adjusted in accordance with that decision. The appeal must, therefore, be allowed and the suit remanded to the Court below with a direction to reinstate it under its original number and to proceed with its disposal in the manner required by law. Costs of this appeal inluding fees in this Court on the higher scale will abide the result.

Appeal allowed.

1924 ALLAHABAD 507

DANIELS, J.

Lagan Rai—Plaintiff—Appellant.

v.

Raja Rai—Defendant—Respondent.

S. A. No. 1559 of 1922, Decided on 2nd April, 1924, against the decree of the District Judge of Ghazipur.

(*a*) *Sir land—Sale, effect of.*

A vendor holding *sir* land becomes an exproprietary tenant of the entire proprietary body and not merely of his vendee. (P. 508, C. 1.)

(*b*) *Agra Tenancy Act (II of 1901) S. 79—Dispossession by fractional landlord is not dispossession.*

Ejectment by one member of a proprietary body, he being not the Lambardar, is not ejectment by the land-holder.

Pyare Lal Banerji—for Appellant.

Iqbal Ahmad—for Respondent.

Judgment.—The two plots in suit situated in khata Nos. 1 and 2 of a joint mahal were originally the joint *sir* of the plaintiff Lagan Rai and the defendant Raja Rai. The plaintiff sold his share to a third party and became exproprietary tenant in the plots in suit under an order passed under S. 36 of the Land Revenue Act. The defendant Raja Rai contested the order right up to the Court of appeal but the matter was finally decided in the plaintiff's favour in 1919 only one year before the present suit. It appears however that Raja Rai managed to retain possession of the plots and the plaintiff brought the present suit to eject him as a sub-tenant under S. 58 read with S. 34 of the Tenancy Act. I have always entertained doubts whether S. 34 was really intended to suport a suit for ejectment but this appears to be the accepted view of the law since the decision of *Balli* v. *Naubat Singh* (1), and has not been contested before me. The defence raised in the Courts below was that as the defendant is a member of the proprietary body this is a case of a tenant being wrongfully ejected by his landlord within the meaning of S. 79 of the Act and therefore the plaintiff's remedy is barred by reason of his not having sued within six months. This defence was rejected by the Assistant Collector but accepted by the learned District Judge and this is the sole issue argued in the appeal. It is now settled law since the Full Bench case of *Debi Prasad* v. *Bhagwan Din* (2), that a sir holder

---

(1) [1912] 9 A. L. J. 771—16 I. C. 120.
(2) [1913] 35 All. 27—16 I. C. 399—10 A. L. J. 437.

who sells his share becomes an exproprietary tenant of the entire proprietary body and not merely of his vendee. The question therefore resolves itself into this whether dispossession by one member of the proprietary body, not being the lambardar, is to be treated as ejectment by the landholder within the meaning of S. 79. The point is covered by a very recent decision of Mr. Justice Mukerji. *Rani* v. *Edal Singh* (3). The matter is fully discussed in this judgment and it is sufficient to say that I am not prepared to dissent from the law laid down therein.

The result is that the present appeal must succeed. I set aside the decree of the Court below and restore that of the trial Court with costs in all Courts.

Appeal allowed.

(3) 1924 All. 431—22 A. L. J. 113—78 I. C. 1041—L. R. 5 A. Rev. 37.

1924 ALLAHABAD 508

NEAVE, J.

Kallu and others—Plaintiffs—Appellants.

v.

Ganga Ram and another—Defendants—Respondents.

S. A. No. 1717 of 1922, Decided on 9th May 1924, against the decree of the Addl. Sub. J. of Bareilly.

Agra Tenancy Act S. 20—Transfer does not include will.

Will does not come within the meaning of word transfer in S. 20. An occupancy tenant therefore cannot regulate his succession to his tenancy by making a will. [P. 508, C. 2.]

S. C. Das—for Appellants.

Nihal Chand Vaish—for Respondents.

Judgment.—The facts in this case may be briefly stated. Daya Ram had two brothers, Ram Kishen and Net Ram. The plaintiffs are the sons of Ram Kishen and the defendants the sons of Net Ram. It has been found as a fact by the Court below that Daya Ram and his nephews were occupancy tenants in possession of a joint holding, though for convenience they cultivated different portions of it separately. Daya Ram is dead. He made a will under which he bequeathed his share of the holding to the defendants. The plaintiffs brought this suit for a declaration that the will of Daya Ram was invalid so far as his occupancy holding was concerned Both the Courts below have dismissed the suit, the lower appellate Court holding that the will operates as a transfer of the holding and was made in favour of a person who was a co-sharer in the holding at the time of its execution.

Two points have been argued in this appeal: the first that an occupancy tenant cannot regulate the succession to his tenancy by making a will, and second that a will does not come within the meaning of the word 'transfer' in S. 20 of the Tenancy Act.

S. 20, clause 2, of the Tenancy Act provides that—"the interest of occupancy tenants is not transferable otherwise than by voluntary transfer between persons in favour of whom as co-sharers in the tenancy such right originally arose or who have become by succession co-sharers therein." S. 22 of the same Act provides that when an occupancy tenant dies, his interest in the holding shall devolve as follows:—(*e*) failing such daughter's son, on the nearest collateral male relative in the male line of descent provided that no such daughter's son or collateral relative shall be entitled to inherit who did not share in the cultivation of the holding at the time of the tenant's death.

It is contended on behalf of the appellant's that the word 'transfer' in S. 20 of the Tenancy Act must bear the same meaning as in S. 5 of the Transfer of Property Act and be confined to a transfer within the meaning of that section. This would exclude an alienation by will. This proposition finds some support from the language of S. 22 in which the word 'shall' would seem to exclude the right of an occupancy tenant to vary the order of succession prescribed in that section. In my opinion the

view put forward on behalf of the appellants is the correct one. As it has been found that they were joint in cultivation with Daya Ram and are equally with the defendants his nearest collateral male relatives in the male line of descent, I hold that they are entitled to the declaration for which they asked.

The appeal is, accordingly, allowed with costs in all Courts including in this Court fees on the higher scale and the appellants are granted a declaration that the will in suit is invalid so far as the occupancy of Daya Ram is concerned.

Appeal allowed.

1924 ALLAHABAD 509

DANIELS, J.

Qadir Bakhsh and others—Defendants—Appellants.

v.

Abdul Haq—Plaintiff—Respondent.

S. A. No. 1758 of 1922, Decided on 28th April 1924, from the decree of the District Judge of Moradabad.

Wajib-ul-arz—Abadi—Construction.

Qassabs are not Sheikhs and therefore they cannot claim rights of transfer given to Sheikhs. [P. 310, C. 2.]

Hameed Ulla and M. U. S. Jang—for Appellants.

K. N. Malaviya—for Respondent.

Daniels, J.—The short point, and the sole point, raised in this appeal is whether Qassabs (butchers), not being proprietors in the village but ryots, have a right of transfer in their houses and the sites thereof in the village of Garhi in the Amroha tahsil of the Moradabad district, in which the property in suit is situated. The second and third defendants who, are Qassabs, sold their house with the site on which it stands to another butcher, the first defendant. The zamindar has sued for a declaration that the sale is invalid and for the possession of the sites by removal of the constructions. The learned Munsif dismissed the suit but the learned District Judge has decreed it.

The custom is recorded in the wajib-ul-arz of the village, which both parties accept but as to the interpretation of which they differ. The wajib-ul-arz recognises a transferable right in their houses and the sites in seven classes of persons and no others. These seven classes are Tambolis, Brahmans, Banias, Sheikhs, Saiyids, Mughals and Pathans. The first three of these are Hindus, and the remaining four Muhammadans. The view taken by the trial Court was that the four classes of Muhammadans specified were merely illustrative and not exhaustive and that the custom applied to all Muhammadans whether belonging to the classes specified or not. This view is obviously untenable. The view pressed before the District Judge and in this Court has been that all Muhammadans who are not either Saiyids, Pathans or Mughals are included under the general description "Sheikh" and that, therefore, all Muhammadans are included under the four classes given. To this contention the learned Judge gives substantially three answers. He says.

Firstly, that if it had been intended to include all Muhammadans it would have been perfectly easy to say so;

Secondly, that though it is true that all Muhammadans who are not Saiyids, Pathans or Mughals when they rise in the world claim to be Sheikhs, on the other hand there are many Muhammadans in India who do not call themselves Sheikhs, Saiyids, Pathans or Mughals, but by other names such as Julahas, Nurbafs, Qassabs, etc.;

Thirdly, that the view that low class Muhammadans and Muhammadan converts were intended to be excluded is supported by the fact that only some classes of Hindus have been given a right of alienation.

In my opinion the view taken by the learned Judge is correct. It is perhaps an overstatement to say that all Muhammadans of other than the four primary classes claim to be Sheikhs when they rise in the world, but it is certainly true that they very commonly do so. This is mentioned by Crooke in his Tribes and Castes of the N. W. P., Volume IV, p. 315; but

on t e other hand a distinction between Qassabs and Sheikhs is recognised even in the very passage on which the appellants rely. Mr. Crooke quotes a common proverb, applicable to a man who has gone up the world. which runs—

"The first year I was a butcher (Qassab), the next a Sheikh; this year if prices rise, I shall be a Saiyid.

It is a matter of common knowledge that Qassabs do not usually describe themselves as Sheikhs and they are not classified as such at the Census. Table XIII of the U. P. Census Report for 1921 gives a classification of the population according to caste, tribe, race or nationality. In this Table (Part II- pp. 224, 225) Qassabs are shown separately from either Pathans, Saiyids or Sheikhs. They are likewise classified separately in the corresponding table in the Census of India Report (Vol. 1, at p. 163). They are also separately treated by Mr. Crooke, Vol. IV, pp. 190, 191. The same conclusion is supported by a reference to the official Gazetteer of the Moradabad district. It is interesting to note that according to the Gazetteer, p. 77, conversion from Hinduism has taken place in this district to a larger extent than in any other district in the province as will appear from the following extract:

"Probably in no other district has conversion from Hinduism occurred to such an extent. Proselytism is still in some degree an active force, judging by the number of Nau-Muslims, of whom no fewer than 12,070 were recorded, irrespective of the many who either retained their old caste name or else adopted a recognised Muhammadan style such as Sheikh or Pathan."

Succeeding paragraphs are devoted to the Sheikhs, Pathans, Saiyids and Mughals and to certain very numerous classes not included under either of these four heads such as Julahas and Barhais. After these have been dealt with there follows a paragraph on p. 80 dealing with "other castes" and among these are enumerated the Qassabs or butchers with a population of 8,914. These authorities and the language of the wajib-ul-arz lead alike to the conclusion that Qassabs are treated as a separate class and that they are not intended to be included under the description "Sheikh." This is the only question which has been argued and my finding on it is against the appellants.

I, accordingly, dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

✱ 1924 ALLAHABAD 510

WALSH AND RYVES, JJ.

Firm Kedar Nath Durga Prasad—Plaintiffs—Appellants.

v.

Firm Bishwanath Lakshmi Chand—Defendants—Respondents.

F. A. No. 52 of 1923, Decided on 11th February 1924, from an Order of Sub. J. Cawnpore.

✱ *Civil P. C., O. 11 R. 18—Absence of denial by the other party taken along with absence of proper affidavit does not justify penal action—Affidavit is generally conclusive—Notice under R. 18 to other side is necessary.*

Where Plaintiff had not denied possession of documents sought to be inspected on affidavit which however was not in proper order the High Court set aside the order of dismissal under R. 21 on plaintiff undertaking to file in the Court a complete affidavit of all the documents relevant to the suit which were in his possession, power or control. Under Rule 18, order for instruction should not be made without giving the other side an opportunity of replying on the affidavit. Such an affidavit of documents material to the case when made by parties is conclusive and as a general rule a Court cannot go behind it. (P. 511, C. 1 & 2.)

S. N. Sen and *K. N. Katju*—for Appellants.

G. W. Dillon and *S. N. Mukherji*—for Respondents.

Walsh, J.—We think this order has arisen out of a misunderstanding. In some ways the defendants are to blame. If they wanted to pin the plaintiffs down to a statement on oath of the relevant documents in the plaintiffs' possession relating either to this case, or the contract of August 1918, or the damages claimed in the

suit, they ought to have applied to the Court without making any affidavit at all for an order directing the plaintiffs to state on oath the documents in their possession under Order 11 rule 12. This they have not done. They omitted this step. They wished to go beyond Order 11 rule 15, and applied to inspect under Order 11 rule 18 documents not mentioned in the pleadings or in the affidavit of documents. They had to found such an application upon an affidavit showing of what documents inspection was sought. We are of opinion that the affidavit which was filed with that object was totally insufficient. Carefully examined, it did not comply with the rule. More important still, we are of opinion that under Order 11 rule 18, when a party applies to inspect documents which are not in the pleadings or in a previous affidavit of documents, and makes an affidavit for that purpose, the Court ought not to make an order for inspection without giving the other side an opportunity of replying on affidavit. If the other side in this case had replied on affidavit, in all probability this trouble would never have arisen. But an atmosphere of suspicion and distrust has grown up. The plaintiffs put in an application, which was not on affidavit, in which they stated that certain books are not in their shop. It is contended that, that is the ordinary expression for "are not used in 'their business'." Mr. Dillon naturally says it is consistent with their being in their house. The learned Judge complains that the plaintiffs did not support their application by an affidavit, and after throwing a cloud of suspicion over the plaintiff's conduct, he has actually dismissed their suit, apparently because it was the only remedy which he could find in the Code. We think that there is a better remedy than that. The plaintiffs are desirous of making an affidavit, which they ought to have been called upon to do long ago stating exactly the books—identifying them by a precise description which will be understood by everybody—which are now or have been in their possession since August 1918, and which contain anything relating to the case in question or the contract in dispute. In addition they are desirous of stating on oath that the four books which they previously said were not kept in the shop and which the defendants now say they want to see, never have been kept in their business and do not exist. We think they ought to be allowed to make this affidavit which must cover both the past and the present of their own position or that anybody under them. If they do this according to the well established practice—at any rate in England from which these rules are derived—that affidavit is conclusive and the Court cannot go behind it unless there is something, as Mr Dillon suggests, like an answer in cross-examination or some other documentary evidence showing conclusively that there is such entry or book. We give the plaintiff an opportunity of filing such an affidavit before us at 11 a. m. to-morrow, and Mr. Dillon accepts that on behalf of his clients. It will be placed upon the record which will be returned to the lower Court, and the order of the Court below will be modified by substituting this order, and the costs of these proceedings here and in the Court below will be costs in the suit, which must be presented without delay.

Order modified.

✱ 1924 ALLAHABAD 511

WALSH AND RYVES, JJ.

Lakhan—Appellant.

v

King Emperor—Opposite Party.

Cr. A. No. 972 of 1923, Decided on 8th January 1924, from the order of Sessions Judge of Gorakhpur.

(a) *Criminal Trial--Benefit of doubt.*

Benefit of doubt means benefit of a real and reasonable doubt in the mind of the Court.

✱ (b) *Evidence Act, S. 30—Admissibility.*

Merely because a confession is not complete and detailed up to the hilt it does not become inadmissible against a co-accused. [P. 513, C. 2]

(c) *Criminal Trial—Opinion of Judge.*

The personal view of the Judge is the ultimate view that is to prevail until law makes the verdict of the Jury or the opinion of the Assessors final and conclusive.

K. Varma—for Appellant.

The Government Advocate—for the Crown.

Walsh, J.—In this case one Lakhan Chamar has been convicted under S. 302, Indian Penal Code, and sentenced to death and has appealed against that conviction. With him was convicted one Mathura Ojha of an offence under S. 325, Indian Penal Code, and sentenced to 7 years rigorous imprisonment, and one Narain Koeri of an offence under S. 201, Indian Penal Code, and also sentenced to 7 years rigorous imprisonment. Two other persons along with these three, namely, Bandhu Chamar and Kolai Chamar have been acquitted. Owing to a somewhat narrow view which the learned Judge has taken of the numerous confessions in this case, these two must consider themselves somewhat fortunate to have escaped. The murder was a most cold-blooded and brutal one of the village patwari and the usual difficulty was experienced in getting direct evidence of guilt in a small village where an unpopular person has been got rid of, and the community probably think that a maximum of one culprit, who will probably be hung, is sufficient to answer the death of one victim. There is no doubt that there was ample motive and that the patwari was living, like the Czar of Russia used to do, on a sort of volcano. His house had been burnt down once, but he had not the courage to take notice of that trifling incident. His head had also been broken by some attack and altogether he seemed to be the general target for every body in the village and there can be no question that he was done to death on this occasion on his return to the village and that his dead body was thrown into a well and that a change of policy was adopted and that the dead body was taken to an adjoining river which was in high flood and, although it was seen once floating, it has since disappeared. There is no doubt that he is dead and the Judge has satisfied himself on that point with an ingenious piece of evidence. The village maps, which this deceased patwari carried with him out of the village, were burnt in the village on the night of his disappearance. So that it is certain that he returned to the village and the maps being on cloth, although they had been charred black by the fire, the ink has come out white, and the division of the village into plots can still be distinctly traced on the charred remains and compared with a genuine map. In such a case as this, where the investigation is generally difficult, the evidence is very strong. Each of the persons mainly implicated, and almost certainly engaged in the murder, has made a sort of confession containing the usual half-hearted but damning admissions, and couched generally in language intended to create an impression that they were merely unwilling spectators. But as a matter of fact, certainly in the case of Mathura, the learned Judge has overlooked the fact that his own confession is enough to hang him and, therefore, is evidence against Lakhan. The learned Judge is not quite right in holding that because a confession is not a complete and detailed confession up to the hilt, it is inadmissible against a co-accused. But the other evidence against Lakhan and Mathura is really very strong. The learned Judge got into a difficulty. The evidence against Mathura is stronger than that against anybody else, and the Judge says two or three times in the course of his judgment that he is satisfied that he really planned the murder. The evidence of motive against Mathura is much stronger than against the other accused. He had just been dispossessed from a valuable and valued office which he had enjoyed for many years and had been dispossessed as the result of the patwari's action, and there was a village rumour that he was engaged in rivalry with the patwari for the illicit affections of some low class villager's wife. The assessors, of whom two were Brahmans, found Mathura not guilty but of course convicted the worthless Chamar. That seems to be considered quite the natural and reasonable consequence of trying a Brahman and a Chamar in the same transaction and the learned Judge

describes their conduct as perverse. He satisfied himself at the trial that at least Mathura was guilty under S. 325, Indian Penal Code, but he was obviously very unhappy about whether he was right or not in acquitting him under S. 302, Indian Penal Code. He actually says in more than one passage of the judgment that he has very little doubt as to the real complicity of Mathura and his own personal view was that he was the person who planned the murder. While sympathising with the learned Judge, after all it is right to point out that until the verdict of a jury or the opinion of the assessors becomes the legal tribunal for questions of fact, the personal view of the learned Judge is the ultimate one, that the benefit of the doubt means a real and reasonable doubt and it is quite clear that the learned Judge had none. It was under these circumstances that the Government Advocate applied to us to adjourn the hearing until an appeal was filed on behalf of Government against the conviction of Mathura under S. 325, Indian Penal Code, instead of S 302, Indian Penal Code. We adjourned the case for that purpose. Ample notice was given to the district authorities in Gorakhpur, namely, on the 4th January. All that was necessary was for the District Magistrate to give notice to the Superintendent of the Jail in Benares, where Mathura is undergoing his punishment, to produce him here on the 18th. Through some unexplained delay they seem to have been unable to get the prisoner into Allahabad in time for the hearing of the appeal to-day, although 14 days time was available. We do not think it right to delay the appeal merely because the prisoner is not here, inasmuch as he has been ably represented by Mr. Kamlakanta Verma and was represented at the trial and everything possible was said for him on the questions arising in the judgment under appeal. It would be difficult for anybody to improve upon the reasons given by the learned Judge, if they are good ones, for not convicting him under S. 302, Indian Penal Code, and, as the man does not know English, we are satisfied that he would have derived no benefit from his presence and certainly would not have assisted us. We have now, therefore, to dispose of the Government appeal and the appeal of Lakhan. Taking the case of Mathura first, it is really an overwhelming case. His confession says that he was asked by Lakhan Chamar to give information when the patwari returned to the village, so that he may be handled for having interfered with the priesthood, that his hands and feet should be broken and that he should be incapacitated from work. He was told that Ram Kishen Koeri, who worked for the patwari, had better be warned to be away that night because the patwari had many enemies. The object was to get rid of Ram Kishen as a witness, but Mathura, according to his own confession, did that part of the business. He then went to sleep and he would have us believe that he was woke up by Lakhan who told him that he was going to beat the patwari. He studiously avoids saying that he was there. But his own half-hearted description indicates that he must have been there. When the Lala began to cry, he says, the village people woke up but none went there. How did he know when he was not there himself? Ram Kishen and Narain ran away to their respective homes. Again how did he know that? Further he says that after the Lala's voice stopped he heard a sound as if somebody had been thrown into a well. There is only one inference from this statement and, if one were to take it at its face value, it means that in this village people are thrown into wells as a matter of such common practice that the sound has become familiar to the residents who can always tell from a distance if a body is being thrown into a well, which is of course an absurdity. But he follows this up by saying that he went home and went to sleep. Where was he when he was awake? The inference is obvious, and it is driven home by the next sentence in which he says that next morning he went to the well to see whether the body was afloat. This convicts him of the knowledge over night of the death and strongly corroborates the eye

witnesses who say he was there. Lakhan, of course, in his confession assigns the principal part to Mathura. Village witnesses speak about the jealousy between this accused and the deceased man and also about the public removal from the priesthood. The confession of Narain contains evidence that Mathura took him to the well with the object of removing the corpse to the river. He says that the body was taken out of the well by means of a hook and that Narain was called there for that purpose, all of which indicate either that Mathura being the principal culprit was anxious to show the crime in two pieces so that he might have two sets of persons implicated and thereby increase the chances of his escaping altogether, or that he really was the brains behind the gang and that thinking slowly he raised after it was too late, that the story of the patwari falling into the well was too thin and ought to be abandoned in favour of something better. No doubt the evidence of the witness Khedan, as Dr. Katju on behalf of Lakhan, against whom the evidence is not so strong says, is in many respects unsatisfactory. He is to some extent directly implicated both by his own admission and by other evidence in the case and he has not told a story consistent in itself in every particular with the irreconcilable confessions of the other persons. But it is just one of those cases where, although the details of the confession are complicated for reasons which one can well understand, a substantial story told by each accused leaves no doubt as to the guilt of Lakhan and Mathura in the full degree under S. 302, Indian Penal Code, and probably of some others as well. Under these circumstances the appeal of Government must be allowed, Mathura must be convicted under S. 302, Indian Penal Code, in lieu of S. 325, Indian Penal Code, and sentenced to death according to law, and the appeal of Lakhan must be dismissed and the conviction and sentence carried out according to law.

Appeal dismissed.

✱ ✱ 1924 ALLAHABAD 514

STUART AND MUKERJI, JJ.

Kedar Nath—Appellant.

v.

Shankar Lal and others — Respondents.

S. A. No. 702 of 1922, Decided on 8th January 1924, from the decree of D. J. Saharanpur.

✱ ✱ (*a*) *Registration Act, (III of 1877) S. 2 Cl. 7—Kabuliat is treated as lease only for registration—It is not a lease for all purposes.*

For purposes of registration a counterpart kabuliat, an undertaking to cultivate or occupy and an agreement to lease are put in the same category as a lease; in other words an undertaking to cultivate or occupy from year to year ordinarily requires registration under the provisions of S. 17. What is known as a lease under the law is not the same thing as an undertaking to cultivate and the substantive law relating to leases cannot be applied to undertakings to cultivate by substituting the words "undertaking to cultivate" for "lease" wherever the word "lease" occurs in legislative enactments other than the Registration Act. [P. 517, C. 2 & P. 518, C 1]

✱ ✱ (*b*) *T. P. Act, S. 105—Kabuliat though accepted by landlord does not create title in lessee as a lease would do.*

A registered kabuliat executed by the person occupying the premises and accepted by the person owning the premises is not sufficient to bestow title upon the person occupying the premises and can in no way be considered a lease as defined in S. 105. [P. 518, C. 1]

Nihal Chand—for Appellant.

Peary Lal Banerji — for Respondents.

Stuart, J. — The learned District Judge decided the contentions which we are now considering upon one point. He wrote in his judgment:—"The main point for decision is one of law and may be stated in this form. Is a registered kabuliat executed by the tenant and accepted by the landlord sufficient to create a tenancy?

He decided that point only.

The facts were as follows:—The plaintiff who is here the appellant is the owner of a shop with a shed attached which he leased to a certain Kundan Lal. Kundan Lal executed a kabuliat in plaintiff appellant's favour, dated the 19th March 1913, agreeing to occupy these premises on a monthly rental until 1918. It is not clear whether the plaintiff had executed a

lease for this period of five years in favour of Kundan Lal. It is of no consequence whether he did or did not execute a lease, for it is admitted that he took no exception to Kundan Lal as a tenant during those five years. His relations with Kundan Lal appear to have been amicable during that period. When that lease came to an end, it is an admitted fact that Kundan Lal executed a registered kabuliat, dated the 10th April 1918, by which he agreed to occupy the same premises as tenant for a further period of eleven years on an annual rental of Rs. 200. Kundan Lal continued to occupy the premises and the plaintiff made no objection, as far as we can gather, to his occupation. Kundan Lal died in 1918. After his death the plaintiff instituted the suit out of which the present appeal arises against the sons of the deceased Kundan Lal, who had continued to occupy the premises, for possession of the premises, for an amount for use and occupation for the period between their father's death and the date of the suit calculated at the rate at which their father had been paying rent, and for damages at the same rate up to the period that the plaintiff might obtain possession. The learned District Judge did not go into the other points raised between the parties. He did not even decide upon the evidence whether the plaintiff had or had not accepted the kabuliat. He took the view that without considering other evidence the plaintiff must be considered to have accepted the kabuliat on the wording of the plaint and on the wording of a notice issued by the plaintiff's pleader to Kundan Lal's sons, dated the 14th April 1919. We do not consider that on the wording of the plaint and the wording of the notice a conclusion can be drawn that the plaintiff accepted the kabuliat of 10th April 1918. The plaint affords no authority for a finding other than that the plaintiff had permitted Kundan Lal to hold over as a tenant from year to year after the first period of five years had come to an end. It does not follow from this that he would extend the same towards Kundan Lal's sons after the death of Kundan Lal. The wording of the notice in no way supports the suggestion that the plaintiff accepted or admitted the kabuliat and so far there has been no finding on the evidence as to whether, and, if so, how far, the plaintiff misled the defendants by his action in permitting Kundan Lal to hold on after the period of five years had come to an end, or in other words as to the validity of the plea of estoppel which has been raised by the defendants. The point as to what the plaintiff actually did do or omitted to do and the effect of his acts and omissions upon the merits of the case has not been decided by a finding of fact and as will be seen from the subsequent portion of this decision, we propose to leave this question in addition to the other questions which so far have not been decided to the decision of the learned District Judge's successor.

But it is unnecessary for us to remand the case for further findings and await their decision before we decide the only question now before us because we answer in the negative the question which the learned Judge answered in the affirmative. We do not find that the plaintiff accepted the kabuliat and we express no opinion as to whether he did or did not, but assuming that he accepted the kabuliat we cannot accept the learned Judge's view as to the law.

The question which we have to decide is one which has been before this and other High Courts on previous occasions and, in so far as this High Court is concerned it has not so far been decided in explicit terms by a Bench. The first occasion when it arose in a reported decision was when it came before a Bench of this Court in *Nand Lal* v. *Hanuman Das* (1). There the defendants who were the occupiers of a house alleged that they could not be ejected therefrom because they held under a lease. What they alleged to be a lease was a registered kabuliat. It was found in that case that the plaintiffs, the owners of the house, had been fully aware of the execution of the kabuliat and had given consent to its execution Blair, J.

(1) [1904] 26 All. 368—1 A.L.J. 96—(1904) A.W.N. 46.

referred to a decision in a Letters Patent appeal (this is quoted as a note to the report) in which the view which he had previously taken that a registered kabuliat even when accepted by the landholder does not constitute a lease was approved by Edge, C. J. and Burkitt, J. He maintained his previous opinion and found that the kabuliat before him in the appeal which he was then deciding could not operate as a lease. He found for the ejectment of the defendants. Banerji, J., also found in favour of the ejectment but he did not express an opinion upon the point now before us. He is entered in the head-note as having questioned the validity of the opinion of Blair, J., but the head-note is not accurate on that point as will be seen from the words of Banerji, J. All that he said was this :—

"Having regard to the fact that it is a common practice in these provinces to treat a kabuliat as the instrument creating a tenancy and that a ruling such as that contended for by the appellants may unsettle titles, I do not desire to express any opinion upon the first question raised in this appeal."

I fail to understand how by using these words the learned Judge could be held to have expressed a doubt as to the correctness of the view of Blair, J. This decision was passed in 1904. A few months later the same point arose before Blair, J., sitting singly in *Kashi Gir* v. *Jogendro Nath Ghose* (2). In that case he repeated the view that a lease could not be created by a kabuliat and that until a lease or a patta was duly executed and registered in cases in which the law required a registered instrument no lease was created or could be proved. In 1905 the point again came before a Bench of this Court when Blair, J., and Banerji, J., refused in a case where certain persons claimed to collect market dues under an unregistered lease and a registered kabuliat to recognise that claim. The decision clearly was that the lease being unregistered was ineffective and that the kabuliat although registered did not create a lease. But the point was not decided explicitly. The decision is reported in *Sikandar* v. *Bahadur* (3). The point was raised again in 1909 before a Full Bench consisting of Stanley, C. J., and Banerji and Aikman, JJ. Their decision is reported in *Sheo Karan Singh* v. *Maharaja Prabhu Narain Singh* (4). The point was not decided. The question was not raised in the form before us. The appeal related to a suit for arrears of rent on the basis of a registered kabuliat. The defendants who were tenants of the Maharaja of Benares were let into occupancy of a tenancy on a registered kabulait. The Maharaja sued them for arrears of rent and they set up that they could not be made to pay rent because, as the Maharaja had not executed a lease, they were not liable to pay anything. This plea did not find favour with the Assistant Collector who heard the suit. He decreed the claim. The plea which was advanced before the High Court was that a kabuliat was equivalent to a counterpart and that there could not be a counterpart without a lease. Thus there being no lease, the kabuliat was waste paper and the defendants were not liable to pay rent at all. The defendants-appellants endeavoured to press into their favour the decisions which I have already quoted and asked the Court to take the view that as a lease could not be created by a kabuliat a tenant who had agreed to pay rent by a registered instrument was under no liability to pay rent at all. The Full Bench decided this plea in the following words :—

"The only ground of appeal which has been pressed in argument before us is the first, namely, that a kabuliat without a patta does not create a valid lease of immoveable property. As to this we express no opinion inasmuch as we find that under the circumstances the plaintiff is clearly entitled to recover compensation for use and occupation."

(2) [1904] 27 All. 136—(1904) A.W.N. 19—1 A.L.J. 576.

(3) [1905] 27 All. 462—(1905) A.W.N. 48—2 A.L.J. 208.

(4) [1909] 31 All. 276—6 A.L.J. 167—2 I.C. 211—5 M.L.T. 347.

They added that they expressed no opinion as to the correctness of the rulings which had already been cited. I fail to understand from the wording of this decision that the learned Judges who composed the Bench dissented from the view taken by Blair, J. The matter was raised again before me as a Single Judge in 1916. My decision is reported in *Bijai Narain Singh* v. *Sri Maharaja Prabhu Narain Singh* (5). The point taken in the present appeal was not material to my decision in that appeal and I expressed no view upon the point which is now before us. The learned Counsel for the respondents in this appeal has been unable to show us any decision of our own Court in which a view has been taken differing from or questioning the law as laid down by Blair, J., and by the Bench which decided 2 A. L. J. 208, and it would appear to me that upon the principle of "*stare decisis*" this Bench would not be competent to accept the view taken by the learned District Judge of Saharanpur and if they differed from the view taken in the past they should refer the point for the decision of a Full Bench. It has been urged upon us by the learned Counsel for the respondents that, in view of certain decisions in the High Courts of Madras and Calcutta, we should refuse to follow the view taken by our own Court. He relies in particular upon a decision of the Full Bench of the High Court at Madras passed in 1910. *Syed Ajam Sahib* v. *Anantha Narayana Aiyar* (6), and a decision of a Bench of the Calcutta High Court, *Raimoni Dassi* v. *Mathura Mohan Dey* (7). In deference to the views of the learned Judges who decided those appeals I propose to say something more. I refer to the provisions of Act IV of 1882 to show what a lease is in India and how a valid lease can be created by the Indian law. S. 105 of that Act states—

"A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

"The transferor is called the lessor, the transferee is called the lessee, the price is called the premium and the money, share, service or other thing to be so rendered is called the rent."

S. 107 commences—

"A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument."

Thus in order to create a valid title to occupation of premises, the property of another person, for a term exceeding one year by lease a registered instrument is necessary. A lease is a transfer. A transfer must obviously be made by the transferor. It cannot be made by the transferee. So the owner of the premises must make the transfer. The transfer can be only made by his volition, but that transfer does not become effective in case of a lease for a term exceeding one year until a registered instrument comes into being. The argument on the other side is apparently that the owner must make the transfer, but the registered instrument creating the transfer, which is essential to the validity of a title in such cases, can be made by the transferee. How is this possible? Surely, if such is the case, the transfer itself is made by the transferee and is accepted by the transferor. I observe that both in Calcutta and Madras stress has been laid upon the terms of S. 2, clause 7, of the Registration Act. Old Act III of 1877, clause 7 of S. 2, states that a lease includes a counterpart, kabuliat, an undertaking to cultivate or occupy, and an agreement to lease. From this it is argued that the word "lease" includes kabuliat and that a kabuliat is a lease. I understand the meaning of the words, however, to be that for purposes of registration a counterpart, kabuliat, an undertaking to cultivate

(5) [1917] 15 A.L.J. 317—37 I.C. 395.
(6) [1912] 35 Mad. 95—21 M.L.J. 202—1910 M.W.N. 766—8 I.C. 668—8 M.L.T. 437 (F.B.)
(7) [1912] 39 Cal. 1016—16 C.W.N. 606—14 I.C. 540—15 C.L.J. 665

or occupy, and an agreement to lease are put in the same category as a lease, in other words, that an undertaking to cultivate or occupy from year to year ordinarily requires registration under the provisions of S. 17. I do not understand these words to suggest that what is known as a lease under the law is the same thing as an undertaking to cultivate and that the substantive law relating to leases can be applied to undertakings to cultivate by substituting the words "undertaking to cultivate" for "lease" wherever the word "lease" occurs in legislative enactments other than the Registration Act. It is true that S. 4, Act IV of 1882, lays down that S. 107 of that Act is to be read as supplemental to the Indian Registration Act. I understand those words to mean that the provisions in S. 107 relating to registration were intended to supersede and to absorb the provisions relating to registration of leases which were contained in the Registration Act that had been passed five years earlier. For these reasons, taking the view of the law which I consider to be the view that has always been accepted in this Court and finding no reason to refer the point to a Full Bench, I should answer the District Judge's question in the negative and decide that a registered kabuliat executed by the person occupying the premises and accepted by the person owning the premises is not sufficient to bestow title upon the person occupying the premises and can in no way be considered a lease as defined in S. 105 of Act IV of 1882. The result of this decision would be that this appeal would succeed and the District Judge's decision upon a preliminary point of law having been reversed, the case would be sent back to his successor for restoration to its original number and decision on the merits upon the other points.

Mukerji, J.—I entirely agree with what has fallen from my learned brother. I wish to add just a few words. In arriving at the conclusion at which I have arrived, namely, the same conclusion at which my learned brother has arrived, I have not overlooked the fact that in this country the custom largely prevails of creating leases, rather attempting to create them by means of a mere kabuliat or a document executed by the intending lessee alone. What we have to do, however, is merely to interpret the law as it stands. In interpreting the law as we have done, it is satisfactory to note that, we are not interfering with a large number of kabuliats and leases which relate to agricultural holdings. By the express provisions of S. 117 of the Transfer of Property Act the provisions in Chapter V of that Act do not apply to agricultural leases.

Lastly, I would observe that we have decided merely a point of law. If apart from the kabuliat, the defendants can show any good reasons for being allowed to continue to occupy the premises in suit, they would still be entitled to show those reasons before the lower appellate Court. I, therefore, concur in the order proposed.

The appeal is allowed. As the Court from whose decree the appeal has been preferred has disposed of the suit on a preliminary point and its decree has been reversed on appeal a copy of these judgments shall be sent to the Court with directions to readmit the appeal under its original number and determine it on the merits. Costs here and hitherto will abide the result. The costs in this Court will be on the higher scale.

Appeal allowed.

✱ 1924 ALLAHABAD 518

WALSH, AG. C. J. AND RYVES. J.

Bijadhar Bhagat—Defendant — Appellant.

v.

Jeat Chamar and another — Plaintiff & Defendant—Respondents.

L. P. A. No. 11 of 1924, Decided on 15th April 1924, against the judgment of Kanhaiya Lal, J.

Practice—Judgment—Second Appeal—Facts stated by counsel cannot be ordinarily challenged by the party at later stages.

A Court of Second Appeal is required by law to express its opinion on the question of law submitted to it and if the counsel choose to

submit to it questions of law based upon the statements of law which they do not challenge, in fact which they convey to the Court, they cannot afterwards be heard to question it in the further stages of the case. e. g. in Letters Patent Appeal.

In other words the judgment should be judged with respect to the law laid down by the Court in accordance with the facts stated at the Bar. [P. 520 C. 1]

* *Practice—Judgment—Erroneous statement by counsel or misunderstanding by a Judge can be corrected only by a review and not by appeal.*

If there is any misunderstanding or slip which has led to an erroneous statement of fact in a judgment owing to a slip by a counsel or a misunderstanding by the Judge, the proper remedy is to go to the Jugde in review and ask him to review his judgment on the ground that he has decided the law upon misunderstanding of what the facts found in the Court below were. Counsel ought not to allow a Judge to decide a point of law upon one hypothesis of fact to which they all are parties, and then appeal and argue a point of law on another hypothesis altogether. [P. 520 C. 1]

S. C Das—for Appellant.

Respondents were not represented.

Walsh, Ag. C. J.—We are satisfied that this decision is right and that it would be idle to issue notice. The case had got into a muddle by the time it reached our brother, Mr. Justice Kanhaiya Lal, but on the view of the evidence taken by him there can be no doubt that the law laid down is correct. The point is quite simple. It is found that Manohar, the predecessor of the plaintiff was the holder of an occupancy tenancy. This he purported to lease in 1897 for 23 years to one Ram Kishun, the zamindar of the village. It would appear doubtful whether Ram Kishun interested himself very much in the tenancy and whether he actually cultivated or occupied, but there is no doubt that at a later date, Bijadhar, who was also defendant in the suit came into possession. If he came into possession with the permission of Ram Kishun he would be either his sub-tenant or assignee. He would therefore be lawfully in possession. Mr. Das says that he has been found to be the zamindar. It may be so, but it does not appear exactly how. Mr. Das says it is immaterial but we can only suppose that it is either by purchase from Ram Kishun or by some other method known to the law, but inasmuch as the transaction was subsequent to the lease, it could not affect the lessor's right and therefore Bijadhar being in possession could only claim to be so through Ram Kishun the lessee. If he does not like that capacity and repudiates Ram Kishun, then he becomes a mere trespasser. Bijadhar, havin appeared upon the scene, got n s name entered as in possession and this property entered as his khudkasht. This moved the plaintiff into activity and produced this suit. He treated it as what has been called a "cloud upon his title" and sued for a declaration. He could not claim possession as he had leased the property.

The mere statament of these facts is sufficient to show that the plaintiff had a clear case to which there was no defence. All sorts of defences were raised, and it is difficult to understand the law, either of the Assistant Collector, or of the District Judge. The most serious thing is a finding of fact in favour Mr. Das' client, namely that the lease was fictitious. But fictitious is an ambiguous phrase and nobody suggests that it did not exist. Indeed the District Judge complains that Ram Kishun refused to produce the document and the lower Court had to rely on a certified copy. We agree with Mr. Justice Kanhaiya Lal that there was no evidence upon which the Court in this case could find that the lease was fictitious. Upon these facts, extracted with difficulty from the cloud of misunderstanding in the Courts below, Mr. Justice Kanhaiya Lal has applied the law correctly and it is impossible to find fault with his judgment. Mr. Das was originally instructed when opening the appeal to challenge the statement of the learned judge that Bijadhar was the successor-in-interest of Ram Kishun. We think that this is a correct statement of the position, but we desire also to say that even if it were not, we should decline to listen to an appeal against a statement of fact in the judgment to which counsel themselves have made themselves parties. We wish it to be clearly understood that in matters of law, like a second appeal in this Court,

the position is not the same as in an appeal from a trial, where the evidence and the findings of the Judge can be reconsidered in the appellate Court. The Judge is required by law to express his opinion on the question of law submitted to him, and if counsel choose to submit to him questions of law based upon a statement of facts which they do not challenge, in fact which they convey to the Court, they cannot afterwards be heard to question it in a Letters Patent Appeal. In other words, the Judge's judgment must be judged with respect to the law laid down by him, in accordance with the facts stated at the Bar. The proper remedy, if there has been any misunderstanding, or slip, so that an erroneous statement of fact has crept into the judgment, owing to a slip by counsel or a misunderstanding by the judge, is to go back to the Judge in review, and ask him to review his judgment on the ground that he has decided the law upon a misunderstanding of what the facts found in the Court below were. We wish counsel to understand that they must not allow the judge to decide a point of law upon one hypothesis of fact to which they are parties, and then come upon and argue a point on another hypothesis, altogether. This appeal must be dismissed.

Appeal dismissed.

✻ 1924 ALLAHABAD 520

WALSH AND RYVES, JJ.

Allah Dia and another—Applicants.

v.

Rahimuddin and others—Opposite Parties.

Civ. Rev. No. 151 of 1922, Decided on 16th January 1924, from the order of Sub. J. Saharanpur.

✻ *Civil P. C., S. 152—Mistake in final form of order due to original mistake in party's application can be corrected.*

Mistakes of the kind which may be described as clerical or due to an oversight between a *decree nisi* and a decree absolute are in the majority of cases the mistakes or slips of the party who sets the Court in motion. A mistake of that sort begun in the plaint and carried right through the proceedings without being discovered can be corrected in the decree.

(P 521, C 2)

Mushtaq Ahmad—for Applicants.

The Opposite Parties were not represented.

Walsh, J.—We think that this application in revision ought to succeed. We do not think that the learned Judge was justified in rejecting the application on any ground, and he certainly was not justified in rejecting it on the ground which he has given. A mistake in the final form of an order may well be due to an original mistake made by the party or his lawyer in making the application. That is not a reason for refusing to correct a mistake, otherwise there would be no object in the legislature giving the Courts jurisdiction to correct mistakes. Mistakes of the kind which may be described as clerical, or due to an oversight between a decree nisi and a decree absolute, are in the majority of cases the mistakes or slips of the party who sets the Court in motion. The application made to the learned Judge was a very ordinary one for amendment, and it ought to have been decided on the merits. We take it that the learned Judge was satisfied that there had been a mistake. He says that if there was one, it was in the application, which looks as though he thought there was one. The result was that the order which followed the application was in a mistaken form, and the decree which followed the order, followed the same mistake. It might happen in a suit that a claim for Rs. 100,000 in a plaint was said to be Rs. 200,000 by a slip of the pen, which nobody noticed and which is carried throughout the whole suit from the plaint down to the decree. Nobody can doubt, and it has been decided over and over again, that a mistake of that sort begun in the plaint and carried right through the proceedings without being discovered, can be corrected in the decree. We, therefore, think that the learned Judge ought to have made the amendment. We are not prepared ourselves to make it, because in addition to the verbal alterations necessary, we are asked to direct a re-sale. A re-sale seems necessarily to follow

from what we are directing to be done. But to prevent any possibility of further mistake, we prefer to indicate what we think ought to be done, and leave the Court below to do it in the presence of anybody who chooses to come and object. If the purchasers, as we are told, themselves asked for a correction of the decree, they cannot be heard to object to it now. But the Court before making any order for re-sale ought to give the purchasers an opportunity of being heard. We direct the case to be returned to the lower Court and to be taken up forthwith as miscellaneous application after notice to the parties, and we direct the lowar Court to entertain the application for inserting into the decree absolute the names of Hoshyar Singh and Chhajju Mal so as to bring the decree in this respect into conformity with the decree nisi. Secondly, to strike out one of the 2/3rds. That is to say, to direct in the decree absolute that 2/3rds of the property, and not 2/3rds of 2/3rd shall be sold, as recorded in the new khewat No. 25, and, lastly, to make such order for re-sale as appears to the Court below to be right, and to be such as the Court below would have made, if it made the decree absolute in the form which we now direct it to be made. The applicant must have the costs of these proceedings in the Court below up to the present date and of the proceedings which we have directed further to be taken.

Application allowed.

✱ 1924 ALLAHABAD 521

DANIELS, J.

Jagannath Prasad — Plaintiff — Applicant.

v.

East Indian Railway Co.—Defendants—Opposite Party.

Civ. Revision No. 19 of 1924, Decided on 31st March 1924, against the order of the Judge of the Court of Small Causes at Allahabad.

Railways Act, S. 77—Risk Note Form B.

The Railway Company is protected by risk Note Form B, even where the loss is due to their negligence unless the loss is of a complete consignment or of one or more complete packages. [P 531 C 2]

Panna Lal—for Applicant.

Lalli Prasad Zutshi—for Opposite Party.

Daniels, J.—This is an application in revision of a decree of the Small Cause Court rejecting a claim against the East Indian Railway for loss of one and a half maunds of *ghi*. The suit has been dismissed on the ground that the railway were protected by Risk Note B which was executed by the consignor. The applicant relies on two decisions of my own in *East Indian Railway* v. *Kishan Lal Tirkhamal* (1) and *East Indian Railway* v. v. *Makhan Lal* (2). The first of these was a case of short delivery where no loss was proved. The second was a case in which the railway took some five or six months to convey the goods and the plaintiffs suffered damages in consequence. The facts of this case are different. The plaintiff's case is that the goods arrived at the station of destination intact. He went down to take delivery on August 13 and for some reason delivery was not made. When he actually got delivery next day holes had been bored in some of the canistors and one and a half maunds of *ghi* had been abstracted. The plaintiff, therefore, alleges that this quantity of *ghi* was stolen between the 13th and 14th of August owing to the negligence of the Railway Company. Risk Note B, therefore, protects the Railway Company even if the loss of goods was due to their negligence unless there was loss of a complete consignment or one or more complete packages. In this case it is common ground that no complete package or consignment was lost. The decision of the learned Judge of the Small Cause Court is, therefore, correct and I dismiss this application with costs.

Appeal dismissed.

---

(1) 1924 All. 7—45 All. 530—21 A.L.J. 438—L.R. 4 A. Civ. 249.

(2) 1923 All. 605—45 All. 575—21 A.L.J. 515—L.R. 4 A. Civ. 280.

✱ 1924 ALLAHABAD 522

NEAVE, J.

Gobind Ram and others—Plaintiffs—Appellants.

v.

Mt. Ram Koer and others—Defendants—Respondents.

S. A. No. 1702 of 1922, Decided on 28th April 1924, against the decree of the District Judge of Mainpuri.

✱ *Adverse possession—Mortgagor and mortgagee.*

Mere continuance in possession of the mortgagee after the mortgage money is paid out of the usufruct or by the mortgagor, does not make that possession of the mortgagee adverse to the mortgagor. 21 A. 115, 7 A.L.J. 963, 34 A. 261 Foll. 25 I.C. 611 Dist. [P 523 C 1]

Saila Nath Mukerji—for Appellants.

B. K. Mukerji and *Krishna Behari Lal Nijam*—for Respondents.

Neave, J.—This appeal arises out of a suit for redemption of a mortgage executed on the 22nd of November, 1884, by one Pahar Singh in favour of four persons, Chhote Lal, Kashi Din, Debi Prasad and Ram Prasad for Rs. 1,100. Ram Prasad was interested in the mortgage to the extent of 1/5th as he had advanced Rs. 220 only of the consideration.

On the 17th October 1890, Pahar Singh sold certain other property to Chhote Lal, Kashi Din and the representative of Debi Prasad and left with them Rs. 938 for payment of the mortgage of 1884. The reason why Rs. 938 was fixed as the amount to be paid was that under the mortgage-deed it had been agreed that the mortgagees were liable to pay Rs. 27 a year to the mortgagor, the rest of the usufruct going towards the interest. As six years had elapsed since the execution of the mortgage Rs. 162 fell to be deducted from the total consideration. The vendees were to pay to Ram Prasad his proportionate share of the mortgage money. In the plaint it is stated that the plaintiffs do not know whether this was paid or not, but all the defendants have admitted that it was paid. The present plaintiffs have by various means which it is not necessary to particularise acquired the equity of redemption of the mortgage and they now seek to recover the 1/5th share which was originally in the possession of Ram Prasad and which they say is now in that of his widow, four fifth of the property having been surrendered to the mortgagor in consequence of the sale-deed.

The only question for decision in this appeal is whether the suit for redemption of the mortgage is barred by limitation or not. Both the Courts below have found that it is so barred, holding that the mortgage was completely paid off in 1890 and that since that year Ram Prasad's widow has been in adverse possession of the property.

The learned Advocate for the appellants argues that the widow of Ram Prasad still occupies the position of a mortgagee. Her husband originally obtained possession with a limited interest and cannot have increased that interest since. He has referred to a number of rulings in support of the proposition that when a mortgage has been paid off and the mortgagee holds over the period of limitation for redemption of the mortgage is sixty years from the execution of the original deed. In *Sudershan Das Shastri* v. *Ram Prasad* (1), it was held that so long as the property remains in the hands of the mortgagee it cannot be said that the mortgage has been redeemed. A right to redeem is a right to pay or tender the mortgage money, and, where the mortgagee is in possession, to obtain from him delivery of possession. To the same effect is *Habib-Ullah* v. *Abdul Hamid* (2), where it was remarked "The position of a mortgagee does not become adverse to the mortgagor merely because the mortgagee remains in possession after the mortgage money has been satisfied out of the usufruct or has afterwards been paid off. Much more is required to set time running against the mort-

(1) [1911] 33 All. 97—7 I.C. 385—7 A.L.J. 963.

(2) [1912] 34 All. 261—13 I.C. 963—9 A.L.J. 131.

gagor." *Pokhpal Singh* v. *Bishan Singh* (3) is to the same effect.

The lower Appellate Court has relied on a ruling in *Mt. Zabi-un-nissa* v. *Parichhat* (4). In that case, however, there had been a suit brought by the mortgagor against the mortgagee for redemption and a decree had been passed in his favour. All through that ruling it was pointed out that this circumstance of an adjudication by a Court entirely altered the position of the parties and it was for this reason that the period of limitation was held to be 12 years from the Court's decree.

In the present case there has been no adjudication by a Court and I hold that the position of the mortgagee has not become adverse to the mortgagor merely because the mortgagee has continued in possession of the mortgaged property.

One other point taken on behalf of the respondent was that the widow of Ram Prasad at all events was holding adversely to the mortgagors as, in presence of the sons of Ram Prasad, she was not entitled to possession of the property at all. This argument has no force. It may be that the widow's possession was adverse to that of the sons, but that would not affect the position of the mortgagors. The rights acquired by the widow by adverse possession could only be rights against the mortgagee.

The appeal is allowed. As the defendants themselves pleaded that the mortgage money had been paid the appellants will get a decree as prayed for in para 10 (1) of the plaint for redemption and proprietary possession of the land in suit. The appellants will get their costs throughout including in this Court costs on the higher scale.

Appeal allowed.

---

(3) [1897] 20 All. 115 — (1897) A.W.N. 214.
(4) [1914] 25 I.C. 611.

1924 ALLAHABAD 523

SULAIMAN AND KANHAIYA LAL, JJ.

Jagmohan Prasad and another—Plaintiffs—Appellants.

v

Brijendra Bahadur Singh and others—Defendants—Respondents.

F. A. No. 274 of 1921, Decided on 7th April 1924 from a decree of the Subordinate Judge of Mirzapur.

Pre-emption—Custom—Sales are not necessary to establish custom.

In order to prove the existence of a custom it is not necessary to establish that sales or transfers had taken place prior to the establishment of that custom. It may well have been that the custom was so strong and so invariably complied with that no co-sharer had the courage of selling the property to a stranger. [P. 525, C. 1]

(*b*) *Pre-emption—Custom—Muhamedan Law In absence of inconsistent particulars right of pre-emption is according to Muhomedan Law.*

In cases where the particulars of a custom are fully set forth and any of those particulars are contrary to or inconsistent with the Muhammadan Law, that custom cannot be co-extensive with Muhammadan Law. Where there is the existence of a right of pre-emption without specifying how that right is to be enforced or exercised, or without laying down the full particulars of that custom, the presumption is that that right of pre-emption is in accordance with the rights allowed by the Muhammadan Law. 2 A. L. J. 482 ; 13 A.L.J. 704, Foll. [P. 525, C. 2]

Surendra Nath Sen and *Saila Nath Mukerji*—for Appellants.

B E. O'Conor—for Respondents.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for pre-emption. The plaintiffs claim to pre-empt properties in a number of villages appended to the parent village Janar, shares in which have been transferred by defendants 2 and 3 to defendant No. 1. The sale deed in question purports to bear the date, the 16th August 1919, but it was not presented for registration till the 11th October, 1919. The plaintiffs who are first cousins base their claim on the custom and the conditions as entered in the *wajib-ul-arz* of the year 1247 F. The district is a permanently sett ed district and it is not sputed that that settlement has not yet expired, though in the meantime records have

been revised. The plaintiffs alleged in the plaint that they had made two demands of pre-emption and in spite of those demands the defendants had not transferred the property to them. The defendant-vendee denied the existence of a custom and denied that the plaintiffs had any right of pre-emption.

The learned Subordinate Judge has found that it is not established that there is a custom of pre emption. He has, however, found that the condition embodied in the *wajib-ul-arz* is binding on the parties and can be taken advantage of by the plaintiffs. He has, however, gone on to find that it was incumbent on the plaintiffs to perform the two demands required by the Muhammadan law. Having come to the conclusion that it has not been established that the demands were made in fact, or made in accordance with the rule of Muhammadan law he has dismissed the suit.

As there has been some controversy as to the actual basis of the claim, it is necessary for us to refer to some of the paragraphs of the plaint. In para 2 the plaintiffs alleged that the *wajib-ul-arz* prepared at the settlement of 1247 F was still in force. In para 3 it was alleged that the condition relating to the pre-emption aforesaid is binding on all the co-sharers. Para 4 stated that the sale-deed in question had been executed contrary to the custom and the conditions laid down in the *wajib ul-arz*. Para 5 referred to the demand alleged to have been made by the plaintiffs and para 11 stated that on the basis of the custom of pre-emption obtaining in the villages in dispute and on the basis of the conditions laid down in the *wajib-ul-arz* and the principle of the Muhammadan law, the plaintiffs are entitled to maintain the suit.

The learned Subordinate Judge, after having framed an issue as to whether there was any custom of pre-emption in the disputed mauzas, framed an additional issue as to whether the plaintiffs had a right to sue for pre-emption under the terms of the *wajib-ul-arz* prepared in 1247 Fasli. In the course of his judgment, he has referred to the clause in that *wajib-ul-arz* as being still binding on the parties. Having regard to all these circumstances, we have come to the conclusion that even though the word "contract" was not specifically alleged in the plaint, the plaintiffs did mean to base their claim both on custom and contract. The learned Subordinate Judge, as we have already remarked, came to the conclusion that the *wajib-ul-arz* of 1247 F, was quite insufficient to establish the custom.

Before we discuss the terms of this *wajib-ul-arz* and the two grounds on which the Court below has held that the record is not one of custom, it is necessary to recall the instructions which were in force to the settlement officers at the time this *wajib-ul-arz* was prepared. References in detail to these circulars are to be found in the Full Bench case of *Returaji Dubain* v. *Pahalwan Bhagat* (1). Knox, J., in his judgment at pages 206 and 207, pointed out that Regulation VII of of 1822 was in force at the time and in S. 9 of that regulation it was the duty of Collectors and other officers exercising the powers of Collectors on the occasion of making or revising settlement of the land revenue to unite with the adjustment of the assessment and the investigation of the extent and produce of the land, the object of ascertaining and recording the fullest possible information in regard to landed tenures etc. For this purpose their proceedings were to embrace the formation of as accurate a record as possible of all local usages connected with land tenures He has gone on to remark that there is nothing in Regulation VII of 1922 which authorised Collectors to record contract regarding landed tenures. It is only right to infer, in the absence of proof to the contrary, that they recorded only local usages, *i. e.*, such usages as had the sanction of custom.

It is true that there is nothing in that Regulation or the circulars which are issued on the basis of that Regulation which prevented settlement officers from recording contracts which had been entered into *inter se*

(1) [1911] 33 All. 196—7 I. C. 680—7 A. L. J. 1040. (F. B.)

by the co-sharers, nevertheless it is to be borne in mind that the primary duty of the settlement officer was to record all local usages. We are, therefore, entitled to infer that in the absence of any contract proved to the contrary, the presumption would be that the entry which was so made in the *wajib-ul-arz* was the entry of a local usage and not of contract to the co-sharers. The right of pre-emption in the *wajib-ul-arz* is contained in clause 8 of the document which runs as follows :—

"Our shares are free from sale or mortgage. If in future any co-sharer wishes to transfer his share wh le or in part, he will have power to do so subject to the right of pre-emption."

The first argument is that the entire village had been free from sale or mortgage, *i e.*, no sale or mortgage had ever taken place in this village, and it is, therefore contended that no custom of pre-emption could possibly have grown up. We are unable to accept this contention. It has never been laid down that in order to prove the existence of a custom it is necessary to establish that sales or transfers had taken place prior to the establishment of that custom. It may well have been that the custom was so strong and so invariably complied with that no co-sharer had the courage of selling the property to a stranger. Their obedience to this custom, continued for a very long time, would prevent any actual sale from taking place. From the mere fact, that no sale or mortgage had taken place, it cannot, therefore follow that the custom cannot possibly exist.

The other argument is that in the clause in question tho words : "In future" are used. It has been laid down in a number of cases that any such words of the use of the future tense in no way negative the existence of the custom of pre-emption. At the time that the *wajib-ui-arz* was framed, there were no less than ten co-sharers and there is nothing else in the history of this village which would indicate that it was impossible for a custom of this kind to have grown up. We are, therefore, unable to agree with the Subordinate Judge that the entry in this clause by itself indicates that it was not a record of custom. Having regard to the rules which were then in force, we are entitled to presume that in the absence of anything indicating that it was a mere contract, the record was one of custom.

The next question is whether, if the record was one of custom, this custom was co-extensive with the Muhammadan law or not, *i. e.*, whether it was part of the existence of this custom that the rules of the Muhammadan law in regard to the making of the two demands were to be observed. In a case where the particulars of a custom are fully set forth ond any of those particulars are contrary to or inconsistent with the Muhammadan law, it is apparent that that custom cannot be co-extensive with Muhammadan law. Where we have the the existence of a right of pre-emption without specifying how that right is to be enforced or exercised, or without laying down the full particulars of that custom, the presumption is that that right of pre-emption is in accordance with the rights allowed by the Muhammadan law. This view has been laid down in a number of cases of this Court, *Jagdam Sahai* v. *Mahabir Prasad* (2) and *Zamir Ahmad* v. *Abdul Razzak* (3). These cases have also been followed in subsequent cases.

We have, therefore, come to the conclusion that a custom of pre-emption does exist in this village and that it is part of that custom that the two demands would have to be made in order that the plaintiffs could succeed. As already noted, the plaintiffs alleged in the plaint that they had made the two demands.

In this view of the matter, it is wholly unnecessary to consider if the record was one of contract, whether that contract is enforceable now and whether it can be taken advantage of by the plaintiffs.

[The judgment then discussed

(2) [1905] 28 All. 60—2 A. L. J. 482—(1905) A. W. N. 190.
(3) [1915] 37 All. 472—29 I. C. 993—13 A. L. J. 704.

the evidence about the demandsand agreeing with the trial Court held that the plaintiffs had not succeeded in proving the demands and in conclusion dismissed the appeal.]

Appeal dismissed.

1924 ALLAHABAD 526

KANHAIYA LAL, J.

Raghunath — Defendant — Appellant.

v

Bindeshwari Nandan — Plaintiff— Respondent.

S. A. No. 1260 of 1922, Decided on 1st February 1924, against the decree of Sub. J., Mirzapur.

Evidence Act, S. 11—Evidence of construction of old houses by old documents—Evidence Act, S. 13.

Old documents mentioning persons who built certain very old houses may be admitted in evidence under S. 11 clause 2 and S. 13 Cl. (b) where direct evidence about the construction may not be easily available. [P. 526 C. 2]

Girdharilal Agarwala—for Appellant.

Surendranath Sen—for Respondent.

Judgment.—The dispute in this appeal relates to a shop and a house situate in Bindhyachal. The question for consideration was whether the defendant-appellant occupied the house in question as a *parjawatdar* or as a tenant on behalf of the plaintiffs. The plaintiffs are admittedly the owners of the land occupied by the house. Their allegation was that the defendant occupied the said house as a tenant and was liable to ejectment. The defendant-appellant, however, said that he was only a *parjawatdar*, holding the land occupied by the house in dispute on rent, and that he was not liable to ejectment. He asserted that the shop and the house in dispute were built by his predecessor-in-title. He produced among other papers a deed-of-gift purporting to have been executed by Mt. Badam in favour of Mt. Chingani on the 18th of May, 1862, wherein it was stated that the ancestors of the donor had obtained the land from Bhawani and Sital and built a house which she was conveying to her daughter. The lower appellate Court treated this document as an admission by the defendant-appellant in his own favour and as such no proof of his title to the house. An admission may, however, be proved on behalf of the person making it under S. 21 clause (3) of the Evidence Act (No. I of 1872), if it is relevant otherwise than as an admission. In the case of a house said to have been built over half a century ago, direct evidence as to who constructed it may not be esily available; and old documents mentioning by whom it was built may be admissible in evidence under S. 11, clause (2), and S. 13 clause (b), of the Indian Evidence Act for what they may be worth. The lower appellate Court refers to a mortgage-deed purporting to have been executed by Bhusi Pande in favour of Badam Panda on the 11th of August 1862, but that document is inconclusive on the point. It refers to Bhawani and Sital as having held three shops; but in what capacity they held the same is not clear. The lower appellate Court has evidently made no serious attempt to discuss the documentary evidence adduced in the case to find whether the plaintiffs were the owners only of the land or also of the shops and the house standing thereon. Before it could be said that there was no evidence to show that the ancestors of the defendant-appellant had built the same, the history of the title to the house as distinct from the land required to be examined in the light of the documentary and other evidence available. Let the lower appellate Court be, therefore, directed to determine, after taking such additional evidence as may be produced, whether the shop and the house in dispute were built by the predecessor-in-title of the plaintiffs or the defendant. Two months time will be allowed for the return of the finding and ten days will be allowed after the return of the finding for filing objections.

Appeal allowed.

1924 ALLAHABAD 527

NEAVE, J.

Mt. Batka—Plaintiff—Appellant.

v

Mt. Sitman — Defendant—Respondent.

S. A. No. 1642 of 1922, Decided on 25th April 1924, from the decree of the District Judge of Gorakhpur.

* *Hindu Law—Reversioner—Gift by widow to two daughters with mutual consent precludes either of them from challenging the gift to the other.*

Reversioner who has elected to hold transfer by a widow good during the lifetime of the widow cannot be allowed to challenge the validity of the transfer after succession has opened in his favour. [P. 528, C. 1.]

Where a widow executed a deed by which her husband's property was gifted in equal shares to her two daughters and their names were accordingly entered in the revenue papers.

Held: that the conduct of each daughter in taking the gift and obtaining mutation indicated approval of the entire deed of gift and neither could be allowed to treat it as nullity and s ue for recovery from the heirs of the other. [P. 528, C. 1]

Harnandan Prasad—for Appellant.

St. C. Thompson—for Respondent.

Neave, J.—This is an appeal from an order of the Additional Judge of Gorakhpur modifying a decree of the Additional Subordinate Judge of that district. The facts of the case are that one Achhaibar died leaving a widow Mt. Gulzari and two daughters Mt, Lanji and Mt. Batka. Mt Gulzari succeeded to her husband's estate which consisted of shares in two villages Katarua and Baldiha. She executed a deed of gift in respect of the Katarua property in favour of her two daughters in equal shares and their names were entered accordingly in the revenue papers.

The share in mauza Baldiha had been mortgaged by Achhaibar. After the death of their mother the two daughters redeemed this mortgage, paying equal shares of the mortgage money. On the 15th August 1918, Mt. Lanji died and after some litigation in the Revenue Courts the name of her daughter-in-law Mt. Sitman was recorded as proprietor of half the property in both the villages. The suit out of which this appeal arises was brought by Mt. Batka against Mt. Sitman for recovery of possession of one half of the property in both Katarua and Baldiha and for mesne profits.

The plaintiff's case was that on the death of her sister Mt. Lanji she was the only surviving heir of her father Achhaibar. The defence so far as mauza Katarua was concerned was that the plaintiff had consented to the deed of gift executed by their mother under which each daughter had obtained a half share in the property and was now debarred from bringing a suit with regard to it. The Baldiha property had been redeemed by the two daughters jointly, mutation had been effected in the names of their sons against their respective shares and the plaintiff was not entitled now to disturb this family arrangement. The first Court held that the plaintiff's consent implied by her taking the share of the property conveyed to her under the deed of gift did not amount to such a ratification of the transfer as would debar her from suing as soon as the succession opened. He, therefore, found that as the plaintiff had failed to prove that the share of the mortgage money for Baldiha had been paid out of the profits by Mt. Lanji the plaintiff was bound to repay it to her and on doing this was entitled to a decree.

On appeal, the learned Additional District Judge held on the authority of *Mahabir Prasad Singh* v. *Mata Prasad* that the plaintiff had consented to execution of the deed of gift and was estopped from subsequently challenging it. The finding of the first Court with regard to the property in mauza Baldiha was not disputed in that appeal.

The present appeal relates only to the Katarua property though there is a cross-objection with regard to mauza Baldiha. It is contended that the deed of gift executed by Mt. Gulzari could only have the effect of accelerating the vesting of the estate in her daughters and could confer no absolute title on them. Mt. Gulzari had only a life interest in the property

(1) [1921] 21 A.L.J. 799—63 I.C. 721

and could give no better title than she herself possessed. It is conceded that if the plaintiff had taken part in the execution of the deed she might have been debarred from challenging it, but the mere fact that she took under it the share which would have come to her in any case when her mother died, does not preclude her from asserting her right to the whole property.

The deed of gift purports to convey the property in mauza Katarua which had belonged to the donor's husband Achhaibar to her daughters in equal shares "as heirs according to the Shastras." It is admitted that they at once entered into possession and obtained mutation. The question is whether this conduct is tantamount to such a consent as would operate to estop the plaintiff from claiming the whole property on her sister's death. The ruling quoted by the learned Judge and a later Full Bench decision of this Court in *Fateh Singh* v. *Rukmini Dewanji Maharaj* (2) have both affirmed the principle that a reversioner in whose favour the succession has opened cannot be permitted to challenge the validity of a transfer by a limited Hindu owner when before her death he has elected to hold the transfer good. It seems to me that in the present case the plaintiff by her conduct in taking her half share of the property and obtaining mutation in respect of it clearly indicated her approval of the entire deed of gift and cannot now be allowed to treat it as a nullity.

One argument adressed to this Court was to the effect that the defendant-respondent Mt. Sitman has no *locus standi* in the case as she is not an heir of her mother-in-law. This argument proceeded on the assumption that Mt. Sitman's husband had predeceased his mother Mt. Lanji. No definite allegation to this effect was made in the plaint, while in the written statement there is a clear assertion that Mt. Sitman's hushand became the owner of the property by right of inheritance on his mother's death. No issue was framed on the point, and it does not appear to have been raised in either of the Courts below. This plea cannot be taken now.

No plea as to the property in mauza Baldiha was taken in the memorandum of appeal to the Court below and it does not appear from the judgment of that Court that the Subordinate Judge's finding on the point was disputed before him. In these circumstances the respondent is not entitled to contest this finding in second appeal. The result is that the appeal and cross-objection are both dismissed with costs including in this Court costs on the higher scale.

Appeal dismissed.

(2) 1923 All. 387—45 All. 339—21 A.L.J. 235—L.R. 4 All. (Civ.) 408 (F.B.)

1924 ALLAHABAD 528

STUART, J.

Mt. Basanti—Applicant.

v.

Maqsud Ali Khan and others—Opposite Parties.

Criminal Rev. No. 568 of 1923, Decided on 2nd January 1924, from the order of Ss. J. Saharanpur.

U. P. (Local) Act II of 1916—Complaint.

Under this Act the prosecution is not one instituted upon complaint since the Magistrate takes cognizance from information received. Consequently S. 247 of the Cr. P. Code does not apply. Non-appearance of the complainant therefore, does not justify dismissal of the complaint. [P 528 C 2]

Mushtaq Ahmad—for Appellant.

Asst. Government Advocate and *M. L. Agarwala*—for Opposite Parties.

Judgment.—There is no force in this application. Under S. 47 of Local Act II of 1916, it is the Magistrate who takes cognizance of the offence upon information received. So the case is not one instituted upon a complaint within the meaning of the word "complaint" in S. 4 (h) of the Code of Criminal Procedure. Thus S. 247 of the Code of Criminal Procedure has no application. I direct that proceedings continue and return the papers.

Application dismissed.

✱ 1924 ALLAHABAD 529

WALSH AND KANHAIYA LAL, JJ.

Brij Ballabh Das and others—Plaintiffs—Appellants.

v.

Mahabir Prasad and others—Defendants—Respondents.

F. A. No. 63 of 1923, Decided on 15th January 1924, from the Order of Judge of Sm. C. C., Allahabad.

(a) Specific Relief Act, S. 21—"Adequate".

In S. 21 the word "adequate" means adequate appearing to the Court for some reason found as a fact and stated by the Court in spite of the plaintiff's opinion that it is inadequate. [P 529, C 2]

✱ *(b) Specific Relief Act, S. 12—Presumption.*

S. 12 raises a presumption that compensation would not be adequate and the party alleging that it is adequate must make out a case to that effect. [P 529, C 2]

N. P. Asthana—for Appellants.

L. P. Zutshi—for Respondents.

Judgment.—The learned Judge has gone wrong over this case The language may be, to persons to whom it is not familiar, somewhat difficult to apply, and it is useful to have a complete knowledge of the whole Act before selecting one passage from a particular section, and construing that by itself. The learned Judge seems to think that the fact that the plaintiffs were able to put into the terms of a money sum the compensation for the loss which they would probably suffer if they could not get the lease that they wanted was in itself equivalant to saying that such sum was adequate compensation. It is quite clear that the plaintiffs did n t say that. In fact the plaintiffs really said just the reverse. They asked for specific performance, and it was only in the final alternative that they claimed a sum to recoup their loss as estimated by them as damages if their claim for specific performance was not allowed. But the plaintiffs were claiming what they were *prima facie* entitled to, namely, a lease of a particular shop, and there may be many reasons why they desire and are willing to pay for a particular shop, and why they are unable to do more than give a rough statement of the loss which they will suffer if they do not get it, preferring the shop to any form of pecuniary compensation. If the matter, or rather the meaning of the word "adequate", is to be judged from their point of view, then it is clear that they do not consider it adequate, otherwise they would ask for the money and not for specific performance. The foregoing reasoning seems to show that the word "adequate" in S. 21 must be adequate in the mind of the Court, for some reason found as a fact and stated by the Court for holding it to be adequate, in spite of the opinion of the plaintiffs that it is inadequate. The illustration in S. 12 is a useful guide to what is meant If one looks first at the illustration to S. 21, sub-section (a), which the learned Judge was construing, one will see that it deals with movable property and with contracts of a commercial nature. But turning back to the explanation to S. 12, it is clear that the Legislature did not intend that presons who entered into contracts to transfer or lease immovable property, should be allowed to escape from them to suit their own convenience by alleging that the person in whose favour the contract was made, could be compensated in money, because that explanation requires the Court to presume that such compensation cannot be adequate unless and until the contrary is proved. There is really no suggestion in the judgment of the learned Judge that he approached this point of view. If he had done so, he would probably have hesitated to make the order which he has done. We only refer to the fact that similar shops are available for which the plaintiffs would have to pay higher rent The plaintiffs' answer to this is that they do not want them unless they are compelled to take them or one of them. We should have preferred to hear the case argued by the respondent representing the view which the learned Judge has taken, but we have no doubt that the appeal must be allowed and the judgment of the first Court restored with costs here and below with costs in this Court on the higher scale.

Appeal allowed.

1924 ALLAHABAD 530

WALSH, AG. C. J. AND NEAVE, J.

Tika Ram—Plaintiff—Appellant.

v.

Daulat Ram—Defendant—Respondent.

F. A. No. 84 of 1923, Decided on 1st May 1924, from the order of S. J Budaun.

* *Principal and Agent—Pukka Adhatia as an agent has to render account at the place where business is transacted and not at the place where principal resides—C. P. C., S. 20.*

Pakka *adhatia* probably corresponding to what is known in England as *del credere* agent, that is to say, an agent or factor, who being entrusted with the goods of his principal to dispose of to the best advantage, is in lawfull possession of them with a general power to deal with them without reference to his principal but guaranteeing the solvency of the sub-purchasers, and while entitled to charge against his principal his expenses and entitled also to an indemnity from his principal against all losses resulting from carrying out his duty, is under an obligation to pay to his principal the amount due after the accounts have been properly settled. Unless the contract clearly indicates the contrary, pakka adatia becomes a factor entrusted with goods of his principal with wide powers and has no doubt under the appropriate section of the Contract Act, eventually to account to his principal but the accounting must necessarily be done at the place where all the business is transacted. 30 Bom. 167. Doubted; 54 I. C. 260. Exp. 8 A. L. J. 1160 Foll. [P 530, C 2; P 531, C 2]

Kailas Nath Katju—for Appellant.

The Respondent was not represented.

Walsh, Ag. C. J.—This is an appeal from a judgment of the Subordinate Judge of Budaun, returning a plaint on the ground of want of jurisdiction. It illustrates the importance of the questions of this character which arise, and it also illustrates the necessity of the Courts being somewhat careful in applying the law so as not to impose an unreasonable and unanticipated burden upon commercial men, of being dragged from their place of business to defend suits, 800 miles away in parts of the world with which they have no concern whatever. This inconvenience is illustrated by the misfortune that we have not had the advantage of hearing counsel in this case on behalf of the respondent who resides and carries on business in Bombay. Dr. Katju, however, on behalf of the appellant, has argued the matter very fully, and has really taken us over all the ground which is relevant. The suit arises out of a relationship of the following character:—

The plaintiff carries on some sort of trade, probably in grain, though he does not say so, at Bilsi, in the district of Budaun. The defendant works as a commission agent, what is known as *pakka adhatia* probably corresponding to what is known in England, as *del credere* agent, that is to say, an agent or factor, who, being entrusted with the goods of his principal to dispose of to the best advantage, is in lawful possession of them with a general power to deal with them without reference to his principal but guaranteeing the solvency of the sub-purchasers, and while entitled to charge against his principal his expenses and entitled also to an indemnity from his principal against all losses resulting from carrying out his duty, is under an obligation to pay to the plaintiff, his principal, the amount due after the accounts have been properly settled.

The main question is whether in this suit, which is brought by the plaintiff to recover money alleged to be due from the defendant commission agent on account of profits on sales improperly retained by the defendant, the cause of action or any part of it arose within the jurisdiction of Budaun. It is clear from the plaint that the plaintiff's legal adviser had some doubt about it, unless it could be established in fact that the conversation resulting in the contract had taken place within the local limits of the jurisdiction of the Court, or unless some express agreement had been made between the parties that payment should be made by the defendant to the plaintiff at Bilsi, or unless in the alternative, some trade usage requiring payment to be made in that way could be established. The pleader went out of his way to allege all three. That part of the case has broken down. The learned Judge finds that this is not a case, in spite of two authorities to which he was referred, decided by the Bombay High Court, in which the agent had to render an

account at the principal's place of business. He finds against the express agreement which was set up by the plaintiff and also against the alleged trade custom, which is always the desperate resort of anybody who knows that his case on the facts is going to break down. A litigant seldom alleges a custom for a particular practice unless he is satisfied that he has no other case to support it. The learned Judge is satisfied that the palpably false allegations which have been made in this case, have been made for the express purpose, which unfortunately is too often the case, of dragging the other party 800 miles from Bombay, and as a counter stroke to the suit of the defendant in Bombay, which will necessitate the plaintiff going there to defend it. Unfortunately, sitting in this Court, one has become too familiar with these false allegations and palpably hallow suggestions of custom, and insidious suggestions of law, which are merely adopted for the dishonest purpose of suing a man who is in Bombay, and who the plaintiff knows quite well, will be unable to appear in the United Provinces to defend the suit.

The learned Judge has dealt with the matter with considerable acumen, and, in particular, we agree with the following passage :—

"It is not to be supposed that even if there was an express agreement to pay at the *adhatia's* place of business, and also to settle accounts there, nonetheless payment would not be made by post and a statement of account would not be sent by post."

In other words, the learned Judge rightly thinks that the mere fact that payments have been made by post and statements of account sent by post to Budaun, is not conclusive on the question of where payment ought, under the contract, to be made. The ordinary maxim that a debtor must find his creditor, and that if no express agreement is made as to the place of payment the debtor must pay the creditor where he can find him, while, of course, perfectly true if understood, is unfortunately frequently quoted, and sought to be applied to circumstances to which it has no relation at all. A little knowledge is a dangerous thing, and the capacity to know by heart and quote at random, legal maxims without reference to the circumstances to which they are applied, is in itself a danger and frequently leads to misunderstanding in the lower Courts. There is a great difference between three classes of contract in relation to which this maxim may be discussed. There is the ordinary case of purchaser and vendor, to which of course it is, in the main, generally applicable. If a purchaser in Allahabad applies to a tradesman in Calcutta to sell him goods, the purchaser in Allahabad must pay the vendor in Calcutta unless some other arrangement is made. The second class is a class of principal and agent which may also colloquially be described as master and servant. It frequently happens that a large establishment dealing, say in carpets at Mirzapore, or cotton in Agra, or some other large commercial centre, has branch businesses presided over by managers who are in a sense agents. They are agents to pledge their principal's credit; they are agents in many of the respects contemplated by the Contract Act, and they are frequently paid by commission on results. But in such cases as those, it may often be that the place at which the agent or branch manager is, by his contract or unwritten understanding with his principal, bound to account and bound to pay and discharge his liabilities is the head place of business. But it is a very different matter in a case of this kind where the defendant is not a servant at all of the plaintiff, is totally independent of him, and is merely a contractor earning his living generally as a commission agent holding himself out to persons all over India, it may be, who are willing to seek and utilise his services in the markets of Bombay. In our view a totally different set of considerations applies to such persons. Unless the contract clearly indicates the contrary, an agent of this kind, who becomes a factor entrusted with goods of his principal with wide powers, has no doubt, under the appropriate section of the Contract Act, eventually to account to his principal but the accounting must necessarily

be done at the place where all the business is transacted. The plaintiff is entitled to see the account, and if commercial men stood on strict technicalities, which of course they never do, the plaintiff might have to go to Bombay to see his agent's account. But he has only got to ask a copy and of course it would be sent to him by post. In the same way, the plaintiff can no doubt get payment of everything which is due to him by writing to the defendant and asking, him to provide for payment to be made at the plaintiffs place of business independently of whether the defendant is bound to make payment in that way or not. Persons who contract with agents 800 miles away and who wish to place their agent under an obligation to pay, or be sued in the foreign district, must in our view, be careful to provide expressly for that in the contract. It is impossible to draw the inference that that was the intention of the agent, at any rate, and as it takes two persons to make a contract, the law cannot draw an inference which cannot be reasonably attributed to both parties to the contract. Dr. Katju, in his very thorough argument on this point, referred us to one or two authorities which it may be suggested, decided the contrary. There is one decision in particular of Mr. Justice Tyabji in *Moti Lal* v. *Suraj Mal* (1), in which that learned Judge appears to consider that the mere fact that the instructions were sent by the plaintiff, the principal in Bombay, from Bombay, was sufficient to give jurisdiction in Bombay. The learned Judge also relied upon the fact that accounts were rendered and the demand for payment was made from Bombay. Without going so far as to say that we should have decided the case the other way, we are bound to say that we are not entirely in accord with the decision. The first ground, namely, that instructions were issued from Bombay, would be fatal to every defence of this kind relating to jurisdiction, and we are satisfied that it has no justification in law. The other grounds on which he decided, appear to be based upon the authority of an English case *Robey* v. *The Snaefell Mining Co. Ltd.* (2), which, although not entirely without assistance in a discussion of this problem, had no application to the particular case which the learned Judge was deciding. That was a question of payment for the delivery, erection and sale of machinery by the plaintiffs to the defendants. The latter were in the Isle of Man and the former were at Lincoln. Goods had been ordered by the defendants in the Isle of Man, and as they had not stipulated any special place for payment, it was held that the ordinary rule must apply, that the debtor must find the creditor, and that they ought to pay the plaintiff at Lincoln. That has no application to a case of the kind we have to consider with regard to transactions by an independent agent on commission.

The other case was in *Kuthiravattam* v. *R. Foulkes* (3). There the Madras High Court seems to have held that the final offer was a decisive point in deciding whether part of a cause of action arose within the jurisdiction. That question may have been relevant for the decision of the particular case, but the English cases which were cited in the judgment in support of that proposition, were decided on a totally different question and really do not bear out the principle for which they appear to have been cited in the Madras case. It is sufficient to say, at any rate, that the point as to the final offer, if it is ever a decisive point at all, has no bearing upon a contract of this kind the acceptance of which took place and execution of which was carried out wholly in the Province of Bombay.

So far as it goes, the authority to which our attention was drawn in *Salig Ram* v. *Chuba Mal* (4), appears to bear out our view.

We dismiss the appeal.

Appeal dismissed.

(1) [1904] 30 Bom. 167—6 Bom. L. R. 1038.

(2) [1878] 20 Q. B. D. 152.
(3) [1920] 10 L. W. 44—54 I. C. 260.
(4) [1911] 34 All. 49—11 I. C. 712—8 A. L. J. 1160.

✱ 1924 ALLAHABAD 533

SULAIMAN, J.

Satraj Singh—Applicant.

v.

King-Emperor—Opposite Party.

Cr. Mis. Appn No. 36 of 1924, Decided on 29th February 1924.

(a) Criminal P. C., S. 528—Strong opinion already formed is good ground for transfer.

Where the Court has already formed a very strong opinion of the conduct of the accused whose prosecution was ordered by the Court under S. 166 I. P. C. transfer should be ordered. [P. 533, C. 2 ; P. 534, C. 1]

✱ *(b) Criminal P. C., S. 526 — Court must postpone a case on an accused's intention to apply for transfer being indicated to it.*

S. 526 is imperative and at any stage an accused notifying to the Court his intention to apply for transfer the Court must postpone the case for giving reasonable time for making the application. [P. 533, C. 2]

G. W. Dillon—for Applicant.

The Government Advocate and *K. N. Malaviya*—for the Crown.

Judgment.—This is an application for transfer of a criminal case.

A report was made by one Gopal Sonar against Shah Muhammad under S. 452 of the Indian Penal Code. The Sub-Inspector Satraj Singh challaned this case and sent it to the Court of the Tahsildar of Dudhi who is a second class Magistrate. On an application for transfer made to the District Magistrate the latter transferred that case to his own file. After having tried the case he discharged the accused Shah Muhammad under an order dated the 12th of January 1924. A perusal of that judgment will, show at once that the learned District Magistrate formed a very adverse opinion of the conduct of Sartaj Singh. He even was inclined to accept the view that the proceedings were a deliberate act of revenge engineered by Satraj Singh with the connivance of Gopal Sonar and a certain Janardhan Singh Constable. He suspected that the whole case had been deliberately intended to involve the accused in a complete ruin. He also commented on the general conduct of the Sub-Inspector and remarked that it disclosed a marked tendency towards crookedness in that investigating officer. On the day of discharge the learned District Magistrate recorded a statement of Imdad Husain, a Mukhtar-e-am of Barhar Raj to the effect that the Sub-Inspector Sartaj Singh be prosecuted under S. 166 of the Indian Penal Code and that his statement should be taken as a complaint. It was on this statement treated as a complaint that the prosecution of the applicant started.

Before any evidence commenced an application was made on behalf of the accused Sartaj Singh under S. 526, sub-clause 8, of the new Code of Criminal Procedure, requesting the Magistrate to postpone the case in order to give the accused an opportunity to apply to the High Court for a transfer. In spite of that application the learned District Magistrate proceeded to record the evidence of the prosecution witnesses and then passed an order fixing the 22nd of February, 1924, for the next hearing.

The learned District Magistrate was entitled to treat the statement of Imdad Husain as a complaint. Having taken cognisance of the case on a complaint he was not bound to transfer the case to any other Magistrate. Nevertheless after the application for transfer had been made to his Court he should not have recorded any evidence at all but should have adjourned the case at once. Under the old Code of Criminal Procedure when such an application was made the Court was bound to postpone the case in such manner as would afford a reasonable time for the application being made and an order being obtained thereon before *the accused was called on for his defence*, that is to say, after the application had been made the Criminal Court had no power to call on the accused for his defence. Under the new Code, however, it is the duty of the Criminal Court to postpone the case at once. S. 526, sub-clause 8, is imperative and it omits the former expression "before the accused is called on for his defence."

I am also satisfied that when the learned District Magistrate has already formed a very strong opinion on the conduct of the Sub-Inspector as disclosed by the judgment, dated the 12th of January, 1924, it would be un-

fair and unjust to the accused that the case against him should be tried by the same District Magistrate.

I accordingly allow this application and order that the case be transferred from the file of the District Magistrate of Mirzapur to the Court of the District Magistrate of Allahabad who will either try the case himself or transfer it to any other Magistrate under him competent to try the case.

Application allowed.

1924 ALLAHABAD 534

LINDSAY AND SULAIMAN, JJ.

Munni Lal and others—Defendants-Appellants.

v.

Mt. Rani and another—Plaintiff & Defendant—Rospondents.

S. A. No. 1311 of 1922, Decided on 21st January 1924, from a Decree of D. J. Farukhabad, D/- 4th September 1922.

Pre-emption—Who can pre-empt—Hissadar Karibi.

A co-sharer by belonging to the same Hindu family as the vendor and by becoming member of the family by marriage is a Hissadar Karibi. [P 534 C 1, 2]

Gulzari Lal—for Appellants.

N. Sen—for Respondents.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for pre-emption.

The plaintiff and the vendor in this case are co-widows and they admittedly are co-sharers in the plot described as grove which has been sold. Both the Courts below have decreed the suit holding that there is a custom under which "*hissedar karibi*" is entitled to preference as against other co-sharers and that the present plaintiff comes within the definition of the expression *hissedar karibi* of the vendor. The defendant transferee is also a co-sharer in the same grove but is not in any way related to the vendor. There is now before us no dispute as to there being a right of pre-emption with regard to the sale-deed. The only question is whether the plaintiff has preference as against the transferees. Both the Courts below have come to the conclusion that having regard to the fact that these ladies belong to the same Hindu family and by marriage have become members of the family they are *hissedars karibi* of each other.

On behalf of the defendants it is contended before us that the word *karibi* means a blood relation and that therefore the plaintiff and the vendor who are connected with each other only through marriage are not blood relations. The word *karibi* is derived from the word *karib* which is defined in Wilson's glossary as meaning near, near to; also near in relationship, a kinsman, a relative, a connection by birth or marriage, accepting the relation of parent and child.

It was also pointed out in the Full Bench case of *Khuman Singh* v. *Bardai* (1) that the word *karibi* is sometimes ambiguous but in connection with other words it may have a very wide meaning. Mr. Justice Karamat Husain in a case *Radhey Prasad* v *Nannu* (2) was of opinion that the word *rishtedaran karibi* meant near relations by blood or marriage. In the present case the word *rishtedar* is not used at all, we have only the word *karibi* and that in our opinion simply means relation.

We may point out that in a case *Jagrani* v. *Bisheshar Dube* (3) it was held that a son-in-law was not a *rishtedar karibi* because he was not connected with the Hindu family whose daughter he had married. It was also pointed out that the cases of Hindu females are different on the ground that they become members of the families into which they marry. This remark distinguishes that case from another case of the same Bench *Kuria* v. *Jafri* (4) which was a case of Muhammedans and where it was held that the two widows of two deceased brothers were not near relations so as to come within that category. In this view of the matter we are of opinion that the view of the Courts below on this point was correct.

The result therefore is that this appeal must fail and it is hereby dismissed with costs.

Appeal dismissed.

---

(1) [1889] 11 All. 41. (F.B.)
(2) [1910] 5 I.C. 669.
(3) [1916] 38 All. 366. (F.B.)
(4) [1916] 33 I.C. 801.

✱ ✱ 1924 ALLAHABAD 535

Full Bench

WALSH, AG. C. J. AND RYVES AND DALAL, JJ.

Majju and another — Defendants—Appellants.

v.

Lachman Prasad and another—Plaintiffs—Respondents.

L. P. A. No. 158 of 1922, Decided on 25th April 1924, from a decree of the District Judge of Badaun.

✱ ✱ *Defamation—Judicial proceedings are absolutely privileged but not report to police which is* prima facie *privileged—In case of qualified privilege accused must prove honest exercise of privilege* i.e. *reasonable grounds for belief—Where defendant pleads truth qualified privilege can't be logically pleaded.*

A report made at a Police Station, though not within the rule of absolute privilege which covers judicial proceedings, is *prima facie* privileged, that is to say the person making it has a right to make it if he honestly believes it and the person receiving it has a duty to receive it. But qualified privilege, as the term indicates, provides only a qualified protection and the person charged with the defamation must prove that he used the privilege honestly, honestly believing the truth of what he said or in other words having reasonable grounds for making the statement and the onus of establishing that lies upon him. Where the statement is made with reference to something in which the person making the complaint was himself involved as a party, it is impossible for him to have had an honest belief in its truth if it is shown to be untrue. And, therefore, in a case of qualified privilege, where the defendant sets up in defence that the allegation is true to his own knowledge the defence of qualified privilege becomes illogical and impossible. [P. 536, C. 1]

S. A. Haider—for Appellants.

M. L Agarwala—for Respondents.

The following is the judgment delivered by

Walsh, Ag .C. J.—This was a suit for damages for defamation. The alleged defamation is contained in a written document in the nature of a report or information lodged with a Police Officer in the course of the Police Officer's duty, in which the defendants charged the plaintiffs with assault and riot, both of which are cognizable offences. The police took no action on the report. They were not bound to do so. It was for them to decide whether or not the case was one on which they should charge the persons against whom the complaint was made. A complaint was eventually made before a Magistrate and dismissed. The plaintiffs have brought their suit for damages.

The first Court held that the defendants had published the libel complained of; that it was untrue, and that Rs. 40 damages were an adequate compensation. The defendants, in substance, pleaded justification. In paragraph 1 of the particular pleas, they said the report was correct. They raised no plea of privilege. Both Courts have dismissed the suit on the ground that it is privileged. It would be much better if the inferior Courts would confine themselves to the dispute between the parties and not go out of their way to raise fancy points which are not raised by the parties themselves. I gather that both Courts are of opinion that the information was covered by absolute privilege. A recent Full Bench decision of this Court in *Chunni Lal* v. *Narsingh Das* (1), held that in questions of this kind the English Common Law must prevail, and that inasmuch as statements made in the course of a Judicial Proceedings are absolutely privileged in England, they must be held to be absolutely privileged in India. I cannot agree with the two Courts that information or a report made to the Police comes within the principle. The District Judge says that the first report to the Police in a cognizable case is a commencement of a judicial proceeding, and that the report is receivable in evidence. There is a fallacy in this statement. It may lead to a judicial proceeding or it may not, but it is a preliminary step taken before judicial proceeding has been commenced. If, as the learned Judge says, the report is receivable in evidence and is in fact taken in evidence in the course of a judicial proceeding, then no doubt by the Full Bench decision that publication, namely, the putting it in as evidence in a judicial proceeding, would be absolutely privileged. I am unable to follow the inference which the learned Judge draws from S. 125 of the Evidence

(1) [1918] 16 A.L.J.R., 360.

Act. There are two kinds of privileges absolute privilege and qualified privilege. It is perhaps desirable to say a word about the latter, although in this particular case it does not help the defendants. In my opinion, without having heard any argument on the point, a report made at a Police Station, though not within the rule of absolute privilege which covers judicial proceedings, is *prima facie* privileged, that is to say, the person making it has a right to make it if he honestly believes it, and the person receiving it has a duty to receive it. But qualified privilege, as the term indicates, provides only a qualified protection, and the person charged with the defamation must prove that he used the privilege honestly, honestly believing the truth of what he said, or, in other words, having reasonable grounds for making the statement; and the onus of establishing that lies upon him. It is obvious that where the statement is made with reference to something in which the person making the complaint was himself involved as a party, it is impossible for him to have had any honest belief in its truth if it is shown to be untrue. And, therefore, in a case of qualified privilege, where the defendant sets up in defence that the allegation is true to his own knowledge, the defence of qualified privilege becomes illogical and impossible. That may be the reason why no effort was made in the written statement to rely upon it And to my mind it cannot be raised in such a case as this where the defendants plead justification. I hold, as a matter of law, that there was no absolute privilege and that there was no ground for raising any question of qualified privilege, and the Courts would have been better advised if they had tried the issues as framed. The lower appellate Court has not dealt with the question of justification or with the question of damages and the case must go back to the lower appellate Court to dispose of the two main issues of fact, that is to say, issues 2 and 3, namely, whether the defamatory statement is true or not, and, if untrue, to what amount of damages is the plaintiff entitled. I set aside the decrees of both the Courts below and remit the case under O. 41, r. 23. Costs of this appeal will abide the result.

[The following judgments were delivered on appeal :—]

Ryves, J.—In my opinion the judgment of my learned brother was correct and I would dismiss the appeal :—]

Dalal, J.—I agree.

Walsh, Ag. C. J.—I should like to say that the matter of law raised by the appeal has been very fully argued by Mr. Haider in a very interesting discussion. I merely want to add my reason for constituting the Bench as I did in this case, because Mr. Haider raised a sort of indefinite protest against it. In this case, and in the next one which we are about to hear, it seemed to me, when I happened to be acting as Chief Justice and was looking into my duty as regards the constitution of the Bench, that these two case were of a somewhat exceptional character, and that in this case, in particular, it was desirable, having regard to the Full Bench which has been referred to and the fact that I was a member of that Full Bench, to have a decision of three Judges. I remain of the same opinion after hearing Mr. Haider's interesting argument.

By the Court.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

1924 ALLAHABAD 536

MUKERJI, J.

Madho Singh --Defendant — Appellant.

v.

Mangal Singh and others--Plaintiffs —Respondents.

S. A. No. 304 of 1924, Decided on 24th March 1924, against the decree of the Add. S. J. Mainpuri.

Malicious prosecution—Acquittal in appeal is no bar to suit for prosecution.

Conviction by the trial Court but acquittal by the Court of appeal do not conclusively show that the charge by the defendant against the plaintiff was a *bona fide* charge and is no bar to a suit for malicious prosecution.

[P. 537, C. 1]

Shamhu Nath Chaube — for Appellant

Respondents were not represented.

Judgment.--This appeal is entirely concluded by the findings of the lower appellate Court. The findings are as clear as any Judge sitting in second appeals would desire.

The suit was brought on account of an alleged malicious prosecution. The lower Court found that the plaintiff-respondents purchased some lands and got possession over the *sir* lands which belonged to their vendors, after obtaining mutation of names in their favour and that when they went to till the lands the defendants resisted and caused hurt. It further found that, the appellant made a false report to the Police and took steps to bring about the conviction of the plaintiffs. It came to the conclusion that the charge brought by the defendant-appellant was utterly false and was therefore malicious.

It is urged that, the fact that the plaintiffs had been convicted by the Court of first instance of criminal jurisdiction, although they were acquitted by the Sessions Judge was a clear and conclusive evidence to show that the charge brought by the defendant was not a *bona fide* charge. In support of this argument the case of *Jadubar Singh* v. *Sheo Saran Singh* (1) has been cited. That case was decided on the peculiar facts of it and it does not lay down that a suit for malicious prosecution is not maintainable where there is a conviction by the Court of first instance and an acquittal by tho appellate Criminal Court. The evidence in the case was gone into by the lower appellate Court and this Court is bound by the findings already mentioned.

In my opinion there is nothing in this appeal. It is dismissed under Order 41, rule 11, C. P. C.

Appeal dismissed.

(1) [1898] 21 All. 26—(1898) A.W.N. 161.

1924 ALLAHABAD 537

LINDSAY, J.

Ganesh Das and another—Defendants—Applicants.

v.

Raja Suraj Pal Singh and another—Plaintiff & Defendant — Opposite Parties.

Civil Revision No. 148 of 1923, Decided on 30th January 1924, from an order of the Judge of the Court of Small Causes at Kasganj (Dt. Etah) D/-24th July 1923.

(a) *Provincial Small Cause Courts Act, Sch II Art 35 (j)—Suit for damages.*

Suit by way of damages arising out of the unlawful attachment and sale in execution of the plaintiff's property is not cognisable by a Court of Small Causes. [P. 538 C. 1]

(b) *Provincial Small Cause Courts Act, Sch. II Art 35 (ii)*

Suit for damages for trees belonging to plaintiff and cut by defendants is outside the cognizance of a Court of small causes. [P. 538 C. 1]

Panna Lal—for Applicants.

N. P. Asthana—for Opposite Parties.

Lindsay, J.- This application must succeed. The suit was tried in Court of Small Causes and the defendants, who are the applicants here put forward the plea that the suit was not cognizable in the Small Cause Court. T e lower Court decided this is ue against the defendants and gave a decree to the plaintiff.

It is necessary to state the facts which are relevant to the matter now under discussion. It appears that Ganesh Das the first defendant held a simple money decree against one Chhidda who was impleaded as defendant No. 3.

In execution of his decree he attached and brought to sale certain trees which were standing on the occupancy holding of his judgment-debtor.

After the trees had been sold, but apparently before they were cut down, the present plaintiff Raja Suraj Pal Singh the *zamindar*, brought a suit for a declaration that these trees were not liable to be taken in execution as being the property of the judgment-debtor Chhidda but that they belonged to him. The

Raja lost his suit in the first Court but he won in the Court of the District Judge in appeal on the 3rd of August 1922. After that he applied to the Court under S. 144 Civil Procedure Code and asked that the value of the trees might be paid over to him by the decree-holder and the auction purchaser. This application was disallowed with the result that this suit was brought on the 5th July 1923.

The above facts are all set out in the plaint. The relief claimed was Rs. 150 by way of damages arising out of the unlawful attachment and sale, in execution of the plaintiff's property.

The Judge of the Court below disposed of the objection to jurisdiction on the ground that the claim was not a claim for compensation for wrongful attachment. In the opinion of the learned Judge it was only a case of "damages for the trees belonging to the plaintiff and cut by the defendants." Even so, it seems to me that if the claim was of the nature described by the learned Judge it was still a claim which was outside the cognizance of the Court of Small Causes [Article 35 clause (ii)].

I agree with the argument put forward on behalf of the applicants here that this suit is really a suit of the nature described in Article 35 (j) of the schedule to the Small Cause Courts Act, and that being so, it was not competent for the Court below to deal with it.

I therefore allow this application, set aside the decree of the Court below and direct that the record be sent back to the Judge of the Court below with directions to return the plaint to the plaintiff for presentation to the proper Court. The applicants are entitled to their costs both here and in the Court below.

Application allowed.

1924 ALLAHABAD 538

MEARS, C. J. AND PIGGOTT, J.

Mt. Rameshra and others — Defendants — Appellants.

v.

Kalpoo Rai and another—Plaintiffs-Respondents.

L. P. A. No. 52 of 1922, Decided on 3rd December 1923, from the Judgment of Stuart, J, D/- 24th January 1922.

* *Hindu Law-Joint family property-Alienation—Paternal uncle acting as manager cannot sell nephew's share to discharge debt incurred by his own father.*

An uncle acting as Manager of a joint family is not entitled to sell the share of his nephew in the joint family property in order to discharge a debt incurred by his own father even though the father be also the grandfather of the nephew whose property is alienated.

[P. 539, C. 2]

N. P. Upadhia—for Appellants.

S. C. Dass—for Respondents.

The Letters Patent Appeal was made from the following judgment :—

Stuart, J.—It is found on the facts that Mahabir Rai son of Gaya Rai and Kalpu son of Ram Baron son of Gaya Rai were, in 1908, members of a joint Hindu family. On the 23rd of January 1908 Mahabir Rai sold a portion of the joint family property, in which Kalpu had interests, to three woman called Rameshra, Subhadra and Talouda for Rs. 750/-. In 1908 Kalpu was about 9 years old. In 1919, when he had attained the age of 20, he instituted a suit against the vendees of Mahabir Rai for possession over a half share of the property transferred. The lower appellate Court has decreed his claim. The Rs. 750/- was made up of five items : Rs. 303/10/- left with the vendees to pay off the amount due on a mortgage deed of the 6th of May 1906; Rs. 199/15/- left with the vendees to pay off a mortgage deed of the 11th of June 1902; Rs. 99/15/- left with the vendees for payment of a mortgage-deed dated Jeth badi 13, 1309; Rs. 96/7 price of grain with interest previously purchased and Rs. 50/1/- previously advanced by the vendees to the vendor. The lower appellate Court rightly applied the principles laid down in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) as subsequently interpreted by this Court and required from the defendants proof of legal necessity or payment of legitimate antecedent debts. The defendants were unable to adduce proof of any item which satisfied the lower appellate Court. The learned counsel for the vendees appellants has laid stress upon the assertions in the various deeds. The existence of these assertions in no way advances his

(1) [1917] 39 All. 437 (P. C.)

client's case. It was for them to prove not to assert. The lower appellate Court has held the proof to be inadequate. The finding that the proof is inadequate is a good finding of fact which cannot be impugned in second appeal. An application was put on the day before hearing, requesting permission to tender documents in evidence at this stage. The mere acceptance of these documents would in no way advance the appellant's case, for it would be necessary to prove the contents before advantage could be taken of the assertions in the documents. The object of the appellants is to establish now that the consideration was taken for purposes of legal necessity. It is a well known rule that the parties must in absence of very special circumstances, be confined to the evidence which they tendered before the trial Courts. The special circumstances asserted here are that the appellants were ignorant of the law on the subject at the time that the suit was heard They were represented by counsel and I cannot accept the excuse of ignorance. In view of what was stated in the case of *Chandradeo Singh* v. *Mata Prasad* (2) as far back as 1909, they should have had their evidence ready. But apart from that the decision of their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) was arrived at in January, 1917, and the appellants filed their written statement in August 1919. In these circumstances they have made out no cause for not being ready with their evidence at the right time. The learned additional Subordinate Judge having applied the law correctly and his findings on the facts being final, this appeal fails and is dismissed with costs.

Judgment in L. P. A.

Piggot, J.—After hearing arguments in the case and considering the recently pronounced decision of their Lordships of the Privy Council in the case of *Raja Bahadur Raja Brij Narain Rai* v. *Mangla Prasad Rai* (3) we are of opinion that this case was rightly decided by the learned Judge of this Court There is nothing in the principles laid down by their Lordships of the Privy Council in the case above quoted to warrant the view that an uncle acting as manager of a joint family is entitled to sell the share of his nephew in the joint family property in order to discharge a debt incurred by his own father even though the father was also the grandfather of the nephew whose property is alienated. On this ground we dismiss the appeal with costs.

Letters Patent Appeal dismissed.

(2) [1909] 31 All. 176.
(3) 1924 P.C. 50.

1924 ALLAHABAD 539

STUART, J.

Kamla Pati—Applicant.

v.

King Emperor—Opposite Party.

Cri. Rev. No. 425 of 1923, Decided on 15th November 1923, from the Order of Dt. Mag. Naini Tal, D/- 17th July 1923.

Forest Act, (VII of 1878) Ss. 29 and 32—Protected forests turned into reserve forests—Same subsequently declared to have ceased to be reserve—They become protected forests.

"Protected forests" were declared to be reserve forests and then they were declared to have ceased to be reserve forests.

Held, the later notification did not turn the forests into village forests or into land to which the Forest Act did not apply at all; but the effect of it was to revert them to their former position of protected forests. [P. 540, C. 1]

H. C. Desanges—for Applicant.

Asst. Government Advocate—for the Crown.

Facts.—Kamlapati was convicted for clearing for cultivation some 20 acres of land in contravention of the rules. The land cleared was in continuation of his "nap." Rules were contravened in so for as the extension was not terraced except in respect of a very small portion.

Judgment.—It is not necessary to go into this application at great length. In the United Provinces Gazette of 16th September 1922 Part I page 1016 there is a notification (No. 889-XIV-25) by which 713 acres in patti Ramgarh Melia Juthia village were disforested according to princi-

ples stated in paragraph 24 (5) of the Grievances Committee report. It was a block of forest of less than 2 square miles which was added to the Reserves by the 1911-17 Forest Settlement. On the facts as stated by the District Magistrate of Naini Tal this particular area had formerly been protected forest" within the meaning of Chapter IV Act VII of 1878, and in 1916 it had been removed from the category of "protected forest" and placed in the category of "reserved forest". The learned counsel for the appellant urges that on the passing of the notification it became either "village forest", or land in no way subject to the provisions of Act VII of 1878. I agree with the learned District Magistrate that the effect of the notification was to restore the status of the land to what it was before i. e. it again became "protected forest" Therefore the provisions of sections 29 and 32 would apply to it and the conviction is a good one. I see no reason to interfere with the sentence and d smiss this application.

Application dismissed.

✱ 1924 ALLAHABAD 540

KANHAIYA LAL, J.

Mahabir—Applicant.

v.

Manohar Singh—Opposite Party.

Civil Revision, Decided on 4th December 1923.

✱ *Civil P. C., Sch. II Para I—Oral consent and statement to refer recorded by Court is an agreement in writing.*

Where a Court in the presence of the parties but without a written application from them, but on their consent, made an order of reference in a pending suit.

Held: that the award by the arbitrators was valid. Oral statements by the parties or their pleaders recorded by the Court is an agreement in writing and supplies the place of a written application by the parties or pleaders

[P 540 C 2]

B. N. Vyas—for Applicant.

Judgment.—This is an application in revision against an award, which has been accepted by the Court below in a suit pending before it. On the date of the hearing of that suit the pleaders for the parties stated that they had agreed to arbitration and wanted to refer the matter in dispute to a certain pleader named by them for decision. Their statements were recorded by the Court and a reference was made in accordance with their agreement. The arbitrator made an award, to which certain objections were taken by the defendants; but they did not there state that the reference was invalid because it was not in writing, or that they had not authorised their pleaders to make it. In fact the *vakalatnama* filed by the applicant in the Court below expressly authorised the pleader concerned to enter into an agreement of arbitration. An objection is now taken that under paragraph 1 of the Second Schedule attached to the Code of Civil Procedure the agreement ought to have been in writing; but a record taken down of an oral statement made by the parties or their pleaders is as much an agreement in writing as a written application made by the parties or their pleaders themselves. The personality of the writer makes no difference. In *Shama Sundaram Iyer* v. *Abdul Latif* (1) and *Abdul Hamid* v. *Riazuddin* (2) it was accordingly held that where both the parties to a pending suit consented to a reference to arbitration and an order of reference was then and there made by the Court in the presence of the parties, though not upon a written application; it was not open to the Court to supersede that reference. An award is not invalid merely because an application for an order of reference is not made in writing. In *Umed Singh* v. *Seth Sobhog Mal Dhadha* (3) their Lordships of the Privy Council held that where a guardian *ad litem* of a minor party was in Court and had assented to the application for reference to arbitration the omission of the guardian to sign the application was immaterial. The application therefore fails and is rejected.

Application dismissed.

---

(1) [1900] 27 Cal. 61.
(2) [1908] 30 All. 32.
(3) [1916] 43 Cal. 290 (P. C.)

1924 ALLAHABAD 541

LINDSAY AND KANHAIYA LAL, JJ.

Nageshar Prasad—Defendant—Appellant.

v.

Ram Harakh Ponde and another—Plaintiffs—Respondents.

S. A. Nos. 1388 and 1389 of 1921, Decided on 8th February 1924, from the Decree of Sub. J. Basti, D/- 30th July 1921.

Pre-emption—Wajib-ul-arz.

An ambiguous Wajib-ul-arz is insufficient to prove the custom of pre-emption which plaintiff is bound to prove in a suit for pre-emption. [P. 542 C. 1]

K. N. Katju—for Appellant
Iqbal Ahmad—for Respondents.

Lindsay, J.—These are two connected appeals which have arisen out of a suit for pre-emption. The sale-deed which was executed and which gave rise to the suits comprised two items of property namely, a share in *mauza* Dhaurahra and another share in *mauza* Kamhariya.

The Court of first instance gave the plaintiff a decree in respect of the share in Dhaurahra but dismissed the claim with respect to the share in Kamhariya

Both parties appealed and the result in the lower Court was that the plaintiffs' claim to Kamhariya was allowed and the defendant's appeal relating to the share in Dhaurahra was dismissed.

We have therefore, these two appeals Nos. 1388 and 1389. In the former the vendee appellant raises the question of the plaintiffs' right of pre-emption with respect to mauza Dhaurahra. As regards this case Dr. Katju has informed us that as the record stands he does not think that he is in a position to press his appeal and therefore we direct that appeal No. 1388 of 1921 be dismissed with costs to the respondents including this Court fees on the higher scale.

There remains the other appeal No. 1389 of 1921.

The question we have to deal with here is one of interpretation. The judge of the Court below was of opinion that the plaintiff had a better right to pre-empt than the vendee-appellant, Nageshar Prasad Pande.

It seems that both the pre-emptors and the vendee belong to the same family as the vendor whose name was Brij Lal. On the pedigree which is set out in the record it seems to us to be clear enough that whatever relationship does exist between the pre-emptors and the vendee on the one hand and the vendor on the other it is a remote relationship.

Coming to the *wajibularz* we find that there are four categories of pre-emptors. The first is described as "*hissedar azis karib*," that is, co-sharers who are near relations. The second category consists of "*hissedar aziz baeed*," that is to say, co-sharers who are distant relations. The third class consists of "*hissedaran patti*," and the fourth class of "*hissedaran deha.*"

The controversy centres round the second category. The Court of first instance was of opinion that here the pre-emptor and the vendee being both distant relatives one had no preference over the other. The Munsif was of opinion that on the language of the *wajibularz* there was no preference *inter se* with respect to individuals who are included in each of the classes we have just mentioned. He was of opinion therefore that as both the parties were distant relations the purchaser Nageshar Prasad had just as good a right to take the property as the pre-emptor Ram Harak.

The judge of the lower appellate Court differed from the Munsif regarding this. He found that Ram Harak the plaintiff is one degree nearer in relationship to the vendor than the purchaser Nageshar Prasad and he thought that by reason of this circumstance Ram Harak had the better title.

The question we have to decide is no doubt one of some difficulty and it is almost impossible to ascertain with any approach to accuracy what the meanings of the words "*karib*" and "*baeed*" are as used in the *wajib-ul-arz.*

Apart from that however, we think that as there is no special declaration in the *wajibularz* to the effect

that individuals in any particular class are to have preference, we ought not to find in favour of the plaintiff. After all the plaintiff has come into Court asserting a better right to take this property than the vendee and the duty lay upon him to satisfy the Court by clear and unambiguous evidence that he had such a right. Whatever may be said about the language of this *wajibularz*, it certainly cannot be described as free from ambiguity.

We find that this principle has been laid down in various cases decided by the pre-emption Bench. Two of these have been quoted before us today by Dr. 'Katju, namely, 11 I. C. 274 and 11 I. C. 278. In both those cases where the language of the *wajibularz* was ambiguous the Court decided upon the principle that the onus lay upon the plaintiff to establish his right of pre-emption by evidence which would satisfy the Court that the custom was certain. Applying the same principle here we think that the judgment of the lower appellate Court as regards the share in Kamhariya is wrong and ought to be reversed.

The result therefore is that we allow second appeal No. 1389 of 1921 and restore the decree of the Court of first instance in *toto*. The appellant in this case is entitled to his costs in the lower appellate Court and in this Court including, here, fees on the higher scale.

Appeal allowed.

1924 ALLAHABAD 542

LINDSAY AND SULAIMAN, JJ.

Karamat and another—Defendants—Appellants.

v.

Wazir Hussain—Plaintiff—Respondent.

F. A. No. 93 of 1923, Decided on 21st November 1923, from an Order of Dt. J. Budaun, D/- 27th March 1923.

Pre-emption—Wajib-ul-arz.

Where a wajib-ul-arz contained a clause in matters recording rights of pre-emption to the effect that if a stranger has inherited property from an issueless co-sharer he would not be entitled to the right of pre-emption,

Held: that the existence of the right of pre-emption was a matter of contract and not of custom. [P 542, C 2; P 543, C 1]

M. A. Aziz—for Appellants.

Harnandan Prasad—for Respondent.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for pre-emption. The plaintiff relied mainly on an entry in the *waj b-ul-arz* of 1,272 Fasli. The defendants denied the existence of any such custom.

The Court of first instance came to the conclusion that although the *wajib-ul-arz* raised a *prima facie* presumption of the existence of custom nevertheless there was internal evidence in the clause relating to pre-emption which negatived it. It held that no custom had been establised and accordingly dismissed the suit. On appeal the learned District Judge came to a different conclusion. He held that the custom is established and remanded the case for trial of the other issues raised.

The entry relied on by the plaintiff, first of all, contains a recital setting forth the right of pre-emption and the way in which the price is to be settled in case of dispute. The clause winds up by saying that if a stranger has inherited property from an issueless co-sharer he would not be entitled to the right of pre-emption. There is no dispute as to the correct interpretation of this portion of the clause. It undoubtedly means that the right of pre-emption is denied to a person who has become a co-sharer by collateral inheritance. This portion of the clause cannot be detached from the other portions of it and in fact it is part of the whole entry regarding the existence of the right of pre-emption. In the case of *Balwant Singh* v. *Mare Singh* (1) we expressed the view that although a *wajib-ul-arz* raises a *prima facie* presumption of the existence of the custom it recites, nevertheless if it contains certain other matters relating to that right which cannot possibly form the subject of a custom, there would be no justification for presuming that the entry is one of custom. We are of opinion that this part of the clause is

(1) 1924 All. 52.

of that nature. It is impossible to conceive of a custom which makes distinctions between persons who have inherited by collateral succession and persons who have inherited by direct descent. All such persons become co-sharers in the village and have equal status and rights in the eye of the law. This being the view we are inclined to agree with the first Court that the entry in the *wajib-ul-arz* was a record of contract which had ceased to be of any effect after the expiry of the settlement. This being the sole evidence in the case the plaintiff has failed to establish the custom alleged by him.

The result therefore is that this appeal is allowed, the order of the lower appellate Court is set aside and the decree of the Court of first instance restored with costs in all courts including in this Court fees on the higher scale.

Appeal allowed.

1924 ALLAHABAD 543

LINDSAY AND SULAIMAN, JJ.

B. Gauri Shanker and others—Plaintiffs—Appellants.

v.

Pdt. Sheo Nandan Misra and others—Defendants—Respondents.

F. A. No. 269 of 1921, Decided on 19th February 1924, from the decree of the Sub-J. of Ghazipur, D/- 30th March 1921.

(a) *Hindu Law—Debt-Antecedent debt merely means debt antecedent in fact and in time is not a part of the transaction impeached.*

It seems plain from the recent decision of their Lordships of the Privy Council in *Brij Narain* v. *Mangal Prasad* (1924 P. C. 50) that the definition of "antecedent debt" which was given in Sahu Ram Chandra's case has been materially altered.

Antecedent debt now means merely a debt which is antecedent in fact as well as in time, that is to say, a debt truly independent of and not part of the transaction impeached. [P. 544 C. 2]

(b) *Limitation Act—Though creditor's remedy may be barred his right is not.*

It is well understood that though remedy which the creditor has may be extinguished the debt may nevertheless subsist, and even after the period of limitation for a suit for recovery of the debt has passed, the creditor has a right to receive the sum due to him from his debtor if the latter is disposed to pay him. It is further clear that a payment made to discharge a time-barred debt could not in law be recovered by the debtor. [P. 545 C. 1]

(c) *Hindu Law—Debts-Pious obligation—Doctrine of Payment of time barred debt by father is not immoral.*

The payment of a time-barred debt by a Hindu father could not in any sense be treated as an improper act or, to use the stock phrase, a transaction tainted with immorality. Alienation of joint property made for such payment is binding on the sons and grandsons. 13 Mad 189; 11 Bom 320; 31 Cal 190 Ref. [P. 545 C. 1]

Per Sulaiman, J.—A mortgage deed executed by a father of a joint Hindu family in consideration of an antecedent debt which had become time-barred is not binding upon the sons. When a debt has become time barred it has ceased to be a legal debt and, even though the Hindu Law does not recognise the principle of limitation the sons can take advantage of the statute of limitation which makes such debt unenforceable. To hold otherwise would be to extend to an unprecedented extent the exception laid down by Sahu Ram's case to the general rule that if the debt is not for the benefit of the estate, an alienation of the estate for the payment of the debt is bad. 8 A. L. J 1099 Foll. The cases where an alienation by a Hindu widow in lieu of time-barred debts of her husband was supported may be distinguished on the ground that thereby she had conferred a spiritual benefit on her deceased husband. [P. 547 C. 2; P. 548 C. 1]

But though a debt, which has become absolutely barred by time and the liability to pay which has not been undertaken in a previous writing, cannot be deemed to be a good antecedent debt so as to validate a conveyance by the father in lieu of it, yet when the mortgage debt as such has not become time-barred but only the personal remedy against the father is barred it can still be a good antecedent debt so as to justify an alienation in lieu of it. [P. 551 C 2]

(d) *Hindu Law—Debts—Pious obligation sons and grandsons can be enforced duri fathar's life time.*

It has now been definitely settled that the pious obligation which binds the sons can be enforced even in the life-time of the father. 1924 P. C. 50 foll. [P. 546 C. 1]

M. L. Agarwala—for Appellants.

Haribans Sahai and *S. N. Gupta*—for Respondents.

Lindsay, J.—The material facts to be considered in this case are as follows:—

On the 8th October 1904 Bachu Singh the defendant No. 2 executed a simple mortgage deed in favour of the first defendant Sheo Nandan Misir.

Admittedly the property which was hypothecated under this document was joint family property.

On the 22nd September 1916, with the object of satisfying the debt which was due under this earlier mortgage, Bachu Singh executed a mortgage with possession in favour of the same mortgagee. It was recited in this deed that the sum of Rs. 12,265 was owing on the earlier mortgage. A further sum of Rs. 460 was recited to have been taken in cash at the time of the execution of the mortgage for necessary expenses and for the completion of the document. The total mortgage debt secured upon this second mortgage was thus a sum of Rs. 12,725.

The suit out of which this appeal arises has been brought by the son and two grandsons of Bachu Singh for the purpose of avoiding this latter mortgage. There were allegations in the plaint to the effect that Bachu Singh the defendant No. 2 is a man of licentious and extravagant habits. It was further alleged that the mortgage in suit had not been executed for legal necessity or for any other purpose which would be binding upon the plaintiffs. It was therefore prayed that the mortgage transaction of the 22nd September 1916 should be set aside. At the same time the plaintiffs expressed their willingness to pay to the defendant No. 1 any sum which the Court might find to be owing to him on the ground that it represented money which was taken for purposes binding upon the family.

In the result the learned Subordinate Judge dismissed the suit for the setting aside of the mortgage. He has given the plaintiffs a decree for redemption on payment of the full amount, that is to say, Rs. 12,725.

The Subordinate Judge definitely found, and we agree with this finding, that there was no reliable proof whatever that Bachu Singh is a licentious or extravagant man. The evidence which was led by the plaintiffs on this point is altogether vague and unsatisfactory.

The plaintiffs come here in appeal and we have heard Dr. Agarwala at length on their behalf. In fact, we have had the case up twice for argument.

It seems to us that this appeal is concluded by the principles which have been laid down by their Lordships of the Privy Council in their recent judgment in the case of *Raja Bahadur Raja Brij Narain Rai* v. *Mangal Prasad Rai* (1).

The question to be considered is whether this mortgage which the plaintiffs now seek to have set aside was entered into for the purpose of discharging an antecedent debt.

It must be admitted that, as the law stood under the ruling in *Sahu Ram Chandra's case*, the debt incurred under the earlier mortgage of 1904 would not have been treated as an antecedent debt for the simple reason that that debt was incurred by the father on the security of the joint family property.

The learned Subordinate Judge was therefore right in holding that this earlier mortgage debt could not constitute an antecedent debt within the meaning of the ruling just referred to. He dismissed the suit however on other grounds mainly concerned with the burden of proof. He was of opinion that the plaintiffs had failed to discharge, what he thought, the onus which lay upon them and it was for this reason that he ordered that a decree for redemption should be prepared

Returning to the question of antecedent debt it seems to us plain from this recent decision of their Lordships that the definition of "antecedent debt" which was given in *Sahu Ram Chandra's* case has been materially altered. As we read this latest pronouncement of the Full Board of the Judicial Committee we understand antecedent debt to mean merely a debt which is antecedent in fact as well as in time, that is to say, a debt truly independent of and not part of the transaction impeached. In the concluding portion of the judgment their Lordships laid down five propositions which govern all cases of this

(1) 1924 P. C. 50—46 All. 95—51 I.A. 129—21 A L. J 934—5 L. R. P, C. 1—28 C.W.N 253—46 M. L. J. 23—5 Pat L. T. 1—2 Pat L. R. *Civ* 41—19 M.L.W. 72—(1924) M.W.N. 68—33 M.L.T. 457 (P.C.)

kind and the definition which has just been quoted is recited in proposition No. 4.

It cannot therefore be doubted that the debt which was raised by the mortgage of 1904 must now under this recent ruling be treated as an antecedent debt.

It has however been argued strenuously before us that we ought not to treat this earlier debt as an antecedent debt because, at the time the mortgage of 1916 was executed, no suit for the recovery of the debt owing under the earlier mortgage would have lain against the father. A suit to recover the money from the father as a personal debt would have been barred by the rule of limitation. We are asked therefore to hold that because in the year 1916 when the transaction which is now being impeached was entered into, the earlier debt had become time-barred, we ought to hold that the debt was not in reality an antecedent debt.

This is a question of some difficulty and there is no direct authority upon the point. There can of course be no doubt that a personal obligation incurred by the father in the year 1904 under a registered-deed could not have been enforced after a period of six years had elapsed.

It is however well understood that though the remedy which the crediter has, may be extinguished the debt may nevertheless subsist, and even after the period of limitation for a suit for recovery of the debt has passed, the creditor has a right to receive the sum due to him from his debtor if the latter is disposed to pay him.

It is further clear that a payment made to discharge a time-barred debt could not in law be recovered by the debtor and further it is to be observed that the payment of a time-barred debt by a Hindu father could not in any sense be treated as an improper act or, to use the stock phrase, a transaction tainted with immorality. In this recent case which was before their Lordships of the Privy Council it is clear from the facts that the personal obligations incurred by the father were still enforceable in asmuch as the earlier debts had been contracted within a period of between two and three years prior to the date of the mortgage in suit.

Here, as we have pointed out, the earlier debt was incurred in 1904 while the mortgage in suit is of the year 1916.

Bearing in mind however that the liability of the son for payment of the father's debts rests upon a pious duty it may well be doubted whether the sons in this instance could be heard to say that they are not bound by the payment which their father made in order to discharge an earlier debt although the recovery of that debt was barred by the law of limitation.

It is well settled that an alienation made by a Hindu widow for the purpose of discharging a debt due by her husband is binding on the reversioner even though the recovery of the debt which was discharged had become time-barred at the time of the transfer made by the widow. This principle has been laid down in a number of cases *e.g. Kondappa* v. *Subba* (2) *Chimnaji* v. *Dinkar* (3) *Udai Chunder* v. *Ashutosh Das* (4).

In these cases it was held that the discharge of a husband's debt whether barred or not was a pious duty of the widow and that an alienation made by her for the payment of such a debt would be binding upon the reversioners. It was said in the judgment in the Bombay case that the moral obligation resting upon the widow could not be obliterated by the circumstance that the law of limitation barred or did not bar a suit against the widow for the recovery of the debts. It is no breach of duty on the widow's part if she pays a debt which is time-barred.

If these principles hold good in the case of a widow it appears to me that they ought to hold equally good in the case of a son who is also under the pious obligation of discharging the debts of his father.

It is true, as we have pointed out, that the father here is still alive, but under the recent Privy Council ruling that circumstance in no way affects

(2) [1890] 13 Mad., 189.
(3) [1887] 11 Bom., 320.
(4) [1894] 21 Cal., 190.

the liability of the sons. It has now been definitely settled that the pious obligation which binds the sons can be enforced even in the life-time of the father.

It seems to me therefore that if the father in his life-time chooses to discharge an antecedent debt, although the recovery of that debt would have been impossible under the law of limitation at the time the father discharges it, the sons ought to be held to be bound by the father's transactions. Clearly they cannot impeach the act of the father on the ground that it is tainted with immorality. As has been pointed out, there can be no suggestion of immorality regarding a transaction which is entered into for the purpose of discharging a debt although the debt is time-barred.

If the true rule is that the moral obligation to pay the debt is not removed by the circumstance that under the statute law the recovery of the debt has become time-barred, it is obvious in the present case that if the father had not paid off this antecedent debt in his life-time the obligation on the sons to pay it would still remain. It has, however, so happened that the father has, before his death, discharged the debt and so relieved his sons from the pious obligation just referred to. In these circumstances I think the proper view to take is that the debt which was discharged by this later mortgage of 1916 was an antecedent debt for which the sons were liable. In my opinion, therefore, the plaintiffs were not entitled to have this mortgage set aside.

With regard to the decree for redemption which has been passed by the Court below, no objection has been raised in the memorandum of appeal. We notice, however, that the decree is not in proper form. According to the provisions of Order 34 rule 7 (see also appendix D, form No. 5 the form for a preliminary decree for redemption), the mortgage being a usufructuary mortgage in this case the proper decree to pass was that if the money were not paid on or before the date fixed the property would be sold. The office ought therefore to prepare a preliminary redemption decree in the proper form and allow six months from the date of this Court's decree to the plaintiffs to deposit the mortgage money.

Sulaiman, J.—The learned advocate for the plaintiffs has strongly urged that the present case must be distinguished from the recent Privy Council case on the ground that the personal remedy to enforce the debt under the deed dated the 8th of October 1904, in lieu of which the mortgage deed in suit was executed had become time-barred. While conceding that a conveyance by the father in lieu of his own antecedent debts is fully binding on his sons, he contends that debt must be a legal and subsisting debt at the time when the cenveyance is made. He has pointed out that out of all the reported cases in which the doctrine of an antecedent debt has been affirmed there is not a single case in which a debt on which the personal remedy of the father had become barred by time was treated as good antecedent debt for upholding a conveyance in lieu of it.

There is certainly this thing to be said in favour of this contention that all the previous cases which have been brought to our notice were either cases in which a simple money decree had been obtained against the father and in execution of it the property had been sold at auction, or cases where before the expiry of the six years and before his personal liability had become barred by time, joint property was transferred by the father.

Reliance has been placed on the following passage in the judgment of Lord Shaw in the case of *Sahu Ram Chander* v. *Bhup Singh* (5). "Although the correct and general principle be, that if the debt was not for the benefit of an estate then the mortgagor should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the

(5) [1917] 39 All. 437—44 I. A. 126—21 C. W. N. 698—1 Pat. L. W. 557—15 A. L. J. 437—19 Bom. L. R. 498—39 I. C. 280—26 C. L. J. 1—33 M.L.J. 14—(1917) M.W.N. 439—22 M. L. T. 22—6 L. W. 213 (P. C.)

case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from the general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded."

The contention is that there being no direct precedent for holding that the debt of the father on which the personal liability has become barred by time is such an antecedent debt as to support an alienation in lieu of it, the exception should not be extended.

It cannot be disputed that the strict Hindu law recognised no bar of limitation On general principles therefore it would make no difference whether the remedy had become barred by the Statute of Limitation or not. But the argument on behalf of the plaintiffs is that though there may be a religious obligation on the sons to be bound by their father's debt, which is neither illegal nor immoral, nevertheless they are entitled to claim the benefit of statutory enactments. If a debt has ceased to be a legal and enforcible debt against the father the liability of the sons to pay it, must also be deemed to have ceased. There cannot be much doubt that if a suit against the father were time-barred the creditor would not be allowed to pursue his remedy against the sons on the basis of the doctrine of their pious obligation to pay it. This was clearly laid down in the case of *Narsingh Misra* v. *Laji Misra* (6) and this principle has been consistently followed. Stanley C. J. in his leading judgment in the Full Bench case of *Chandra Deo Singh* v. *Mata Prasad* (7) remarked " A son admittedly may be succesfully sued for the debt of his father on the basis of his pious obligation to discharge his father's debts, provided that the suit be not barred by limitation, and a decree passed in such a suit may be enforced in execution by the sale of ancestral property of the family."

On the other hand it must also be conceded that when a debt becomes time-barred the debt itself is not extinguished but the right to recover it becomes barred.

There is nothing immoral or illegal in the debtor paying off such a time-barred debt. In fact under S. 25 subclause (c) of the Indian Contract Act a promise made in writing and signed by the person to be charged therewith to pay wholly or in part a debt, of which a creditor might have enforced payment but for the law for the limitation of suits is not considered void as being without consideration. If therefore a father previous to the deed of transfer had given a promise in writing undertaking to pay his time-barred debt his personal liability would be revived and such liability could be enforced against his sons.

The point pressed before us, however, is that in the present case the father had not, in any such way, revived his personal liability before the conveyance was executed, that is to say, there was no subsisting personal debt of the father which could have been legally enforced just before this deed of transfer, and independently of it. It is pertinently asked whether a sale-deed by a father in lieu of some old debt, more than 12 years old, on which all remedies have become time-barred, would be considered to be a conveyance in lieu of an antecedent debt so as to bind the sons. I am not prepared to say that such a conveyance would be a good conveyance.

Knox and Piggott, JJ. in the case of *Inder Singh* v. *Sarju Singh* (8) laid down that a mortgage deed executed by a father of a joint Hindu family in consideration of an antecedent debt which had become time-barred was not binding upon the sons. I am inclined to agree with the view expressed therein. When a debt has become time-barred it has ceased to be a legal debt, and, even though the Hindu law does not recognise the principle of limitation, I see no ground for holding that the sons cannot take advantage of the statute of

(6) [1901] 23 All., 206—(1901) A.W.N. 34.

(7) [1905] 31 All., 176—1 I. C. 479—6 A. L. J. 263 (F. B.)

(8) [1911] 8 A L.J. 1099—11 I.C. 737

limitation which makes such a debt unenforceable. If such a debt had been tried to be enforced against the father or the sons, the suit could not possibly have been decreed on the basis of any pious obligation. Can such an unenforcible obligation be deemed to be an antecedent debt for validating a subsequent transfer ?

The soundness of the decision in *Inder Singh* v. *Sarju Singh* (8) was somewhat doubted in the case of *Harihar Bakhsh Singh* v. *Bharat Prasad* (9), but the latter case was one in which previous to the transfer there had been a promise in writing by the father undertaking to pay his previous debt. On the same ground the case of *Narayana Sami Chetti* v. *Sami Das Mudali* (10) is distinguishable inasmuch as, there too the father had executed a promissory note in lieu of a previous time-barred debt. The same can be said about the case of *Ram Kishen* v. *Chedi Bai* (11) The cases where an alienation by a Hindu widow in lieu of time-barred debts of her husband was supported, may be distinguished on the ground that thereby she had conferred a spiritual benefit on her deceased husband.

I am therefore of opinion that if the previous debt of the father had become absolutely time-barred a conveyance in lieu of it, cannot be held to be binding on the sons. To hold so, would be to extend the applicability of the exception to an extent for which there is, up to now, no precedent.

This, however does not dispose of the whole question. In the present case, the previous mortgage-debt had not become absolutely barred by time. The creditor's remedy, if enforceable, was to realise his debt as against the security. All that had happened was, that owing to the lapse of six years a personal decree against the father in the event of the security proving insufficient, could not have been passed.

The question to be considered therefore is, whether the mortgage debt *per se* as distinct from a personal debt of the father can be deemed to be an antecedent debt within the meaning of the exception.

The rule laid down in *Suraj Bansi Kunwar* v. *Sheo Prasad Singh* (12) was that "where joint ancestral property had passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted Lord Hobhouse in *Mt. Nanomi Babuasin* v. *Modun Mohun* (13) remarked that the decisions have for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is now no conflict of authority. In none of these cases any expression like the expression "an antecedent unsecured debt" or the expression "an antecedent personal debt" was used. Stanley, C. J. in the Full Bench case of *Chandradeo Singh* v. *Mata Prasad* (7) defined the expression 'antecedent debt' as meaning a debt which is not for the first time incurred at the time of a sale or mortgage, that is presently incurred, but a debt which existed prior to and independently of such sale or mortgage, though of course a *bona fide* debt not colourably incurred for the purpose of forming a basis for a subsequent mortgage or sale or other similar object.

(9) [1913] 16 O.C. 185—20 I.C. 590.
(10) [1883] 6 Mad. 293.
(11) 1922 All. 402—44 All. 628 — 20 A.L.J. 577.
(12) [1880] 5 Cal. 148—6 I.A. 88—4 C.L.R. 226—4 Sar. 1 (P.C.)
(13) [1886] 13 Cal. 21—13 I.A. 1 4 Sar 682 (P.C.)

The case of *Sahu Ram Chandra* v. *Bhup Singh* (5) was one where on the facts no antecedency arose. The debt had been incurred under the mortgage itself which was in suit and all other remedies excepting that of enforcing the security had gone. In view of a certain conflict of decisions in the various Courts in India which was brought to their Lordships' notice it was thought desirable to state the law comprehensively. According to the interpretation put on that case by the Allahabad High Court two main propositions could be deduced from it. (1) The debt in order to be an antecedent debt must not only have been antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate; that is to say, that it must be a personal debt of the father and not a mortgage debt by him. And (2) while the father remains alive, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debt and not in respect of the debt having been principally incurred for the interest of the estate itself which they and their father jointly own, must fail, that is to say, there could be no pious obligation to pay off the father's debt during the lifetime of the father. It might be said that from the first proposition it logically followed that the debt being a personal debt of the father must have been one incurred within six years of the transfer.

A Full Bench of the Madras High Court in *Arumugham Chetty* v. *Muthu Goundan* (14) came to the conclusion that the first proposition did not follow from *Sahu Ram Chandra's case* (5). A Full Bench of the Patna High Court in the case of *Mathura Misra* v. *Raj Kumar* (15) came to the same conclusion.

The case of *Jogi Das* v. *Ganga Ram* (16) was also a case in which there was no antecedency in time between the debt and the conveyance.

Great reliance has been placed by the learned Advocate for the appellants on the case of *Chet Ram* v. *Ram Singh* (17). In that case the father had execut d a mortgage in the year 1904 for a period of ten years. Within three years from its date he, in 1907 sold his equity of redemption in the property to the mortgagees themselves. Their Lordships set aside the sale deed and refused to treat the previous mortgage debt as an antecedent debt so as to justify the second alienation. It is strongly contended on behalf of the plaintiffs appellants that this case was expressly referred to in counsel's argument before their Lordships in a subsequent case to be presently referred to and was not disapproved of. It is urged that this case is intelligible only on the assumption that in order to be a good antecedent debt there must be a personal liability of the father to pay it and it is suggested that the mortgage debt of 1904 was not treated as an antecedent debt because it was secured by a usufructuary mortgage under which the mortgagee had no right to sue for money against the father. It is said that if every previous mortgage debt were to be treated to be an antecedent debt then the sale deed of the year 1907 could not have been set aside at all. I have carefully considered the force of this argument and have come to the conclusion that *Chet Ram's case* (17) was decided not on this supposed ground but on the principle laid down in *Sahu Ram Chandra's case* (5). At page 373, Lord Shaw repelled the argument that 'although by the rules of the Mitakshara law a mortgage is at its date an invalid deed in so far as

(14) [1919] 42 Mad. 711—37 M.L.J. 166—9 L.W. 665—52 I.C. 525—(1919) M.W.N. 409—26 M.L.T. 96 (F.B.)

(15) [1921] 2 Pat.L.T. 407—6 P.L.J. 526—62 I.C. 132—(1921) P.H.C.C. 245 (F.B)

(16) [1917] 21 C.W.N. 957—42 I.C. 791—(1917) M.W.N. 739 (P.C.)

(17) 1922 P.C. 247—44 All. 368—49 I.A 228—16 M.L.W. 89—1922 M.W.N. 455—3 Pat.L.T. 363—43 M.L.J. 98—31 M.L.T. 50—24 Bom.L.R. 1231—27 C.W.N. 150—21 A.L.J. 114—37 C.L.J. 79 (P.C.)

purporting to encumber the joint family property, yet when it purports to become a consideration for a sale it then becomes a just and a legal consideration on the principle of antecedent debt, and that the family property could not be affected by such an invalid mortgage, but it could be sold next year or next day to the mortgagee for an antecedent debt, namely the mortgage debt itself'. The rule in *Sahu Ram Chandra's case* (5) insisting that the obligation must not only have been antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate, was re-affirmed. The case of *Jogi Das* v. *Ganga Ram* (16) was also quoted where Lord Haldane had interpreted the judgment in the case of *Sahu Ram Chandra* v. *Bhup Singh* (5) as one laying down in effect that joint property could not be alienated as against co-sharers by way of mortgage or otherwise, except for necessity, or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in consequence the transaction in that case could not stand', and it was added that 'the very circumstance of a pious obligation does not validate the mortgage'. The other rule laid down in *Sahu Ram Chandra's case* (5) namely, that there could be no pious obligation during the father's life-time was also relied upon and the appellant's argument was not acceded to as the doctrine was being invoked against grandsons in the life-time of the sons. I am unable to find any passage in the judgment in *Chet Ram* v. *Ram Singh* (17) which would support the contention that the previous mortgage debt was not treated as an antecedent debt because the usufructuary mortgagee had no right to recover a money decree.

The question what is an antecedent debt has been recently considered by a Full Board of the Privy Council in *Raja Bahadur Raja Brij Narain Rai* v. *Mangla Prasad Rai* (1). Their Lordships after referring to the previous authorities have laid down certain propositions which they would wish to lay down as the result of those authorities. We are bound therefore to accept the most recent pronouncement as the final authority on the matter. I concede that on the actual facts of that case the question which we have to consider in the present case did not directly arise, for, the previous mortgage deeds were all deeds within six years of the mortgage deed in suit, and the personal remedy of the mortgagor had not become barred by time. Nevertheless, the five propositions laid down by their Lordships must be unreservedly accepted. In these five propositions I understand the basis of the liability of Hindu sons to be three-fold. That liability may either be based on the existence of a legal necessity or on the ground of the personal obligation of the sons to pay their father's debt or on the ground of the transfer being in lieu of an antecedent debt. I understand each of these to be a distinct and separate basis. It is true that, the original foundation of the doctrine of an antecedent debt might have been the pious obligation of the Hindu sons to pay their father's debt but by a long series of decisions it has been recognised as a distinct basis. Their Lordships define an antecedent debt as one which is 'antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached. Their Lordships also add, that the liability cannot be affected by the question whether the father, who contracted the debt or burdened the estate, is alive or dead.

The learned Judges of this High Court had held that a mortgage *per se* could not be an antecedent debt for a mortgage is obviously a security which is not apart from the security of the estate over which it is constituted. If, therefore, it could not be shown that an anterior mortgage had been incurred in respect of an antecedent debt unconnected with the estate, then the anterior mortgage could not be held to be debt antecedent to the subsequent mortgage and that subsequent mortgage could not stand though its proceeds were entirely used to pay off the prior mortgage'. Their Lordships of the Privy Council thought that if proper attention were

paid to the word 'incurred' mentioned in the judgment in *Sahu Ram Chandra's case* (5), this High Court's interpretation on it was not correct. Their Lordships clearly held that a debt does not cease to be an antecedent debt merely because it is secured on the family property. Referring to the observations in Sahu Ram Chandra's case, that there could be no pious obligations on the sons during the life-time of the father their Lordships felt bound to say that they did not think that those observations could be supported. A mortgage debt therefore can be an antecedent debt just as much as a simple money debt can be. Although in the particular case before their Lordships the personal liability of the father had not become barred by time when the deed in suit was executed, yet their Lordships do not at all lay stress on that fact, or, make it the basis of their decision. That this is so is supported by the following consideration. Their Lordships at page 937 express their entire agreement with the view of the learned Chief Justice in the Full Bench Madras case reported in 42 Mad., 711.

Now there can be no doubt that the Madras Full Bench case had not proceeded on the basis of the personal liability of the father being still subsisting The Division Bench had referred two questions for the decision of the Full Bench. "(1) whether an independent debt, not immoral or illegal, contracted by the father on the security of the joint estate antecedent to the mortgage sued on, can be treated as an antecedent debt so as to support the charge on the sons' share also to the extent of the sum secured on the prior mortgage, and (2) in such a case can the former debt be treated as an antecedent debt for the purpose referred to, if the personal liability of the father under the earlier mortgage is not barred on the date of the suit on the document?" It is noteworthy that the learned Chief Justice, whose views have been approved of by their Lordships of the Privy Council, answered the first question in the affirmative and therefore thought it unnecessary to answer the second question at all. It is manifest that the learned Chief Justice treated a mortgage debt as a good antecedent debt, independently of the question whether the personal liability of the father under the earlier mortgage had or had not become barred at the date of the mortgage deed in suit. These views having been approved of by their Lordships of the Privy Council we are bound to give effect to them.

The conclusion to which I have come therefore is that although a debt, which has become absolutely barred by time and the liability to pay which has not been undertaken in a previous writing cannot be deemed to be a good antecedent debt so as to validate a conveyance by the father in lieu of it, yet, when the mortgage debt as such, has not become time-barred but only the personal remedy against the father is barred it can still be a good antecedent debt so as to justify an alienation in lieu of it I also therefore agree that the plaintiffs cannot avoid the mortgage.

By the Court.—The appeal is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

✱✱ 1924 ALLAHABAD 551

Full Bench

WALSH AG C. J. AND PIGGOTT, KANHAIYA LAL, DANIELS, AND MUKERJI, JJ.

Gajadhar — Defendant — Appellant.

v

Jagannath—Plaintiff—Respondent.

S. A. No. 837 of 1922, Decided on 8th April 1924, from a decree of the Officiating District Judge of Agra, D/-7th April 1922.

✱✱ *Hindu Law—Joint family— Alienation by father for debt barred at date of alienation binds sons.*

A right to receive the payment of a debt, as distinct from a right to enforce its payment, subsists, even after the remedy by action has become barred by time; and if the debt exists and the debtor is willing to pay it by an alienation of the family property, such an alienation, if otherwise valid, can bind his sons and grandsons to the same extent as if the said debt had been received by the

debtor, and was sought to be recovered by the creditor by the attachment and sale of the family estate. 33 Mad. 308; 6 Mad. 293; 43 All. 604; 1922 All. 402 Foll. 8 A. L. J. 1099 35 All. 207, 41 B 347 Dist. [P. 554, C. 2]

B. N. Vyas and *M. P. Asthana*—for Appellants.

A. Sanyal and *P. L. Banerji*—for Respondent.

Walsh, Ag. C. J.—The question referred to this Full Bench having been amended during the argument, is, as follows: "Whether a time-barred debt can constitute a valid antecedent debt as consideration for a sale deed given by a father of a joint Hindu family alienating joint ancestral family property?

I entertain no doubt that that question ought to be answered in the affirmative and I do not propose to add to the reasons given by my brothers.

Piggott, J. — This question has been referred to a Full Bench by reason of a conflict in authority, understood to exist between the decision in *Ram Kishan Rai* v. *Chedi Rai* (1) and certain older decisions of this Court, more particularly *Dalip Singh* v. *Kundan Lal* (2). In this latter case the learned Judges quoted with approval and purported to follow an older decision of a Bench of this Court of which I was myself a member in the case of *Indar Singh* v. *Suraj Singh* (3). I apprehend that the result of the decision which we are today pronouncing will be to overrule this case, as also *Dalip Singh's* case (2). I therefore feel it incumbent upon me to say a few words in explanation of my own position, otherwise I should have been content to leave this question to be decided on the authority of the Hindu Judges who are members of this Bench. As a matter of fact I should unhesitatingly have concurred with the learned Judges who decided *Ram Kishan Rai's* case (1). Under S. 25 of the Indian Contract Act a Hindu father, like any other person, can enter into a valid contract by promising to pay a debt formerly incurred by himself, the payment of which can no longer be enforced by reason of the law governing the limitation of suits. If a Hindu father enters into a contract of this nature, he incurs a legal liability personal to himself, from the date of this new contract. The liability does not, as it seems to me, differ in principle from that which the father incurred when he contracted the debt originally. The sons, therefore, can be made liable to a suit upon a promissory note or simple bond executed by their father the consideration for which was a previous debt which was statute barred when the said bond or promissory note was executed. It does not seem to me, however, that this principle of law suffices to determine the question which this Court had to decide in *Indar Singh* v. *Sarju Singh* (3). Suppose a Hindu father, instead of giving a simple money bond in satisfaction of the statute barred debt, enters into a contract of mortgage which involves an alienation of joint ancestral property belonging to himself and his sons. The real meaning of the decision in *Indar Singh* v. *Sarju Singh* (3) is that in the opinion of the learned Judges who decided that case, the antecedent debt of his own in satisfaction of which a Hindu father may make an alienation of joint ancestral family property which his sons cannot question, except on the plea that such debt was contracted for immoral purposes must be an antecedent liability which is still enforceable against the father on the date on which the alienation of joint family property is effected. We were really applying the principle laid down by the majority of the Full Bench of this Court in Chandra Deo's case and subsequently affirmed by their Lordships of the Privy Council, subject to this that we interpreted the words "antecedent debt" in that case as equivalent to "a subsisting liability, previously incurred". On the date on which the Hindu father, in the case which we are supposing, executed the contract of mort-

(1) 1922 All. 402—44 All. 628—20 A. L. J. 577.
(2) [1913] 35 All. 207—18 I. C. 726—11 A L. J. 244.
(3) [1911] 8 A. L. J. 1099 — 11 I. C. 737.

gage, he was under no liability enforceable against him by law ; he created a liability enforceable against himself when he signed the contract of mortgage. That liability was treated as being on the same footing as the liability which the father might incur by raising a loan on the security of joint family property under the very contract of mortgage which he was signing. We held in effect, that a liability against the father which only came into existence when he signed the contract of mortgage, could not be treated as an antecedent liability validating an alienation of joint family property on the principle laid down in Chaudra Deo's case. I have now had an opportunity of considering the entire question in the light of the arguments which have been addressed to us and of the opinions expressed by the senior Hindu Judge who is a member of this Bench. Undoubtedly the pious duty of Hindu sons to discharge their father's debts, not tainted with immorality, cannot be affected by the usual statute of limitation. In the case of *Brij Narain* v. *Mangal Prasad* (4) their Lordships of the Privy Council have summed up the law on this question of alienations of coparcenary property by the manager of a joint undivided estate. They have expressly laid it down that if such manager is the father, he may by incurring debt, so long as it is not for an immoral purpose lay the estate open to be taken in execution proceedings upon a decree for payment of that debt. It seems to me to follow that if the father, instead of waiting for a decree to be passed and the estate to be taken in execution himself sells a portion of that estate in order to satisfy a previous debt of his own, not incurred for immoral purposes the sons by reason of their duty can no more challenge a voluntary alienation of this sort than they could have done an auction-sale in execution of a simple money decree. In this view of the case it seems to me that the principle of the antecedent debt can no longer be rightly interpreted as it was done by us in the case reported *Indar Singh* v. *Suraj Singh* (3) as if the expression were equivalent to an existing liability antecedently incurred. Stress must be laid on the fact that the debt was one incurred by the father prior to and altogether independently of the alienation of the joint family estate by which he proposes to satisfy it. I concur, therefore, in the answer proposed to the question before us for decision.

Kanhaiya Lal, J.—The question for consideration in this case is whether a time-barred debt can constitute a valid antecedent debt for the purpose of supporting an alienation, by the father of an ancestral or joint family property.

Under the Hindu law it is well recognised that the father has a larger power of disposal over the ancestral and joint family property than an ordinary manager, the reason being that his sons and grandsons are under a pious obligation to discharge his just and lawful debts which may have remained unpaid. Apart from the question of family necessity or common benefit, it is open to the father to pay such a debt by an alienation of the joint family property, though the debt may have become barred by limitation, because what can be revived by the father and may be recovered from him by the attachment and sale of the family property can also be recovered from his sons and grandsons, that is to say, from the joint family estate in their possession.

In the view of the Hindu lawyers a debt due is not merely an obligation but a sin, the consequences of which follow the debtor in the next life. Vrihaspati says,

"He who, having received a sum lent or the like, does not repay it to the owner will be born hereafter in his creditor's house a slave, a servant, a woman, or a quadruped."

Narada similarly says,

(4) 1924 P. C. 50—46 All. 95 — 51 I. A. 129—21 A. L. J. 934 — 5 L.R.P.C. 1—28 C.W.N. 253— 46 M. L. J. 23—5 Pat. L. T. 1— 2 Pat. L.R. 41—19 M.L.W. 72— (1924) M. W. N. 68—33 M. L. T. 457—26 Bom. L. R. 500—11 O. L. J. 107 (P. C.)

"When a devotee or a man who maintained a sacrificial fire, dies without having discharged his debt, the whole merit of his devotions, or of his perpetual fire, belongs to his creditors."

The duty of relieving a person from the evil consequences of his debts, remaining unpaid, therefore lies very heavily upon his sons and grandsons; and the only limitations, which the law recognizes are, that the debts must not be illegal or immoral and that the obligation would only be enforceable against the family estate. Narada says that "Fathers desire offspring for their own sake, reflecting that this son will redeem them from every debt whatsoever due to superior and inferior beings". In fact, the older the debt, the greater the responsibility on the descendants of the man, who leaves the debt unpaid. Vrihaspati accordingly lays down

"The father's debt must be first paid and next the debt contracted by the man himself, but the debt of the paternal grandfather must even be paid before either of these."

To the same effect is a dictum of Katyayana who declares:—

"The Judge shall compel a son to pay the debt of his father, provided he be involved in no distress, be capable of property and liable to bear the burden, but in no other case shall he compel the son to pay his father's debt."

A further restriction has now been introduced by the law of limitation. A son is not liable for the payment of a debt due by his father, if it was not legally recoverable from him, had he been alive But a time-barred debt may be revived by the father, and when so revived, it stands on the same footing as a debt enforceable against him in his life time. Under S. 25 of the Indian Contract Act (IX of 1872), it is open to a person against whom a debt has become barred by time to make a promise in writing to pay that debt, and such a promise would form a good consideration for a sale made to pay that debt. Under Ss. 60 and 61 of that Act, a creditor can lawfully appropriate a payment not made for any specific purpose, towards a debt, barred by time. A contract in writing to pay such debt may for certain purposes be treated as an independent contract; but the liability, which it renews, is a liability, which existed from before, though for the time being it may have ceased to be enforceable. The Hindu Law did not recognize any rule of limitation for the recovery of debts. Every debt which was lawful was binding and recoverable from the debtor irrespective of the period which may have elapsed since the original liability was incurred, and no restriction on its recovery was recognised beyond this that at no time more than double the amount of the principal money could be claimed.

A debt may become irrecoverable under the law, now in force, by reason of the lapse of the period of limitation, but the debt exists all the same, and if a person chooses to pay a time-barred debt in the manner permitted by S. 25 of the Indian Contract Act, the debt which he chooses to pay, remains the same debt though by reason of the contract, which he enters into, it assumes a new garb and gains a fresh vitality.

As pointed out in *Subramania Aiyar* v. *Gopala Aiyar* (5) a right to receive the payment of a debt, as distinct from a right to enforce its payment, subsists, even after the remedy by action has become barred by time; and if the debt exists, and the debtor is willing to pay it, by an alienation of the family property, such an alienation, if otherwise valid, can bind his sons and grandsons to the same extent, as if the said debt had been revived by the debtor, and was sought to be recovered by the creditor by the attachment and sale of the family estate.

In *Narayanasami Chetti* v. *Samidas Mudali* (6) it was held that liability of a Hindu son to pay the money due on a promissory note executed by his deceased father in consideration of his debt, which had been declared barred by limitation could validly be enforced against the assets of the father. In *Sheoram Pande* v. *Sheoratan Pande* (7) it was pointed

(5) [1910] 33 Mad. 308—20 M. L. J. 633—7 I.C. 898—9 M. L. T. 321.
(6) [1883] 6 Mad. 293.
(7) [1921] 43 All. 604—63 I.C. 279—19 A. L. J. 613.

out that in the matter of the pious obligation, the Hindu law made no difference between a time-barred debt and a debt which was not so barred; and in *Ram Kishen Rai* v. *Chedi Rai* (1) it was similarly held that inasmuch as the Hindu law did not recognise any rule as to the extinction of claims by the efflux of time, the sons in a joint Hindu family were not exempt from the payment of bonds executed by their father merely because such bonds were given by way of a renewal of other bonds, which at the time of the execution of the former were barred by limitation. Thesame principle was recognized in *Hari Har Baksh Singh* v. *Bharat Prasad* (8) and *Muttuswamy* v. *Subramanya* (9). A promise to pay a barred-debt is in fact neither illegal nor immoral; and a son cannot escape liability merely because the debt, which his father had agreed in writing to pay, was one, the payment of which he could have legally avoided.

Our attention has been drawn to two decisions in *Indar Singh* v. *Sarju Singh* (3) and *Dalip Singh* v. *Kundan Lal* (2). In the former case Knox J., who delivered the judgment of the Bench, after pointing out that he had not been referred to any text of Hindu Law, or any precedent, bearing upon the point, observed, "There is no doubt that the Hindu Law did not recognise the principle of limitation with reference to debts; at the same time the fact remains that if the creditor had tried to sue for the debt at the time that the mortgage was entered into, or if the father had executed a mortgage on the basis of an acknowledgment of such time barred debt, the debt could not have been recovered or the mortgage lien enforced in our Courts." It is difficult to understand the latter observation, because if the father had executed a mortgage on the basis of such a time-barred debt, or an acknowledgment had been made before the debt had become barred by time, a suit for the recovery of the debt either on the foot of that mortgage or on the foot of that acknowledgment could have been easily maintainable. It may, however, be assumed that the acknowledgment therein referred to, was an acknowledgment made or supposed to have been made after the debt had become barred by time; but even if that was so, the debt, if revived by a mortgage in writing, would for the purpose of enforcing the pious obligation be a good and valid debt, unless it was shown to have been taken for an illegal or immoral purpose. In the second case, the ground of distinction between cases where legal necessity is proved and those where an antecedent debt is proved to have existed, does not appear to have been recognized. A debt taken for legal necessity, whether taken by a father or by any other manager is binding on all the members of the joint family, but an alienation made to pay an antecedent debt, not so taken by a manager, who is not the father, is not so binding. The rule which enforces an alienation made to pay an antecedent debt, not shown to have been taken for legal necessity or common benefit, nor shown to have been taken for an illegal or an immoral purpose, rests entirely on the theory of pious obligation; and where such a pious obligation exists, an alienation made to pay such an antecedent debt by a father is held to be binding on his sons and grandsons

A reference has also been made to the decision in *Naro Gopal* v. *Paraganda* (10) but in that case a time barred debt was held sufficient to support an alienation by a father of his interest in the joint family property, and the question now at issue was not definitely considered.

It is argued that a time-barred debt is not *avyavaharik* debt within the meaning of the text of *Ushanas* cited in the Mitakshara. But a debt revived by the father cannot be regarded as an *avyavaharik* debt, or a debt not recognized by law or usage either under the old Hindu Law or under the law now in force.

(8) [1913] 16 O.C. 185—20 I.C. 590.
(9) [1912] 11 M.L.T. 142—14 I.C. 69—(1912) M.W.N. 453.

(10) [1917] 41 Bom. 347—39 I.C. 23—19 Bom. L. R. 69.

The case of an alienation effected by a Hindu widow to pay a debt due by her deceased husband, if barred, by time, presents a useful analogy for the purpose of guiding the decision of this question. It is well settled that a Hindu widow is competent to transfer the property, which she has received from her husband to pay a debt due by him though it may have been barred by limitation, so as to bind the reversionary heirs of her husband *Udai Chunder* v. *Asutosh Das* (11) *Chimnaji* v. *Dinker* (12) *Kondappa* v. *Subba* (13) *Bhagwat* v. *Nivratti* (14) and *Sheoram Pande* v. *Sheoratan Pande* (7). The principle underlying that rule is that she is under a pious obligation in a reasonable measure to promote the spiritual benefit of her husband, whose estate she has inherited; and one of the ways in which this benefit can be promoted is by getting him released from the penalty or sin of leaving his debts unpaid. A son is in a more independent position be cause he acquires a right in the family property by birth, but he too is under a pious obligation to save his father from a similar penalty and to pay the debts due by him if not illegal or tainted with vice. If a Hindu widow can validly alienate to pay time-barred debts, due by her husband, a Hindu father can similarly alienate property to pay the time-barred debts due by him in order to release himself from the sin of having left them unpaid, so as to bind his sons and grandsons. In *Shib Nath* v. *The Alliance Bank of Simla* (15) it was accordingly held that under the Hindu law the payment of a debt due by the father, though time-barred was a pious duty. and such a debt was a good antecedent debt however old it might be. A debt, which was barred by time and has been revived, stands on the same footing as a debt which is not time barred; and if it is enforceable against the father, it is also enforceable against his son's and grandsons, provided, it was not taken for an illegal or immoral purpose. An alienation made to pay such a debt is, therefore, valid, and can bind the interests of the sons and grandsons of the person making the alienation. The reply to the question is therefore in the affirmative.

Daniels. J. — The answer to the question referred to us lies in a very brief compass. It is settled law that a father can alienate joint family property in lieu of his own antecedent debt when such debt was neither illegal nor immoral. Does a debt cease to be a debt because its recovery is barred by the statute of limitation? Clearly not. Limitation extinguished the remedy, but except in the case covered by S. 28 of the Limitation Act, does not destory the right. S 28 applies only to suits for possession of property, and has no application to the case of a debt. Hindu law, moreover, recognises no limitation for debts. Even under the Contract Act a time-barred debt is still recognised as a valid consideration for a contract.

There is another way of looking at the matter which leads to the same result. The sons' liability admittedly arose from the pious obligation which lies on them to pay their father's debt. Now a pious obligation is necessarily independent of modern statute of limitations. It may be legal to evade payment of a just debt by taking shelter under the law of limitation, but such a conduct is generally regarded as dishonest, and this is still more the case under the Hindu system of law under which the obligations of payment of debts is elevated into a religous duty.

For these reasons I concur in answering the question in the affirmative.

Mukerji, J. —I also agree in answering the question put to us in the affirmative.

I shall add just a few words. According to the Mitakshara law as translated by Colebrook, Chapter 5, p. 188, a son is asked to relinquish his own share in the property so that the debts of his father may be paid

(11) [1894] 21 Cal. 190.
(12) [1887] 11 Bom. 320.
(13) [1890] 13 Mad. 189.
(14) [1915] 39 Bom. 113—27 I.C. 356—16 Bom. L. R. 738.
(15) 25 I. C. 480.

off. This is really the foundation of the principle that a Hindu father may alienate the joint family property in order to pay off his own antecedent debts, although such debts may not have been incurred for the benefit of the family. A debt does not cease to be a debt by being barred by limitation. Even under Anglo-Indian law a barred debt forms a good consideration for a fresh contract. Under the Hindu law, which knew of no rule of limitation for the enforcement of a debt, the rule would apply with much more force. It therefore seems clear to me that a father can alienate family property in order to pay off his antecedent debts, though such debts cannot be enforced in British Courts of law on account of the rule of limitation.

By the Court.—

The order of the Court is that the question be answered in the affirmative and the appeal remitted to Mr. Justice Daniels and Mr. Justice Dalal for final disposal.

Question answered in the affirmative.

1924 ALLAHABAD 557

KANHAIYA LAL, J.

Pt. Auseri Lal—Plaintiff—Applicant.

v.

Mullhan and another—Defendants—Opposite Parties.

Civ. Rev. Nos. 137 and 138 of 1923, Decided on 24th January 1924, from the Order of Sm. C.J. Cawnpore, D/-1st August 1923.

° *Provincial Sm. C. C. Act, Sch. II Art 8—Grazing dues.*

Suit for recovery of rent of a grazing area is excluded under clause 8. 12 A. L. J 36, 31 All. 342 Dist. [P 557, C 2]

N. P. Asthana—for Applicant.

Mukhtar Ahmad—for Opposite Parties.

Kanhaiya Lal, J.—The plaintiff obtained a lease of some grass land situated in the Cawnpore cantonment from the cantolment committee. He sub-let that land for grazing purposes to another person at a fixed rate per cattle. The present suit was filed by him for the recovery of the rent payable by the latter. The suit was clearly one for the rent of the grazing area let to the defendant; and it was excluded from the cognizance of the Small Cause Court by clause 8 of Schedule 2 of the Provincial Small Cause Courts Act (No. IX of 1887). It was not a suit for the recovery of the price of grass sold to be cut and the decision in *B and N. W. Railway* v. *Bandhu Singh* (1) does not therefore apply; nor was it a suit for the recovery of the rent of land situated in a mahal and let for grazing purposes; and the decision in *Manohar Lal* v. *Mt. Gauri* (2) is equally inapplicable. The defendant was entitled to use the land and the grass growing on it for grazing purposes during the period for which the lease was granted; and the order of the Court below, returning the plaint cannot therefore be sustained. The present application, in revision is not directed solely against the erroneous order of the appellate Court, upholding the order of the Munsif. It is also directed against the order of the Munsif returning the plaint for presentation to the proper Court; and as pointed out in *Chandu Mal* v. *Koka Mal* (3) a refusal of a Court to exercise the jurisdiction invested in it by law can legitimately form the subject of revision. The application is therefore allowed and the orders passed by the Courts below are set aside with a direction to the Court of first instance to restore the suit to its original number, and to proceed with its hearing in the manner provided by the law. The costs here and hitherto will abide the result.

Application allowed.

---

(1) [1909] 31 All. 342.
(2) [1914] 12 A. L. J. 360.
(3) [1919] 43 All. 334.

1924 ALLAHABAD 558

WALSH AND RYVES JJ.

Gobind Ram—Applicant.

v.

King Emperor—Opposite Party.

Crl. Rev. No. 387 of 1923, Decided on 28th November 1923, from an order of 2nd Addl. Sess. J. Cawnpore, D/-21st May 1923.

Opium Act I of 1878, S. 9—Smuggling opium in maize.

Where a person under a pretended name consigned from Kotah, a native state into Cawnpore in British India bags of maize containing a considerable quantity of opium which was detected at Cawnpore and searched in his presence.

Held: that the offence under S. 9 was committed. [P. 559, C. 1.]

S. N. Mukherji and S. N. Chaube—for Applicant.

Asst. Government Advocate — for the Crown.

Walsh, J.—The facts found or admitted in this case are that one Ram Chander, who is alleged to be a pseudonym for Gobind Ram applicant, despatched from Kotah Native State 111 bags *maize* containing a large quantity of opium. The goods were addressed to the same, Ram Chander the consignee at Cawnpore, and arrived at Cawnpore in the train by which Gobind Ram and his servant travelled. He went to a *dharamsala* and being suspected of traffic in opium he was there arrested and searched and he was taken to the railway station where the truck containing the bags of maize was, and in his presence the truck was emptied and the maize examined and opium was discovered. In his possession was the railway receipt addressed by Ram Chander in Kotah to Ram Chander in Cawnpore. There cannot be the slightest doubt that he is the Ram Chander indicated in the railway receipt. His possession of the railway receipt is almost conclusive on the subject, and no explanation has been tendered, except the absurd story that it was planted on him. On these facts it is quite clear that he was rightly convicted of importing.

On the question of the meaning of the word "importing," we wish, in the first place, to draw attention to the fact that the case of *Munshi Lal* v. *Emperor* (1), which was a single Judge judgment delivered by me, has been entirely misunderstood by the auther of the head-note in the Allahabad Law Journal, and therefore apparently by the learned Judge who referred this case. The important passage in that judgment exactly fits this case:—

"I say nothing to discourage the view that a person who exports from outside, the United Provinces, to a warehouse inside the United Provinces of which he is really the proprietor or temporary possessor even under a false name, is, in fact, committing an offence under the Act and importing into the United Provinces, although he is also the person who exported from outside. It is perfectly possible for me to send an article for myself from the High Court at Allahabad to my Chambers in London, and if I did so with a dutiable article without declaration, I should be guilty of importing into England." That exactly fits in the case we have before us. I go on to point out in my judgment that the sentence under revision, which I quashed, was a contradiction in terms, and that you cannot import to a place, unless you are the person taking delivery inside the area. That is not intended, and never could have been properly understood as being intended as a comprehensive definition of "to import." It is merely a definition of a part of the act of importing indicating that it must be a person who was intending to take delivery, or had the right to take delivery, or desired to take delivery inside the area. To say, as the head note says in the report, that "to import goods to a place means taking delivery of them at the place," is absurd and inconsistent with the whole tenor of my judgment and with the actual language which I used. Mr. Justice Sulaiman appears to have thought the same thing, because he points out that in this particular case the applicant in revision had not taken delivery, and he therefore thought that a debateable

(1) 1922 All. 21.

point of law arose, and he referred it to two Judges. But as a matter of fact taking delivery is merely the final step and by no means the test and was never intended by me, nor was it said by me to be the test of importation. We think therefore that in any event no point of law arises, and that the ambiguity suggested by Mr. Justice Sulaiman is entirely due to an irrelevant and foolish head note.

A previous application in revision has already been made by the applicant in this case. The judgment of the Chief Justice who allowed that application, which related to an order of confiscation of the notes found in his possession, shows that the previous application for restoration of his notes was decided upon the basis that he was the owner of the opium, but that the money in his possession was the purchase price of the sub-sale. As a matter of general discretion, in our view, if a man makes an application to this Court in revision with full knowledge of the facts and deliberately keeps back one point, he will not be heard to make a second. It may be, that the law gives him technical right to apply, but granting the application is a matter of discretion. If by some *bona fide* mistake, for which he is not responsible, or by the *bona fide* mistake of some agent, if he happens to be in prison at the time, a real point is omitted, that may be an exception, but under ordinary circumstances this Court would reject an application on a second point. The application is dismissed.

Application dismissed.

✱ 1924 ALLAHABAD 559

MEARS, C. J. AND PIGGOTT, J.

Bishambhar Nath—Applicant.

v.

Md. Ubaidullah and others—Opposite Parties.

Privy Council App. No. 25 of 1923, Decided on 20th December 1923.

✱ *Civil P. C. S. 110—Substantial question of law.*

The interpretation of documents involving a substantial question of law and of general interest only justifies grant of leave. 12 All 387 and 38 All 570 foll. [P 560, C 1]

N. P. Asthana—for Applicant.

Tej Bahadur Sapru—for Opposite Party.

Judgment.—This is an application for leave to appeal to His Majesty in Council in a second appeal. It appears that on the 25th of June 1886 Durga Prasad and others executed a document by which they transferred certain property to Qudratullah Khan. The question that has arisen is whether on the terms of the document the transaction that was entered into, was an out and out sale with liberty to re-acquire the property on a given date, or whether it was a mortgage. For the purposes of this application we are treating the subject matter of the suit as being of the value of Rs. 10,000 and upwards but it is to be noticed that Sir Tej Bahadur Sapru, who appears for the respondents, is not able to accept the figures contained in the affidavit which has been put before the Court to-day by the applicants; and we express, and need express on this occasion no opinion as to the real value either of the suit or of the appeal. The High Court in second appeal affirmed the decision of the lower appellate Court, who had reversed the Munsif. The Munsif, decreed the suit believing that the Rs. 3,600 which was the consideration for the deed, together with a small amount of interest namely Rs. 196, should be the proper amount on payment of which redemption should be decreed. The lower appellate Court on its construction of the document said that the document was not in any sense a mortgage, that redemption could not be had on the terms as decreed by the Munsif, but that the real transaction between the parties was an out and out sale coupled with a bargain for reconveyance, on the performance of certain conditions.

In second appeal the matter was carefully gone into, by two learned Judges of this High Court, and they on a review of the authorities, and specially of *Bhagwan Sahai* v. *Bhag-*

wan Din (1) and *Jhanda Singh* v. *Wahid Uddin* (2) confirmed the decision of the lower appellate Court. In those two cases their Lordships of the Privy Council gave to the Courts in this country clear guidance as to the interpretation of documents of this character, some of which are from time to time decreed to be out and out sales, and others decreed to be mortgages. Sir Tej Bahadur Sapru has argued that there is no substantial question of law, because the broad general principles have already been subjected to such discussion and analysis that there is no difficulty in ascertaining what are the principles. The difficulty arises in their application, and he contented that difficulty of application is not a matter which can come under the words "substantial question of law".

We have invited Mr. Narain Prasad to explain to us how and in what manner he would himself draft any document which he desired to be conclusively regarded as an out and out sale, and to take away from the document under consideration, or to add to the document under consideration, any terms which would make it more clear on the assumption of its being an out and out sale. We did this with a view to getting from him, something from which it could be argued that from the very terms of the document a substantial question of law arose. He felt himself unable to make any detailed criticism of the document from the stand point of its not being an out and out sale. We are of opinion that having regard to the state of the authorities, and again we specially refer to 12 All., 387 and 38 All., 570, this case cannot be said to be one, involving a substantial question of law; and, in accordance with the practice of the Privy Council, where special leave is asked to that we should add a substantial question of law of general interest. This case certainly possesses no general interest Its right decision depends on the proper construction of the particular words and clauses to be found in a particular document. Mr. Narain Prasad has relied upon a case which is reported in 14 I. C., 269 and it is interesting to refer to that because it happens to be the case which ultimately went to the Privy Council and now figures in 38 All., 570.

The application before this Court was of exactly the nature which Mr. Narain Prasad has made to-day. It so happened that when the appeal came before two Judges of this Bench there was a difference of opinion as to what should be said to be the true construction of the documents. One of the learned Judges was in favour of decreeing the suit on the basis of the documents amounting to a sale, the other believed the documents to be a mortgage. Thereupon, a third Judge was brought in, and the Full Bench decided that the deeds in question evidenced an out-and-out sale. Now, the very facts of the division of opinion and the necessity to constitute a Full Bench, point to the substantiality of the question involved. There was a further reason why leave to appeal to His Majesty in Council was granted, namely, that at this very time in 1912, a very large number of cases of this character were believed to be on their way to this Court owing to certain legislation that had recently been enacted. This Court, welcoming a decision on the point, thought it proper to issue a certificate. The decision now appears, as we have said, in 38 All., 570 and is the case of *Jhanda Singh* v. *Wahiduddin*, to which we have referred. We are of opinion that Mr. Narain Prasad has failed to make out in this particular case that there is a substantial question of law of general interest involved. The application is therefore rejected with costs and fees on the higher scale.

Application rejected.

(1) [1890] 12 All., 387 P. C.
(2) [1916] 38 All., 570 (P. C.)

1924 ALLAHABAD 561

MEARS, C. J. AND PIGGOTT, J.

Adya Saran Singh—Applicant,

v.

Jagannath—Opposite Party.

Mis. Application No. 417 of 1923, Decided on 18th January 1924.

Government of India Act, S. 107—Error of law or fact is not revisable under S. 107.

The power of superintendence vested in High Court and embodied in S. 107 of the Government of India Act, was not intended to authorise the Court, in the exercise of the authority so given, to interfere with and set right the orders of a subordinate Court on the ground that such order proceeded on an error of law or an error of fact. 9 All. 104, Foll. [P. 563, C. 1]

P. L. Banerji and *U. S. Bajpai*—for Applicant.

N. P. Asthana—for Opposite Party.

Piggott, J.—This is an application of a somewhat unusual character. It is perhaps advisable that we should explain precisely the circumstances under which it comes to be presented. The suit out of which it arose was one filed in the Court of an Assistant Collector. The plaintiff in that suit, alleging himself to be the proprietor of certain land in the possession of the defendant as a rent free grantee, claimed to resume that said grant under the provisions of S. 154 of the Local Tenancy Act (II of 1901). The trial Court fixed a large number of issues and decided all of them. In substance, it came to the conclusion that the plaintiff was entitled to the relief claimed and it decreed that relief accordingly. There was an appeal by the defendant to the Court of the District Judge and it is not denied that under the circumstances an appeal lay to that Court. The District Judge came to the conclusion that the land in possession of the defendant was not liable to resumption under S. 154, aforesaid. By reason of the provisions of S. 153 of the same Act, the Court, hearing a suit for the resumption of a rent-free grant and finding the grant not liable to resumption on grounds other than those specified in S. 151 of the Act, is bound to proceed to determine whether that land is liable to assessment of rent, or whether the holder thereof is liable to pay the revenue assessed thereon. The District Judge proceeded to deal with this matter himself. He found on the evidence that this land had been held rent-free for fifty years and by two successors to the original grantee, and on this finding held, that the defendant must be deemed to hold the land in proprietary right. This made it necessary that the revenue payable by the defendant should be determined. There were no materials on the record upon which this could be done. The District Judge therefore passed an order in which he stated that the appeal was allowed with costs, but that the record must go back to the Assistant Collector in order that the revenue payable by the defendant might be determined. The order is not happily worded. It does not embody the important finding that the defendant is declared to be the proprietor of the land. Moreover, it does not refer to any provision of the the law, on the strength of which the case is remanded to the Court of first instance for further proceedings. The defendant assumed that the order of the appellate Court at that stage must be treated as an order of remand under Order 41, rule 23, of the Code of Civil Procedure and he was advised that no appeal from such an order would lie to this Court. There is a decision to that effect in the case of *Anand Gir* v. *Sriniwas* (1). When the Assistant Collector had carried out the direction given him, the plaintiff presented to the Court of the District Judge an appeal against the final decree in the suit. The District Judge held that no appeal lay to him and passed an order returning the appeal for presentation to the proper Court, meaning thereby no doubt, the Court of the Commissioner of the Division. Against this order no appeal lay and even an application in revision would not have been entertained by this Court in the existing state of the authorities. We feel bound to remark that it is a matter deserving the attention of the legislature whether some defi-

(1) [1918] 40 All. 652—47 I. C. 1008—16 A.L.J. 711.

nite procedure ought not to be provided, by which the question as to whether an appeal in a particular instance lies to the District Judge or to the Revenue Courts, might be brought before this Court for adjudication. The application before us now, however, has nothing to do with this order of the District Judge, refusing to entertain the plaintiff's appeal against the final decree of the Assistant Collector. Our jurisdiction is being invoked under S. 107 of the Government of India Act in respect of the order by which the learned District Judge, after having adjudicated the defendant in the suit to be the proprietor of the land in question, remanded the case to the Court of first instance to have the amount of the revenue payable by him determined. In argument before us this order has been treated as an order of remand under Order 41 rule 23 of the Code of Civil Procedure. Looking at the order in this way, it has been contended that it is not a proper order because the trial Court had disposed of every single issue fixed in the suit, and the necessity for a further proceeding in that Court had arisen under the provisions of the Tenancy Act by reason of the District Judge's finding that the defendant was entitled to be declared the proprietor of the land in suit. It has further been suggested that, under the circumstances, the District Judge would have been better advised to remit an issue to the trial Court under Order 41 rule 25 of Civil Procedure Code calling for a finding as to the amount of the revenue payable. Certainly, if this had been done, the District Judge would then have been in a position to pass a decree in appeal determining every question which had arisen on the pleadings, or which required to be determined under the provisions of the law, and against such decree a second appeal would have lain to this Court. Looking into this matter in the course of the arguments addressed to us to day, we find some reason to doubt whether the District Judge's order is really one under the provisions of Order 41 rule 23 of the Civil Procedure Code. If it is not, it would have to be described as a decree in the suit, and in that case, it would seem that an appeal might have been presented to this Court. We appreciate the difficulty in which the plaintiff was placed. The ruling of this Court to which we have already referred was passed in a suit very similar to the one now before us, and only distinguishable from it, by reason of the fact that it was a suit instituted by the holder of the rent-free grant for a declaration that he had become by operation of law, proprietor of the same. The difierence between the two cases, therefore, is that in the case referred to as a ruling, the whole of the proceedings had throughout been under S. 158 of the Tenancy Act, whereas we are dealing here with a proceeding initiated under S. 154 of the same Act and it only required to be supplemented by a further proceeding under S. 158 because of the decision arrived at by the appellate Court and the provisions of S. 153 of the Act. We are not in a position, as the matter now stands before us, to pronounce a final opinion as to whether a distinction could be drawn in principle between the present case and that of *Anand Gir* v. *Sriniwas* (1) already referred to; still less can we undertake to reconsider that case or to pronounce an opinion as to whether it was rightly decided. Obviously if upon a correct view of the order drawn up by the Court of the District Judge on the judgment delivered by him when he heard and determined the appeal filed by the defendant did amount to a decree, then there is no foundation for the application now before us. It would be on the face of it absurd for this Court, to issue a direction to the District Judge to draw up a decree on the basis of a certain judgment, if as a matter of fact and of law such a decree had already been prepared. We must therefore deal with the application before us on the assumption that the order which it is desired to call in question is not a decree, but is an order of remand, whether such remand be assumed to be based upon the provisions of rule 23, Order 41, of the Civil Procedure Code, or on some inherent power of remand exercisable by the appellate Court inde-

pendently of that rule. Looking at the matter from this point of view, it seems to us that we are really being asked to hold that the District Judge made an improper exercise of his discretion in passing that order of remand, instead of either remitting an issue under Order 41 rule 25 of the Civil Procedure Code, or drawing up his decision on the appeal in such a form as to put it beyond doubt that the said decision was a decree and not an order of remand. Now, in the case of *Muhammad Sulaiman Khan* v. *Fatima* (2) it was held as long ago as the year 1886 that the power of superintendence vested in this Court, which is now embodied in S. 107 of the Government of India Act, was not intended to authorise this Court, in the exercise of the authority so given, to interfere with and set right the orders of a subordinate Court, on the ground that such order has proceeded on an error of law or an error of fact. We approve of the principle laid down in this decision and we propose to follow it. It is in our opinion fatal to this present application. We dismiss it accordingly with costs.

Application dismissed.

(2) [1887] 9 All. 104.

1924 ALLAHABAD 563

DANIELS, J.

Kashmiri Lal—Applicant.

v.

Mt. Kishen Dei—Opposite Party.

Civ. Rev. Nos. 4, 5, 6, 12 and 13 of 1924, Decided on 16th April 1924, from an order of the District Judge of Moradabad.

(a) *General Clauses Act, (I of 1897) S. 6 (e)—"Enactment" meaning of—Construction.*

The word enactment in S. 6 (e) includes not only an entire law but any section or provision of a law. [P. 564, C. 1]

(b) *Criminal P. C, S. 195 — Sanction to prosecute refused under old Act — Sanction given under new Act on appeal is valid.*

Where proceedings under S. 195 were commenced and the order of the Subordinate Judge refusing to sanction prosecution was passed under the old Code but during the pendency of an application to the District Judge against the order of refusal the new Code came into force and the District Judge sanctioned the prosecution.

Held: that inasmuch as the accused had incurred the liability to have his prosecution sanctioned and the complainant on the dismissal of his application by the Subordinate Judge had acquired a right to apply for sanction to the appellate Court, S. 6 (e) of the General Clauses Act applied to the case and the repeal of the old S. 195 did not affect the investigation. [P. 563, C. 2]

(c) *Criminal P. C., S. 195 — Passages under complaint not given in the order but given in application for sanction are sufficient.*

Where the particular passages in respect of which sanction was sought under S. 195 were set out in the application for sanction but, not in the order of the Court.

Held: that the order of sanction must be deemed to have been passed with respect to the statements contained in the application for sanction and was valid. [P. 564, C. 1]

Gulzari Lal—for Applicant.

Kashi Narayan Malviya—for the Crown.

Judgment.—These are five applications for revision, of an order of the learned District Judge of Moradabad giving sanction for the prosecution of the applicants under S. 195, Criminal Procedure Code, the sanction having been refused by the Subordinate Judge. The main ground in revision is that the District Judge had no jurisdiction to grant the sanction inasmuch as, the amended Code of Criminal Procedure had come into force on the date when it was given. The evidence alleged to be false had been given and the proceedings under S. 195 had been commenced long before the amended Code came into force. The Subordinate Judge's order was also passed under the old Code and the application to the appellate Court was pending, when the new Code came into force. The case is therefore governed by S. (6) (*e*) of the General Clauses Act. The applicants had incurred a liability to have their prosecution for false evidence sanctioned and the complainant, on his application being dismissed by the Subordinate Judge, acquired a right to apply to the appellate Court under S. 195 of the unamended Code for the grant of the sanction which the lower Court had refused. Under these circumstances the repeal of S. 195 as it then stood could not affect any pending investigation in respect of the right which had accrued to the complainant or the liability which had

been incurred by the applicants. It has indeed been suggested that S. 6 may not be applicable because the Code of 1898 has not been repealed but merely amended. The effect of the amendment has, however, been to repeal Ss. 195 as 476 and they previously stood and to substitute new sections in their place. The word "enactment" as defined in the General Clauses Act includes not only an entire law but any section or provision of a law. There has therefore been a repeal of Ss. 195 and 476 as they previously stood.

It has further been objected that the learned District Judge does not find that a *prima facie* case has been made out and that his order does not show with sufficient clearness the statement in respect of which the prosecution has been sanctioned. On the first point there can be no doubt. The evidence which these witnesses gave was found by the Civil Court to be entirely false. As regards the second point although the particular passages are not set out in the District Judge's judgment they were set out in the application for sanction and the order of sanction must be deemed to have been passed with respect to the statements alleged in the application. I find no ground for interfering in revision and I dismiss the applications with costs.

Application dismissed.

1924 ALLAHABAD 564

DALAL, J.

Palati Rai and others—Appellants.

v.

King Emperor—Opposite Party.

Cr. A. No. 26 of 1924, Decided on 8th April 1924, against the order of the Sessions Judge of Azamgarh.

Criminal P. C., S. 339—Expression of ignorance by accused prior to tender shows non-acceptance of pardon.

A pardon is likely to be accepted when the person to whom it is tendered does volunteer to make some statement with reference to the crime. Where he expressed complete ignorance and stated that he was indifferent whether a pardon was granted to him or not.

Held, he did not accept the tender of pardon. [P. 564, C. 2]

M. U. S. Jung—for Appellant.

The Government Pleader — for the Crown.

Judgment — Eight persons have appealed from their conviction under S. 395 of the Indian Penal Code of committing a dacoity. The learned Sessions Judge concurring with the unanimous opinion of all the four assessors, held the appellants to be guilty. Dacoity was committed in a market and all the appellants were known to the shopkeepers. Their names were promptly mentioned in the first report. There is nothing that can be urged in favour of the appellants

A point of law was raised as regards one appellant Palati Rai. He was produced before a Magistrate to have his statement recorded as a confession on tender of a pardon. The Magistrate tendered pardon to him but the proceedings indicate that the pardon was not accepted by him. The learned Counsel here argued that the case of Palati Rai came within the provisions of S 339 of the Code of Criminal Procedure and therefore Palati Rai could not be tried without a certificate from the Public Prosecutor and in all events could not be jointly tried with the other accused. I have examined the record and am satisfied that the observations of the learned Judge are correct

A tender of pardon was made to Palati Rai but when the Magistrate started recording his statement Palati Rai declared that he knew nothing. Here there was no acceptance of pardon. A pardon would be accepted when the person to whom it is tendered does volunteer to make some statement with reference to the crime. In this case Palati Rai expressed complete ignorance and stated that he was indifferent whether a pardon was granted to him or not. I agree with the lower Court that Palati Rai did not accept the tender of pardon.

Under the circumstances the provisions of S. 339 do not apply to his case. The appeals of all the appellants are dismissed.

Appeal rejected.

---

* 1924 ALLAHABAD 565

WALSH, KANHAIYA LAL AND RYVES, JJ.

In The Matter of W. S. Day, Vakil.

Mis Case No. 79 of 1924, Decided on 11th April 1924.

** Legal Practitioner-Misconduct—In affidavit in support of appeal or revision petitioner must take scrupulous care not to conceal or distort facts—Charge of impropriety or inattention against Judge is not to be lightly made.*

A legal practitioner who chooses to file an affidavit in support of a petition of appeal or revision must swear to the facts as they occur and take scrupulous care not to conceal or distort them or confound them with his own impressions hastily formed at the time. From the slip of notes found attached to the record of the appeal or the refusal of the Judge to wait for the records before proceeding with the hearing or from his own failure to make an impression on the Judge the practitioner has no right to assume that the Court had made up its mind or pre-judged the case.

The members of the legal profession are responsible for the fair and honest conduct of a case and they cannot be allowed to make personal attacks or reckless and unfounded charges of impopriety or inattention against a tribunal when the real ground is that the advocate concerned has failed to make an impression by his arguments on the Court concerned and lost his case in spite of every effort. [P. 666, C. 1 & 2]

The Vakil—In person.

L. M. Banerji—for the Crowu.

Kanhaiya Lal, J.—In this case a notice was issued to Mr Day, a vakil practising in Agra, to show cause why he should not be dealt with under paragraph 8, of the Letters Patent with regard to certain statements made by him in paragraphs 4,12 and 16 of an affidavit filed in this Court in Criminal Revision No. 489 of 1923.

The affidavit was filed in support of a petition for revision of an order passed by the Sessions Judge of Agra in a criminal appeal in which Mr. Day had appeared for the appellants. That appeal was unsuccessful. In his affidavit Mr. Day stated that Sessions Judge had pre-judged the appeal, that he did not wait for the records to come, and that he was so impressed with the opinion which he had already formed in the absence of the record that he did not appreciate the arguments addressed to him and was some times inattentive. In reply to this affidavit Mr. Bennett, the Sessions Judge, stated that he might have put some notes taken from the copy of the judgment produced in the appeal, but the making of the notes did not mean that he had pre-judged the case. He further stated that though the record of the case and other records had not arrived when the hearing was started, Mr. Day was allowed to proceed with his address as he stated that he had complete copies of the evidence typed out and of other papers, that a telephonic message was sent to get the records wanted by Mr. Day and they arrived while the argument was going on, that the hearing of the appeal took about 3 hours and that Mr. Day was wrong in saying that he was at any time inattentive. He also controverted certain other statements made by Mr. Day which are not material to the present proceeding.

Mr. Day has been examined by this Court in answer to the charge. He explains that from a note appended to the petition of appeal in the hand writing of the Sessions Judge, he formed an impression that the Sessions Judge had already formed his opinion adverse to the appellants, that his impression was confirmed by the Judge not waiting for the records, and that he did not question the honesty of the Judge, but only meant to say that the Judge would have come to a different conclusion, had he done what S. 423 of the Code of Criminal Procedure required him to do. He admits that the Judge allowed him to say what he had to say and that the records sent for had arrived before his argument was concluded, but he explains that from the attitude taken up by the Judge and from his remark that he was unable to see his points, he honestly felt that the Judge was sometimes inattentive and unable to appreciate his argument.

It is clear that Mr. Day was absolutely wrong in saying that the Sessions Judge had pre-judged his case, and that the record had arrived at the end of his address. The slip merely contained the preliminary notes the Sessions Judge had made for his own use on reading the copy of the judgment, when admitting the appeal or

setting it down for hearing. It could not in any way represent the final conclusion at which he was to arrive on hearing the appeal. The record of the original trial and the other records summoned by Mr. Day had arrived before the hearing was concluded, and his statement on that point is, to say the least, not quite accurate. Mr. Day may have thought that when the records came they arrived too late to be of any use to him. But a legal practitioner who chooses to file an affidavit in support of a petition of appeal or revision must swear to the facts as they occur and take scrupulous care not to conceal or distort them or confound them with his own impressions hastily formed at the time. From the slip of notes found attached to the record of the appeal, or the refusal of the Judge to wait for the records before proceeding with the hearing or from his own failure to make an impression on the Judge, Mr. Day had no right to assume that the Sessions Judge had made up his mind or pre-judged the case. The Sessions Judge allowed him the fullest possible opportunity for saying what he had to say and though it might perhaps have been better for the judge to have waited for the record of the case under appeal before the hearing of the appeal was commenced Mr. Day had no justification for asserting that the Sessions Judge had already formed his opinion or was sometimes inattentive.

Mr. Day has now withdrawn the statements made by him in paragraphs 4, 12 and 16 of the affidavit and expressed his unqualified regret for having made them. The Sessions Judge of Agra reports that Mr. Day has expressed his regret publicly and in open Court and has undertaken not to make such reckless statements in future. It would have been necessary for us to take much more serious notice of his conduct but for the consideration he was apparently led in the heat of advocacy to treat his impressions hastily formed, as facts and to describe the stage at which the records had arrived before the close of his arguments, as if they had come at the end of his address when, he thought, they could be of no use to him. As pointed out *In the matter of Dwarka Prasad Mittal* (1), the members of the legal profession are responsible for the fair and honest conduct of a case and they cannot be allowed to make personal attacks or reckless and unfounded charges of impropriety or inattention against a tribunal when the real ground is that the advocate concerned has failed to make an impression by his arguments on the Court concerned and lost his case inspite of every effort. We are alive to the necessity of preserving and protecting the independence of the Bar and allowing them every rightful opportunity for the proper discharge of their duties, but we cannot allow them to cast aspersions on the conduct of the presiding Judge before whom they have occasion to argue their cases, if they happen to argue without success. The affidavit in the present instance was filed before the decision in the above case was pronounced. It was not confined to a complaint that the usual procedure prescribed by S. 423 of the Code of Criminal Procedure was departed from, and the Sessions Judge proceeded to hear the appeal without waiting for the record. It contained personal imputations of inattention and prejudgment which were unfounded and reckless. Mr. Day now recognises his mistake. In these circumstances while we mark our disapproval of his conduct by a warning to him that a repetition would receive much more serious treatment, we accept his expression of regret and direct the papers to be filed.

Warning issued.

---

(1) 1924 All. 253—46 All. 121—21 A.L.J. 893—4 L. R. A, Civ. 615. (F. B.)

———

✱ 1924 ALLAHABAD 566

DANIELS, J.

Ram Narain—Applicant.

v.

King Emperor—Opposite Party.

Cr. Rev. No. 106 of 1924, Decided on 22nd April 1924, from an order of the Additional Sessions Judge of Cawnpore.

** Penal Code, S. 499—Defamation—Intention to cause harm to reputation is sufficient for offence - Whether harm is actually caused is immaterial.*

A person commits defamation within the meaning of S. 499 who publishes any imputation concerning any person intending to harm the reputation of that person whether harm is actually caused or not. A person who publishes defamatory matter against another in a case not covered by any of the exceptions cannot escape punishment on the ground that the reputation of the person attacked was so good or that of the persons attacking so bad, that serious injury to the reputation was not, in fact, caused. [P 567, C 2]

J. M. Banerji—for Applicant.

R. Malcomson—for the Crown.

Daniels, J.—The applicant in this case has been convicted of defamation, under S. 500 of the Indian Penal Code, on the ground that he published a pamphlet in Hindi defaming the complainant. Both in the heading and in the body of this pamphlet he describes the complainant as a *sharif badmash*, which has been aptly translated by the court below as a "gentleman scoundrel". He says in the pamphlet that he has issued a previous pamphlet giving a summary of the complainant's evil doings and challenging a prosecution for defamation. and he describes him as one of a gang of badmashes who in the Sambat year 1966 established an unlawful Court in the market to the injury of the Government Courts and, as he further says, in a portion of the pamphlet not reproduced in the charge, thereby inflicting great injustice on the public. There can be no doubt that the pamphlet was grossly defamatory in character, and in view of the fact that the Chamber of Commerce, which is described by the accused as a Court, ceased to exist ten years before the case, it is impossible for the accused to assert that he acted in good faith for the public good.

The revision is pressed mainly on the basis of a sentence in the judgment of the lower appellate Court in which the learned Judge says that nothing said by a man in the accused's postition could seriously injure the reputation of the complainant and that the complainant did not lose his reputation by reason of the injury.

The applicant relies on Explanation 4 to S. 499. In this Explanation it is said that no imputation is said to harm a person's reputation unless it lowers his moral or intellectual character etc. etc. This argument overlooks the fact that a person commits defamation within the meaning of S 499 who publishes any imputation concerning any person intending to harm the reputation of that person whether harm is actually caused or not. A person who publishes defamatory matter against another in a case not covered by any of the exceptions cannot escape punishment on the ground that the reputation of the person attacked was so good, or that of the persons attacking so bad, that serious injury to the reputation was not in fact caused.

The accused has been rightly convicted and I reject the application.

Application dismissed.

1924 ALLAHABAD 567

DANIELS AND BOYS, JJ.

Brij Bhushan Lal—Applicant.

v.

The Municipal Board of Kanauj—Opposite Party.

Misc. Ref. No. 121 of 1924, Decided on 28th April 1924, from the District Magistrate of Farukhabad.

U. P. Municipalities Act, S, 128 (1) clause IX—"Carrying on a trade" does not include working as a clerk.

The expression "carrying on a trade" has a well recognised meaning and cannot by any straining of language be made to include a person who merely works for an employer as a salaried clerk.

A person can only be said to be carrying on trade in the ordinary sense of the word when he is working for his own profit and not when he is in receipt of a fixed salary. [P 568, C 1]

Gulzari Lal—for Applicant.

Uma Shankar Bajpai—for Opposite Party.

Daniels, J.—This is a reference under S. 162 of the U. P. Municipalities Act. The question referred is whether the applicant, who resides outside the Kanauj Municipality but

is employed during business hours as a clerk on a salary within Municipal limits, is liable to be taxed under a tax on circumstances and property imposed under clause (ix) of S. 128 (1) of the Act. S. 128 permits the Municipality to impose the tax on all classes of inhabitants as defined in S. 2 (7). They have, however, chosen to limit the tax to persons "residing or carrying on any trade or owning property within the limits of the Kanauj Municipality", *vide* Notification No. 6575-XXIII 9, dated 7th August, 1920, printed on page 324 of Part III of the U. P. Gazette for 1920. The expression "carrying on a trade" has a well recognised meaning and cannot by any straining of language be made to include a person who merely works for an employer as a salaried clerk. "Trade" implies buying and selling or dealing in money or at least the making of some article for the purpose of sale. Further, a person can only be said to be carrying on trade in the ordinary sense of the word when he is working for his own profit and not when he is in receipt of a fixed salary. Mr. Bajpai for the Municipal Board has drawn our attention to the very wide definition of the word "trade" in Webster's dictionary, but it may be pointed out that the Act itself in clause (iii) of S. 128 distinguishes between trades, callings and vocations, and includes under vocations all employments remunerated by salary. It is clear, therefore, that in the very section under which the tax is imposed, occupation as a salaried clerk is not included under the word "trade". Our answer to the reference is that the applicant is not liable to assessment under the tax on circumstances and property imposed by the Kanauj Municipal Board.

Reference answered in the negative.

1924 ALLAHABAD 568

DANIELS, J.

Happoo Mal—Applicant.

v.

King Emperor—Opposite Party.

Cr. Rev. No. 140 of 1924, Decided on 22nd April 1924, from an order of the Sessions Judge of Muttra.

Penal Code, S. 290—Person responsible for the crowd is more guilty.

If a crowd collects and obstructs the traffic so as to cause a nuisance, the person who is directly responsible for the crowd collecting is obviously not less, but more guilty than the other persons who from the crowd and this would be equally the case whether he were inside or outside his shop at the precise moment when the police appeared. [P 568, C 2]

Judgment.—The applicant Happoo has been convicted along with a number of other persons of committing public nuisance under S. 290 of the Indian Penal Code and his conviction has been upheld by the lower appellate Court. It appears that there was a very large crowd of persons engaged in satta gambling in front of the shops of the accused and other persons and that this crowd was so great as to stop the traffic in the street for the space of half an hour. This was not the first time that such a crowd had collected. On a previous occasion a similar crowd had collected for the same purpose and a man had been killed owing to stampede taking place in the crowd on the approach of the police. The trial Court acquitted the owners of the satta shops except the accused, but convicted him on the ground that he was outside among the crowd. The lower appellate Court held that the accused in fact was outside but disagreed with the reasoning of the trial Court. If a crowd collects and obstructs the traffic so as to cause a nuisance, the person who is directly responsible for the crowd collecting is obviously not less, but more guilty than the other persons who form the crowd and this would be equally the case whether he were inside or outside his shop at the precise moment when the police appeared. No one is allowed to make use of his premises in such a way as to interfere with the rights of the public. There is no reason for interfering with the conviction in this case and I dismiss the application.

Application dismissed.

1924 ALLAHABAD 569

RYVES, J.

Alim-ud-din alias *Allia*—Applicant.

v.

King Emperor—Opposite Party,

Criminal Revision 169 of 1924, Decided 30th April 1924, from the order of Ss. J. Agra.

Criminal P.C., S. 110—Revision—Grounds of revision though not ordinarily allowed prosecution evidence must show necessity of sending the person to prison or demanding security.

Although it is very difficult in revision to interfere in cases under 110 still the Court must be satisfied that the prosecution evidence is of such a character that it will reasonably support the inference that it is necessary in the interest of public security to send the person to prison or bind him down. [P. 569, C. 1.]

Saila Nath Mukerji—for Applicant.

The Assistant Government Advocate—for the Crown.

Judgment.—This is an application in revision by one Alim-ud-din *alias* Allia, who was sentenced to three years' rigorous imprisonment on failure to furnish security under S. 110 of the Criminal Procedure Code. It is very difficult for this Court in revision to interfere in these cases, but this Court has to be satisfied that the evidence is of a character which will reasonably support the inference that it is necessary in the interest of public security to send the man to prison or bind him down. Alim-ud-din was convicted of theft in 1916. That cannot have been a very bad case as he was sentenced only to 15 days' imprisonment. However, a history sheet was started and he came under the suspicion of the police. In April 1921, he was bound down for one year under S. 110 although the order was not enforced. Evidently he has been a marked man ever since. Between February and May, 1923, four dacoities were committed in the Agra district within the police circle of Khalil-ud-din, Circle Inspector. In the last of these dacoities one Beni Singh was caught on the spot and he made a confession in which he indicated that the four dacoities were the work of one gang. Among the members of that gang, it is said was a Muhammadan from Agra. He was not able to name the Muhammadan and was not able to identify him. The result was that the Muhammadan from Agra was not put on his trial for dacoity. The Police have come to the conclusion that the accused is the Muhammadan from Agra. As he was neither named nor identified by Beni Singh it seems to me there is no justification for the inference that Allia had anything to do with these dacoities.

I think the reason why the police have taken proceedings against this man is because they believe that he was connected with these dacoities. The other evidence in the case seems to me to be too vague to support the charge. On two occasions in September and October 1922 he was charged of having committed offences, but his house was not searched and the complainants in those cases have given the reasons why they suspected Allia and the reasons really are very unsubstantial. None of the witnesses can say anything recent about the accused. There is evidence that he associates with two bad characters, but this evidence is very unsatisfactory. One witness, for instance, says that he learned this fact from a statement made to him by the accused himself. In cross-examination he denied that he ever had any conversation with the accused. Another witness who testified against the accused when asked to identify him in the Court pointed to a pleader's clerk.

All this evidence, however, even if believed, is to the effect that the accused has the reputation of dealing in stolen cattle or stealing cattle. He says of himself that he is a butcher by profession and this is admitted by some of the prosecution witnesses. Many butchers rightly or wrongly are suspected of dealing in stolen cattle, but the evidence, in my opinion against Allia is much too vague. I cannot help thinking that but for the fact that the police suspected that in spite of Beni Singh's failure to name and mention Allia in connection with the dacoits, they believed he was concerned with those dacoities, and hence this case. I must accept the application and set aside the order under S. 110 and the applicant will be released.

Application allowed.

✱ 1924 ALLAHABAD 570

SULAIMAN AND KANHAIYA LAL, JJ.

Himanchal Singh—Plaintiff — Appellant.

v.

Jatwar Singh and others — Defendants—Respondents.

S. A No. 293 of 1924, Decided on 7th May 1924, from a decree of the District Judge of Jhansi.

✱ (a) *Evidence Act, S. 20—Statement by a common representatives of both parties is an admission—Evidence Act, S. 31.*

Where both the parties and their legal advisers agreed in writing that a certain Vakil should hear the dispute between them and that they would abide by the statement that he might make before the Court.

Held: that the statement of the Vakil was an admission made in a suit by a nominee of a party and is as effectual as an admission made in pleadings either orally or in writing.

Held: further, that the agreement was an adjustment of the suit and that the parties therefore could not be allowed to resile from it unless there was fraud, dishonesty or misrepresentation. 21 A. L. J. 209; (1898) A.W.N. 200; 42 M. 625 Foll. [P. 570, C. 1]

✱ *Civ. P. C., Order 23 rule 3 — Lawful adjustment.*

Statement by parties that a certain Vakil should hear the dispute and that they would accept his statement amounts to an adjustment. [P. 570, C. 2]

Nihal Chand Vaish — for Appellant.

Judgment.—These two appeals are connected and arise out of two suits for pre-emption.

On the 22nd February 1922, before the trial Court the plaintiff and the contesting defendants with the pleaders for both parties signed a written statement to the following effect:—

"It has been settled between the parties that Rai Sahib Pandit Gopal Das Sharma, Vakil, shall hear our whole affair and that we shall accept any statement that he may make before the Court."

It is not necessary to refer to the various adjournments in the case, but it may be noted that ultimately the case was under an order of the District Judge transferred from the Court of the learned Munsif to that of another officer. Pandit Gopal Das Sharma, Vakil, made a statement on oath before this latter Court, and the suit was dismissed in accordance with the referee's statement.

On an appeal by the plaintiff to the District Judge that decree has been affirmed.

On behalf of the plaintiff it is strongly contended that the statement referred to above was not a reference to arbitration; nor did it come under the Oaths Act. It is, accordingly, urged, that it is in no way binding on the plaintiff, and that the Courts below should have decided the case on the merits, and not on the mere statement of Pandit Gopal Das Sharma.

We are of opinion that the contention of the plaintiff cannot prevail. The case can be looked at from two points of view. To say the least, the statement being duly signed by the plaintiff as well as his pleader amounted to an agreement that he would be bound by the statement that would be made by the referee. The statement made by the referee was clearly a statement made by a person to whom the parties to the suit had expressly referred for information, in reference to the matters in dispute, and was a statement within the meaning of S. 20 of the Indian Evidence Act. It is true that ordinarily mere admissions are not conclusive as is provided in S. 31; but admissions of this kind must be taken to be admissions made in a suit by the nominee of a party thereto. Such admissions, therefore, are as conclusive and effectual as admissions made by the parties in their written or oral pleadings. The effect is to prevent each party from resiling from the statement made by such a nominee.

It may also be said that the parties really compromised their dispute in this manner that they agreed that the decree of the Court shall be in accordance with the statement to be made by their nominee hereafter. There is nothing to prevent the parties from compromising the suit and agreeing to a decree being passed in terms to be stated by a person named. Such an agreement, therefore, would be an adjustment of the suit, and it is difficult to see how any party could be allowed to go back on it. The Madras High Court has treated such an agreement as an adjustment of the claim

(*vide Chinna Venkatasami Naicken* v. *Venkatasami Naicken* (1), and the earlier cases referred to therein). In the case of *Muhammad Asghar Ali Khan* v. *Muhammad Imtiaz Ali* (2), it was held that an agreement by a defendant to a Civil Suit to be bound by whatever statement that might be made by the plaintiff upon oath was binding on him, even though it did not fall under the Oaths Act. A similar view has been expressed by Walsh, J., in the case of *Kesho Ram* v. *Piare Lal* (3).

We are satisfied that it is impossible to allow the plaintiff now to go back on the statement. There is no suggestion that there was any fraud or dishonesty or misrepresentation which has prejudiced the plaintiff. We accordingly dismiss this appeal under Order 41, rule 11, Civil Procedure Code.

Appeal dismissed.

(1) [1919] 42 Mad. 625—36 M.L.J. 291—51 I.C. 827—(1919) M.W.N. 221—25 M.L.T. 397.
(2) [1898] A.W.N. 200.
(3) 1923 All. 443—21 A.L.J. 209—L.R. 4 All. (Civ.) 368.

✱ 1924 ALLAHABAD 571

WALSH AG, C.J. AND NEAVE, J.

Makhan Lal—Plaintiff—Appellant.

v.

Bihari Lal—Defendant — Respondent.

F. A. F. O. No. 99 of 1923, Decided on 30th April 1924, from an order passed by the Judge of Small Cause Court, Agra.

✱ *Provincial Small Cause Courts Act (IX of 1887) Art. 35 (2)—Suit for return of thing lent but not returned in time is not excluded.*

Suit for recovery of the property or the price thereof is not excluded under Art. 35, Thus a suit against borrower who merely detains property lent to him beyond the period within which he was expected to return it is not excluded, because he does not retain the property by committing the offence of criminal breach of trust, [P. 571 C. 2]

Girdhari Lat Agrawala—for Appellant.

Narain Prasad Asthana—for Respondent.

Judgment.—This is an appeal against an order of the Subordinate Judge of Agra, setting aside a decree passed by the Munsif of Agra, and returning the plaint for presentation to the proper Court. The facts alleged in the plaint were that the defendant, who is the brother-in-law of the plaintiff, had borrowed from him ornaments to the value of Rs. 500 on the occasion of his son's marriage for the purpose of presentation and show and had promised to return them two months after the marriage. This promise was not kept and the plaintiff brought this suit asking that the defendant might be made to return the ornaments or to pay Rs. 500.

The plaint was filed in the Court of the Munsif. One of the issues framed was whether the suit was cognizable by that Court. The munsif held that it was on the ground that the facts disclosed an offence of breach of trust committed by the defendant. In appeal, the learned Subordinate Judge has dissented from this finding. In our opinion his view is the correct one. The only possible reason for holding that the suit was excluded from the jurisdiction of the Court of Small Causes, is, that given by the learned Counsel for the appellant that it is a suit which comes within the definition of Article 35, sub-section II. of the Second Schedule of Act IX of 1887, that is that the act complained of, is an offence punishable under Chapter XVII of the Indian Penal Code. The sections of the Indian Penal Code under which the learned Counsel seeks to bring it are Ss. 403 and 405. He has himself scarcely attempted to argue that it comes under the former of these sections. With regard to the latter, it is to be observed that the plaintiff himself has not suggested that his brother-in-law has actually made away with the ornaments in question. He goes no further than to say that he has failed to return them. We are not prepared to hold that a borrower who merely detains property lent to him beyond the period within which he was expected to return it, is guilty of the offence of criminal breach of trust In these circumstances it would appear that the case is not one which is

excluded from the jurisdiction of the Court of Small Causes. The plaint should, therefore, have been filed in that Court, and the present appeal must fail. Having regard however, to the broad facts of the case, and the alleged conduct of the defendant we make an order as to costs but direct that the costs in this Court and in the Court below abide the result.

Appeal dismissed.

1924 ALLAHABAD 572

WALSH, AG. C. J. AND NEAVE, J.

Chedda Plaintiff--Appellant.

v.

Achha Singh and anotker—Defendants—Respondents.

F. A. F. O. No. 110 of 1923, Decided on 1st May 1924, from an order of First class Sub-Judge of Cawnpore.

Agra Tenancy Act, S. 79—A tenant in an undivided mahal can sue in a Civil Court when dispossessed by one co-owner.

A suit under S. 79 is maintainable only when the tenant is dispossessed by or on behalf of the whole proprietary body. A tenant in an undivided mahal is a tenant of the whole proprietary body. A suit in a Civil Court by a tenant on dispossession by one of the co-owners is tenable. [P. 572, C. 2]

Peary Lal Banerji—for Appellant.

Kailas Nath Katju—for Respondents.

Neave, J.—Only one point arises for decision in this appeal. The appellant was a tenant in the village which admittedly has not been partitioned. It is alleged that some sort of private arrangement had been come to, between the co-sharers under which the plots occupied by the appellant had fallen to the lot of Achhu Singh, the defendant-respondent. The appellant failed to pay his rent and Achhu Singh dispossessed him. The appellant filed a suit against Achhu Singh and certain others for possession and mesne profits in the Civil Court. The learned Munsif decreed his suit holding that he had jurisdiction and that the suit was not barred by S. 79 of the Tenancy Act. The lower appellate Court has come to the opposite conclusion on the subject of jurisdiction and has taken the view that the respondent Acchhu Singh being a co-sharer in the patti is a landlord of the present appellant within the meaning of S. 4 of the Tenancy Act. It has accordingly held that the Civil Court has no jurisdiction and has ordered the plaint to be returned for presentation to the proper Court.

In appeal it is pointed out that Achhu Singh is only one of a number of co-parceners, and as such cannot be regarded as the landlord of the appellant. To enable a suit to be brought under S. 79 of the Tenancy Act, the ejectment must have been made by the landlord, that is, in such a case as this, the whole of the co-parcenary body. The appellant's counsel relies particularly on a recent ruling of a Judge of this Court reported in 22 Allahabad Law Journal, page 115, which has been followed still more recently by another Judge in S. A. No. 1559 of 1922. In both these decisions the principle was adopted of the ruling in *Debi Prasad* v. *Bhagwan Din* (1), that a tenant in an undivided mahal is the tenant of the whole co-parcenary body, and that a suit under S. 79 cannot be brought against one of those co-parceners only. In our opinion this is the correct view. We accordingly allow this appeal and direct the learned Subordinate Judge to restore the case to his own file and dispose of it on the merits. The appellant will get his costs on this appeal in any event. Other costs will abide the event.

Appeal allowed.

---

(1) [1912] 35 All. 27—16 I. C. 399—10 A. L. J. 437.

✱ 1924 ALLAHABAD 573

DANIELS AND DALAL, JJ.

Chandradip Tewari and others—Defendants—Appellants.

v.

Babu Jadunandan Singh and another—Plaintiffs & Defendants — Respondents.

S. A. No. 917 of 1922, Decided on 25th March 1924, against the decree of the District Judge of Ghazipur.

✱ (a) *Civil P. C., O. 34 R. 3—Non-service on minor renders decree invalid.*

Non-service of notice of minor renders decree invalid for want of representation. 37 A. 179 Foll. 1923 Patna 242 Not Foll. [P. 573 C. 2]

✱ (b) *Hindu Law—Joint family—Decree against father.*

Mortgage executed by father for legal necessity would be binding on the joint family property in spite of the fact that the son was not properly represented in suit on the mortgage, 37 A. 179 Foll. 1923 Patna 242 Not Foll. [P. 573 C. 2]

M. L. Agarwala—for Appellants.
Haribans Sahai —for Respondents.

Judgment.—This appeal arises out of a suit by the plaintiff Jadunandan Singh to set aside a mortgage and a mortgage decree obtained against his father Bal Narain Singh on the ground of fraud and want of legal necessity. The plaintiff's father executed a mortgage in favour of the ancestor of the answering defendants. The latter brought a suit on the mortgage impleading both the plaintiff and his father. The plaintiff was at the time a minor. His father was at first named as his guardian *ad litem* but refused to act. The Nazir of the Court was then appointed guardian. Although notices had been served in connection with the nomination of the plaintiff's father as his guardian, it appears that no second notice was served on the minor when the Nazir of the Court was appointed nor were any funds provided for the latter to defend the suit. Both the Courts have found that there was not fraud on the part of the defendants but the learned District Judge has held on the authority of *Bhagwan Dayal* v. *Param Sukh* (1), that the plaintiff was not properly represented in that suit, and on this ground he has set aside the decree against him. We may note that the Patna High Court in *Pande Satdeo Narain* v. *Ramayan Tewari* (2), has taken a somewhat different view of the effect of failure to serve notice in connection with the appointment of a guardian *ad litem* but if we follow the ruling in 37 All., 179 this does not conclude the matter. If the mortgage executed by the plaintiff's father was executed for legal necessity then the mortgage is binding on the joint family property and would be equally binding even though the plaintiff had not been formally impleaded in the suit. A similar plea of the minor not having been represented was taken in the recent Privy Council case of *Brij Narain Rai* v. *Mangla Prasad Rai* (3). In that case it was admitted before their Lordships that the minors were not properly represented and that the decree was not binding on them, but as the mortgage was found to have been duly made for antecedent debt their Lordships nevertheless granted a declaration that it was binding on the joint family property. In this case although no separate issue on the question of necessity was framed the parties went into evidence on the point in connection with the issue of fraud. Indeed apart from limitation *res-judicata* the issue of fraud was the only issue raised, and it was on this issue that the evidence was adduced on which the respondents succeeded in the Court below.

The question of limitation was not seriously argued either before me or in the Court below and there can be no doubt that the suit was within time.

We accordingly remit the following issue to the Court below :—

(1) [1915] 37 All. 179—13 A.L.J. 179—27 I.C. 623.

(2) 1923 Patna 242—2 Pat. 335—4 Pat.L.T. 147.

(3) 1924 P.C. 50—46 All. 95—51 I.A. 129—21 A.L.J. 934—5 L.R.P.C. 1—28 C.W.N. 253—46 M.L.J. 23—5 Pat.L.T. 1—2 Pat.L.R. 41—1924 M.W.N.68—19 M.L.W. 72—33 M.L.T. 457—26 Bom.L.R. 500—11 O.L.J. 107 (P.C.)

Was the mortgage in dispute executed for legal necessity or antecedent debt ?

The parties will be at liberty to adduce additional evidence. The finding should be submitted within two months. On receipt of the finding ten days will be allowed for objection.

Appeal allowed.

✱ 1924 ALLAHABAD 574

DALAL, J.

Firm Peare Lal Gopi Nath—Plaintiffs—Applicants.

v

The E. I. R. Company—Defendants—Respondents.

Civ. Rev. No. 33 of 1924, Decided on 1st May 1924, from an order of the Additional Subordinate Judge of Mainpuri.

✱ *Railways Act, S, 72—Endorsee can sue for short delivery.*

Title of the consignor can be conveyed to another person by an endorsement on the railway receipt. The endorsee of such a receipt has sufficient interest in the goods covered by it, to maintain an action for damages against the Railway Company, the carrier of the goods. 38 Bom. 659 Dist.

[P 574 C 2]

Girdharilal Agarwala—for Applicant.

Ladli Prasad Zutshi—for Respondents.

Dalal, J.—Only one point is decided by the lower-appellate Court that the plaintiff, the firm of Peare Lal Gopi Nath, had no right to sue the East Indian Railway Company for damages caused on the consignment. The consignment was sent from Kidderpore Docks to Shikohabad by the firm of Hemraj Durga Das. The consignor endorsed the Railway receipt to the plaintiff's firm which took delivery. The plaintiff's firm then brought this suit for price of seven bags, the shortage in the consignment when it arrived at Shikohabad. The learned Judge of the appellate Court was of opinion that there was no contract between the plaintiff and defendant companies, and that therefore, the plaintiff was not entitled to sue The language of the judgment, however, is in favour of the plaintiff. The learned Judge was of opinion that a carrier's contract is with the person in whom the property in goods is vested at the time the contract of carriage was entered into. The learned Judge did not go further and enquire whether the consignor had transferred all his rights and interest in the contract to the plaintiff. The Bombay case of *Dolatram Dwarkadas* v. *Bombay Baroda and Central India Railway Co.* (1) is an authority for the proposition that the title of the consignor can be conveyed to another person by an endorsement on a Railway receipt In that case one Sukhdin Ramlal consigned 115 bags of wheat from a station on the Oudh and Rohilkhand Railway to Ahmedabad. The goods were consigned by Sukhdin to self and he then endorsed on the Railway receipt delivery to one Naraindas. Naraindas on his side endorsed it in favour of the plaintiff of that suit Dolatram. Under these circumstances a Bench of the Bombay High Court held that the Railway receipt was a mercantile document of title and that the endorsee of such a Railway receipt had sufficient interest in the goods covered by it, to maintain an action for damages against the railway company the carrier. If A makes a contract, there can be no doubt that A can pass over the benefit of that contract to a third person. The question here is whether the endorsement of the Railway receipt did pass the benefit of the contract to the endorsee. On the authority of the Bombay case I hold that it did. The learned Counsel for the respondent quoted another Bombay case of the *Great Indian Peninsula Railway Company* v. *Saheb Ram* (2). That case, however, was of consignee of goods and not of a person to whom the benefit of the contract of the consignor was conveyed by the consignor. In my opinion the plaintiff had a right to sue.

---

(1) [1914] 38 Bom. 659—25 I. C. 380—16 Bom. L. R. 525.

(2) [1903] 5 Bom. L. R. 953.

As other points have not been determined by the learned Judge of the lower appellate Court I set aside his decree and direct that Court to decide the appeal after decision of the other issues. Costs here and hitherto shall abide the result.

Application allowed.

✱ 1924 ALLAHABAD 575

KANHAIYA LAL AND MUKERJI, JJ.

Mt. Anandi and others—Defendants—Appellants.

v.

Nand Lal and another—Plaintiffs—Respondents.

F. A. No. 217 of 1921, Decided on 25th April 1924, against the decree of the Subordinate Judge of Agra.

✱ *Evidence Act, S. 32 (6)—Bahis of Ganga basis are admissible.*

Entries made by successive generations of bards supply a running account of the different branches of the families of their customers and they afford, if otherwise reliable, evidence of as great value as any family pedigree kept by the family members themselves. [P 576 C 1]

A pedigree may be kept by a member of the family or by another person on his behalf and can be admitted in evidence if it is written by a family Bard for the purpose of keeping a record of the family events for his use and for the use of the family. At any rate such a record is a record of the statements as are usually made to and noted by the Bard; it can be admitted in evidence, though the person who made the entries is unknown. The Bahis of Gangabasi priests which contain the relationships of their clients and their ancestors are the records of statements made by persons having special means of knowledge and are admissible in evidence. 46 B. 753; 30 A. 510 Dist. [P 577 C 1]

Tej Bahadur Sapru and Narain Prasad Asthana—for Appellants.

B. E. O'Conor, Iqbal Ahmad and L. M. Banerji—for Respondents.

Kanhaiya Lal, J.—The dispute in this appeal relates to the property of Parabh Lal, who died of plague on the 28th of January, 1905. He had several sons some of whom had died in his lifetime. The allegation of the plaintiff was that one of his sons, Har Bilas, survived him and died of plague a few days later, that Har Bilas was succeeded by his mother Mt. Kishori and that on the death of Mt. Kishori which took place on the 9th December 1916, Nand Lal and Param Sukh became entitled to the property in dispute as his nearest reversionary heirs. Param Sukh has since sold his rights to Mangli who was substituted in his place during the pendency of this litigation.

The defendants Dongar Singh and Ugar Singh claim to be the sons of the sister of Parabh Lal. The defendants Nos. 9—16 have been impleaded as the remoter members of the family to which Parabh Lal belonged. The defendants 1—6 are transferees either from Mt. Kishori or from one or other of the claimants to the estate. The main defence urged on behalf of the defendants appellants was that Nand and Param Sukh were not the nearest reversionary heirs of Parabh Lal or Har Bilas that Harbilas had died in the life-time of Parabh Lal and that Dongar Singh and Ugar Singh were entitled to his estate as his sister's sons. There were other pleas raised which are not material for the purpose of this appeal.

The Court below found that Har Bilas had survived Parabh Lal, though that finding was expressed in terms apt to be misunderstood. It further found that the plaintiffs were the nearest reversionary heirs of Har Bilas and were entitled to his estate in preference to any of the contesting defendants.

The learned Counsel for the defendants-appellants has made no attempt to challenge the correctness of the finding arrived at by the learned Subordinate Judge in regard to the order in which Parabh Lal and Har Bilas died. The learned Subordinate Judge accepted the evidence afforded by the extracts from the registers of births and deaths produced by the plaintiffs which indicated that Parabh Lal had died on the 28th January 1905, and Har Bilas on the 2nd February, 1905, but he misstated that the witnesses for the plaintiffs sought to prove that Har Bilas had pre-deceased his father, whereas the fact was that the witnesses of the defendants had tried to do so. He similarly misstated that the witnesses for the de-

fence sought to prove that Har Bilas died after his father, whereas the fact was that they had tried to prove that he had predeceased him. In any case, the conclusion at which he arrived based on the extracts from the registers of births and deaths, which support the evidence of the witnesses for the plaintiffs, stands unchallenged and we accept it as representing the correct order in which the deaths of Parabh Lal and Har Bilas took place.

Har Bilas must on that finding be deemed to have been the last male holder of the disputed property. He was succeeded by his mother Mt. Kishori, who died some time in 1916. The plaintiffs have sought to rely in support of their relationship with Har Bilas on a *bahi* or memorandum book produced by Kokaran, a bard of Sitalgarh, and another *bahi* or memorandum book, produced by Mt. Tirbeni, the daughter and heir of a Gangabasi priest residing at Soron. They have also relied on the evidence of certain witnesses produced on their behalf. It is admitted by the witnesses produced by the defendants-appellants and in fact by one of the defendants himself that the family to which Parabh Lal belonged had a family bard named Sanwalia and it is also admitted that there was a priest of the family at Soron named Vidya Ram. Kokaran is the nephew of Sanwalia. He has produced a *bahi* in which the relationship between the ancestors of Parabh Lal and those of Nand Lal and Paras Ram is given in detail. According to the evidence a family bard usually gets presents from his customers on the occasion of births in their families. He visits his customers on other occasions also. He notes the births in his book The entries thus made by successive generations of bards supply a running account of the different branches of the families of their customers and they afford, if otherwise reliable, evidence of as great value as any family pedigrees kept by the members of the families themselves. Kokaran says that his uncle Sanwalia had in his service a gumastha named Jhandu, who used to write the entries for him. He also states that the *bahi* produced was in the handwriting of Jhandu and that it contained entries which had been copied from an earliar book maintained by the ancestors of Sanwalia, which had become very old and tattered. He affirms that the old book was in the hand-writing of the father and grandfather of Khumani one of his ancestors; but that book has not, so far as we have been able to discover, been produced in this case. He was not asked which entries had been copied from the old book, and which were those added afterwards by Jhandu, as occasions arose. Jhandu deposes that he had been in the service of Sanwalia, since 1925 Sambat that the *bahi* produced was in his handwriting, that he used to make the entries from time to time and that among those entries were entries of the occasions when births took place and buffaloes and horses were given.

The learned Counsel for the defendants appellants contends that the *bahi* should be excluded from consideration because it was a copy made from an earlier book which had not been produced and also because it was not otherwise admissible in evidence. But there is nothing to show that the particular entries now in question had been brought forward or incorporated from the old book in use, or maintained prior to 1925 Sambat. The *bahi* produced is in the handwriting of Jhandu. It contains entries made during a course of over 55 years and from a vague and general statement of the kind elicited from Kokaran, it cannot be deduced that the specific entries bearing on the relationship now in question are not original entries but only copies made from an earlier book.

S. 32, clause (5) of the Indian Evidence Act permits evidence to be taken in regard to the statements, made by persons who are dead, or cannot be called as witnesses without considerable expense or delay relating to the existence of relationship, where the persons who made the tatement had a special means of knowledge and the statements were made before the question in dispute was raised. Sanwalia was admittedly the family

bard, and Jhandu worked with him; and considering the course of practice usually followed by these bards, as deposed to by some of the witnesses, it cannot seriously be disputed that the writer had a special means of knowledge regarding the facts of the relationship between the different members of the families of the *jajmans*. S. 32, clause (6), of the Indian Evidence Act provides that a statement made in similar circumstances relating to the existence of the relationship in a family pedigree or other thing on which such statement is usually made can also be admitted in evidence, if such a statement was made before the question in dispute was raised. A family pedigree may be a pedigree kept by a member of the family or by another person on its behalf, and as pointed out in *Mohan Singh* v *Dalpat Singh Kanbaji* (1), it can be admitted in evidence, if it is written by a family bard for the purpose of keeping a record of the family events for his use and for the use of the family. Such a record is at any rate a record of the statements such as are usually made to and noted by the family bards, and the Court below has rightly admitted it in evidence. The book does not purport to contain the signature of Sanwalia or of the person by whom it is proved to have been written. But so long as we treat the book as a record of the relationship made by Jhandu on behalf of Sanwalia, the family bard, and recognize the practice which is usually followed by the bards in such matters, it can be admitted even though it is unknown who made the statements which were recorded by Jhandu therein. The decision in *Kalka Prasad* v. *Mathura Prasad* (2) is not applicable, because in that case the pedigree had been prepared by a member of the family for his own use in a certain year and was filed by another member of the family in a subsequent proceeding; and those facts precluded it from its being treated as an ancient family record, such as is handed down from generation to generation and added to as a member of the family dies or is born within the meaning, of S. 32, clause (6), of the Indian Evidence Act. In the p esent case the chronicle produced by the family bard stands on a different footing; and, as, pointed out in *Jahangir* v. *Sheoraj Singh* (3), it was necessary for the plaintiff to show by whom the statements therein recorded were made.

The plaintiffs have next relied on a *bahi* produced by the Gargabasi priest of Soron, wherein the relationship between the ancestor of Nand Lal and Param Sukh and the ancestor of Parabh Lal and Har Bilas are similarly recorded. Both Dongar Singh and Puja Ram admit that Vidya Ram was the priest of Parabh Lal at Soron. Mt. Tirbeni is the daughter of Vidya Ram. She deposes that the entry noted in the *bahi* was partly in the handwriting of her father Vidya Ram and party in the hand-writing of her grand-father Chhab Nath. These entries are records of statements made by persons who had a special means of knowledge. They further show the occasions on which the statements were made and the persons who had made them when they visited Soron to bathe in the river Ganges.

The entries made in this book are corroborated by Gauri Shankar, a priest of the family, who used to officiate at the marriages celebrated in the family on which occasions the names of the ancestors are usually recited. Both Mt. Tirbeni and Gauri Shankar hold some *muafi* land in the village Rahli, which was apparently given to them by the members of the family to which Parabh Lal, Nand Lal and Param Sukh belonged. They have held these *muafi* lan s from as far back as 40 to 50 years and their special means of knowledge as regards the relationship between the different branches of the family cannot, therefore be doubted.

We have besides the evidence of three members of the family including Nand Lal one of the plaintiffs all of whom agree in regard to the rela-

(1) 1922 Bom. 51—46 Bom. 753—24 Bom. L. R. 289.

(2) [1908] 30 All. 510—35 I.A. 166—10 Bom. L.R. 1088—13 C.W.N. 1—18 M.L J. 421—1 I.C. 175—4 M.L T. 380—8 C.L.J. 447—5 A.L.J. 701—11 O.C. 362 (P.C.)

(3) [1915] 37 All. 600—30 I.C. 505—13 A.L.J 817.

tionship to which the evidence already referred to bears testimony. Lala Ram and Kashi Ram are not the next reversioners of Har Bilas and have no particular interest in supporting the claim of the plaintiffs one of whom is admittedly a purchaser and a stranger to the family. The evidence adduced by the defendants-appellants is of little value.

It has been pointed out that the pedigree filed by the plaintiffs in the present suit does not tally with the one filed by Radha Kishen in a previous suit instituted by him against Kishori Lal and others in 1910 which had abated on the death of Radha Kishan and in another suit filed by Param Sukh and Nand Lal against Kishori Lal and others in 1913 which was dismissed for default. It does not appear whether Radha Kishan had at that time made any serious effort to get reliable information as to the nature of his relationship with the family to which Parabh Lal belonged and his statement cannot bind the present plaintiffs. In the course of his examination the plaintiff Nand Lal was asked whether the pedigree given by him was correct and when he replied that it was correct he was further asked if the pedigree of Radha Kishan was correct and his reply again was in the affirmative. It is contended that the effect of that statement was that Nand Lal vouched for the correctness of the pedigree filed by Radha Kishan. But the statement of Nand Lal is not so worded and it cannot be said that he was fully cognizant of the details of the pedigree which had been filed by Radha Kishan and the pedigree which he himself had filed with the plaint. The pedigree which was filed by Param Sukh and Nand Lal in the suit filed by them in 1913 is not shown to have been different from the pedigree which has now been produced; and the contention of the learned Counsel of the defendants-appellants is not therefore tenable. The claim of the plaintiffs has in our opinion been rightly allowed. We dismiss the appeal accordingly with costs including fees in this Court on the higher scale.

Appeal dismissed.

✱ 1924 ALLAHABAD 578

STUART J.

Kanhai Lal—Applicant.

v.

King Emperor—Opposite Party.

Cr. Ref. No. 707 of 1923, Decided on 29th January 1924, from Ss. J., Saharanpur.

✱ *Stamp Act, Art. 58—Exemption B—Definition.*

Receiving back one's own money which was recovered from the person by the Police and returned by the Magistrate does not require a stamp. [P 578, C. 2]

Asst. Govt. Advocate—for the Crown.

Referring Order

The applicant Kanhailal has been convicted under S. 62, clause 1 (b) of the Indian Stamp Act and sentenced to a fine of R. 50/—

The facts are as follows:—There was a theft at applicant's house and Rs. 150/- were recovered by the police from the house of the accused who was tried and convicted for the offence. The Tahsildar who tried the theft case ordered that the money be returned to the applicant as it was part of the property stolen from his house. The sum of Rs. 150/- was accordingly paid to the applicant who executed a receipt for the same without fixing any stamp on it.

The only point for consideration is whether the document was liable to stamp duty. I think that the receipt comes under exemption (b) to Article 53 and that it was for payment of money without consideration. In any case it seems to me extremely hard that a person who was receiving back his own money should have to pay a heavy fine for failing to give a stamped receipt to the Criminal Court.

I refer the case to the Hon'ble High Court with a recommendation that the conviction and sentence be set aside or at any rate that the amount of fine be substantially reduced. The explanation, if any, of the Magistrate concerned will accompany this reference.

Stuart, J.—I agree with the learned Sessions Judge. I set aside the conviction and sentence and direct that the fine, if paid, be refunded.

Conviction set aside.

** 1924 ALLAHABAD 579

SULAIMAN, LINDSAY AND KANHAIYA LAL, JJ.

Sheo Prakash — Plaintiff — Appellant.

v

Ala ul-Din and others — Defendants—Respondents.

F. A. No. 368 of 1923, Decided on 10th March 1924, from the decree of the Officiating Subordinate Judge of Allahabad.

** *Mortgage—Substitution on partition is allowed to the extent of mortgagor's interest of joint property.*

Three members A, Z, and S of a Mahomedan joint family mortgaged part of joint property. On a subsequent partition the whole joint property was held liable for all the debts incurred by several members of the family. In a suit by mortgagee, it was found that the claim under mortgage was barred by limitation against two of the members A & Z but by force of an acknowledgement it was within time as against the third S.

Held: that the true way to find out the substituted security is by determining the ratio which the value of the shares owned by S. in the mortgaged properties at the time of the partition bore to S.'s actual share in the entire family property. [P 585 C 1]

M.L. Agarwala and *K.N. Malaviya*—for Appellant.

L. M. Banerji, *P. L. Banerji* and *George Banerji*—for Respondents.

Lindsay, J.—My learned colleague and myself are agreed that the decree given by the Court below in this suit is erroneous but we differ, unfortunately, as to the relief which the mortgagee-plaintiffs are entitled to obtain. The principal facts are set out in my learned brother's order, but I desire to lay particular stress on the position and constitution of the family to which the mortgagors belonged and for this purpose reference must be made to the award made by Moulvi Farid-ud-din and Munshi Shaikh Shams-ud-din on the 26th July 1897. This document is to be found in Part III of the printed record of this case. Reference must also be made to a further award by Muhammad Rahmat Ullah in the year 1901, which is to be found in the printed record of First Appeal No. 193 of 1915, (see the appellant's book p. 10 *et seq*).

To deal first with the award of the 26th July 1897. This document sets out in detail the constitution of the family to which the mortgagors belong. Although a Muhammadan family, it is declared to be a joint family and it is clearly stated that although the members incurred debts and hypothecated properties which stood recorded in their own names the entire property of the family was joint property and those persons whose names were entered in the public register did not acquire any seprate rights.

The following extract from this award may be quoted :—

"All lived as members of a joint family and the entire business of all of them was joint. No sort of separation existed between them.....This jointness of the family existed in all household affairs and in the purchase and acquisition of property, debts, expenditure on marriages and debts and in all other matters. No sort of disunion or separation existed in this family and in view of permanent jointness the property was entered in different names and in different ways. Some property was purchased in the name of some body and some in the names of others. This was the case of debts also. Some loans were taken in the name of one person and some in the names of others. Sometimes this jointness extended so far that the name of some particular person was recorded in the public register against the ancestral property inspite of the specification of shares.....On the other hand the inference is simply that loans were taken in the names of different persons at different times and in lieu thereof the property of any of the executants of documents relating to debts was hypothecated specifying therein the ancestral property or that property which was acquired in his name.....We are of opinion that these facts do not affect the jointness of the family ; on the other hand this is a practice observed in all joint families."

It follows from this that the entries made in the revenue registers bore no relation to the actual facts. Items of property recorded in the names of individual members of the family did

not belong exclusively to them but were the joint property of all the members and secured debts contracted by individual members and charged upon specific items of property recorded in their names were in fact debts binding upon all the members of the family and upon all the family property which was held jointly. In short, it would appear that individual members were treated as agents of the entire family for the purpose of borrowing money for family purposes, and the family property in its entirety was charged with debts so incurred, and it was upon this footing that actual division of the family property came to be made by Muhammad Rahmat Ullah in the year 1901 (see his award printed at p. 10 *et seq* of the appellants' book in F. A. 193 of 1915). Among the issues which M. Rahmat Ullah set himself to determine was issue No. 5 (p. 11 of his award) which reads as follows :—

"What are the joint family debts and what is the amount thereof?"

At page 17 of the award the arbitrator records his finding and states "there is no disagreement between the parties as regards the debts entered in columns 1 and 2 of List No. 5 being joint."

List No. 5 is to be found at page 26 of the award and the first item in column 1 is the debt contracted under the document now in suit. The amount of the debt is stated to be Rs. 35,670-5-6. This debt was duly apportioned between the persons to whom shares were allotted by the award.

The arbitrator laid down that the joint debts (of which the debt in suit was one) were to be paid in the proportions laid down in List 6, (printed at p. 27 of the award). He further ruled that the share allotted to each co-sharer stood hypothecated for his share of the joint debts. The award also provided for contribution for it was declared that in the event of any sharer being compelled to pay a sum in excess of his due share of the joint debts he was to be entitled to claim contribution against the other sharers and their property.

The mortgage-deed in suit should, therefore, be interpreted in the light of these facts as determined by the two awards to which reference has just been made.

With regard to the law as laid down in the case of *Byjnath Lal* v. *Ramoodeen Chowdhury* (1), which is cited in the order of my learned brother, that was a case in which a mortgage of an undivided share had been made by one of several co-owners of joint property. The case was decided upon the principle that while a mortgagor has power to pledge his undivided share in joint property he cannot by so doing affect the interests of other co-sharers. The person who takes the security takes it subject to the rights of those other co-sharers to enforce partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. And so where there is a mortgage of an undivided share followed by a partition under which the co-sharers of the mortgagor take the lands allotted to them free of the mortgage, the only right of the mortgagee is to follow the parcel allotted to his mortgagor. But this is not what happened in the present case In the first place, the deed does not purport to mortgage an undivided share or shares and in the next place it is apparent from what has been set out above that when partition came to be made the co-sharers other than the mortgagors did not take the lands allotted to them free of the mortgage in suit but subject to it.

In his comments upon the case of *Byjnath* v. *Ramoodeen* (1), Dr. Ghosh at page 292 of his book on the Law of Mortgage in India (4th edition) observes as follows :—

"But if in making the allotments the incumbrance is taken into account in valuing the share which is subject to it, the partition will not, for obvious reasons, affect the security of the mortgagee."

In other words, the mortgagee can enforce his security in its original form notwithstanding the subsequent partition. If this is a correct view

(1) [1874] 1 I. A. 106—21 W. R. 233.

of the law the mortgagees in the present case would ordinarily be entitled to bring to sale the properties as specified in the mortgage-deed. But the lower Court has found, and the finding has not been challenged, that the suit is time-barred as against the representatives of Asad Ullah and Zia Ullah, two of the mortgagors and that the claim is alive only against the legal representatives of the third mortgagor Sharf-ud-din.

Another fact to be noticed is that subsequent to the date of the mortgage certain sums were paid by representatives of some of the mortgagors and in consideration of these payments some items of the mortgaged property were released. These are specified in the endorsements made upon the deed (see the translation at page 9 of the appellants book in F. A. 193 of 1915).

According to the recitals in the deed of mortgage the property mortgaged consisted (*a*) of certain specified shares in villages which were declared to belong jointly to all the three mortgagors and (*b*) of certain property—shares in villages and house property—described as being the sole property of Sharf-ud-din.

I agree with the subordinate Judge that the items of property described in the mortgage deed as belonging exclusively to Sharf-ud din are liable to be sold, excluding however any items which were subsequently released in whole or part from the mortgage.

As to the (*a*) property *i. e.*, the property described in the deed as joint property of the three mortgagors the Subordinate Judge held that none of it could be brought to sale because it could not be ascertained what share Sharf-ud-din was entitled to in the joint family property at the time of the mortgage. As pointed out by my learned colleague in his order the Subordinate Judge is in error for it is proved that at the time of the mortgage Sharf-ud-din was entitled to $7\frac{11}{12}$ pies out of 16 annas and, that being so, I am of opinion that the items falling under the head (*a*) are liable to be sold to the extent of $7\frac{11}{12}$ pies out of 16 annas which is represented by the 95/2304.

I would, therefore, vary the decree of the Subordinate Judge by providing for sale of a 95/2304 share of those items of property described in the mortgage deed as the joint property of the three mortgagors. In other respects I would leave the lower Court's decree as it is.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for sale on the basis of a mortgage deed dated the 12th September 1893, executed by three persons Asad Ullah, Zia Ullah and Sharf-ud-din for a sum of Rs. 22,000 bearing interest at the rate of 10 annas per cent. per mensem with the stipulation that interest if not paid every year would be added on to the principal and bear interest at the same rate.

Under this deed a very large number of properties were mortgaged. Three specifications of the village properties and a house were hypothecated under this deed. The first one was said to belong to all the three debtors jointly. The second and the third were said to belong to Shar-fud-din only. The plaintiff claimed a decree for sale of the mortgaged properties as specified in the mortgage-deed.

The mortgagees were Bhawani Prasad, Brij Mohan Lal and Raja Ram. Only Raja Ram and his son Sheo Prakash instituted this suit, making Bhawani Prasad and the other members of his family *pro-forma* defendants. Credit was given for some amount said to have been realised.

There were a very large number of defendants to the suit who were stated to be either the heirs of the three mortgagors or subsequent transferees from them or their heirs. No further details were set forth in the plaint.

A number of separate written statements were filed on behalf of the various groups of the defendants. It is not necessary to enumerate all the pleas in detail. It will be sufficient to say that the main pleas were that the claim was barred by limitation; that all the properties mortgaged did

not belong to the 3 mortgagors and that without showing which of the defandants is in possession of what property the claim could not be decreed. It was also pleaded that some of the mortgaged properties had been released from liability and were no longer liable to be sold.

The learned Subordinate Judge was of opinion that the claim was barred by limitation as against the representatives of Asad Ullah and Zia Ullah. He, however, held that there was a written acknowledgment of liability signed by Sharf-ud-din within 12 years of the mortgage-deed and also within 12 years of the institution of the suit which saved limitation as against his representatives; but he held that the defendants were entitled to require the plaintiffs to prove that the mortgagors were owners of the property mortgaged and were competent to execute the mortgage. Being of opinion that there was no evidence on the record to show what share was owned by which of the mortgagors in the mortgaged property or in the family property he thought that it could not be said what share should be exempted and what not. Acting on the admission made by Mr. Abid Ali, Vakil for some of the defendants, he held that the properties given in the 2nd and 3rd specifications of the mortgage deed belonged exclusively to Sharf-ud-din and that the plaintiffs could seek their remedy against those properties. As to the joint properties detailed in the first specification he was of opinion that the mortgaged money could not be recovered by sale of any of those properties. He, accordingly, passed a decree for the properties described in the mortgage-deed as belonging exclusively to Sharf-ud-din, except certain properties in the possession of particular defendants named and dismissed the claim with regard to the property described therein as joint property Village Adampur and half shares in Ulda and Kurha were also exempted. He also directed that certain properties relased by Bhawani Prasad would not be liable for the amount of the mortgage debt found due to him.

Babu Sheo Prakash plaintiff not being satisfied with the decree passed in his favour has come up in appeal to this Court. None of the defendants, however, has either filed a separate appeal or any cross-objection.

The position taken up by the plaintiffs in the plaint as well as at the trial was that they were entitled to follow the entire mortgaged property in the hands of the defendants whosoever they may be and this claim was persisted in the grounds of appeal filed in this Court.

There is one circumstance, however, of which the true significance has been entirely overlooked by the parties as well as the Court below. The three mortgagors were members of a very large Muhammadan family which owned shares in a large number of different villages. The three executants were only entitled to undivided shares in the various villages along with the other members of their family. In the mortgage-deed, however, they professed to be the exclusive owners of the entire shares in certain specified villages mortgaged withont making any mention of the rights of the other members of the family.

On the 4th of February, 1897, three private arbitrators pronounced a lengthy award settling all the disputes of the family and defining the share which each member was entitled to. In the course of their findings they pointed out that all the members of the family had been living together as if they constituted a joint family and had been incurring expenses and also acquiring properties for the whole family though in the name of one or other of the members. This finding led them to the conclusion that no matter whose name was actually entered against any property it must be deemed to have been owned jointly by all the members. They were further of opinion that all the members of the family were jointly responsible for the payments of all the debts even though the same had been borrowed by only some of the members The question of personal liability now does not arise as the suit was instituted long after the expiry of six years. Leaving out of account the share

which Sharf-ud-din became entitled to by inheritance between the dates of the mortgage-deed and the award (for this share must be excluded for the purpose of this appeal) I am satisfied that according to their findings Sharf-ud-din had at least a $7\frac{11}{12}$ pies share if the family estate be deemed to be sixteen annas. The plaintiff's Vakil in the oral pleadings printed at page 32 of the paper book admitted that Sharf-ud din's share was only a $7\frac{11}{12}$ pies in the 16 annas estate. And this was by no means an over-estimate.

At page 7 the arbitrators found that Aman-ullah, the grandfather of Sharf-ud-din had 3 annas and 4 pies As Sharf-ud-din's father had three other brothers and Sharf-ud-din himself had a brother his ancestral share came to 1/8 of 3 annas 4 pies which amounted to 5 pies. Then again Mubarakullah, by inheritance and purchase had 9 annas and 4 pies. By collateral inheritance Sharf-ud-din got 5/192 of 9 annas and 4 pies which was equal to $5/192 \times 112 = 35/12 = 2\frac{11}{12}$ pies. Thus excluding any other small fractional share which he might have inherited on the death of some other members, Sharf-ud-din's total share was in no cases less than $7\frac{11}{12}$ pies, which the plaintiff's Vakil admitted. The view of the learned Subordinate Judge that there is nothing to show what share he owned is entirely wrong.

On the 13th September 1901, Maulvi Rahmat Ullah by an arbitration award divided up the entire family property including villages, houses and other properties and in this division all debts and liabilities were fully taken into account. Thus the three mortgagors in the final adjustment of the accounts were charged with the due proportion of the debt for which they alone had undertaken the liability. Had the partition been made of the equities of redemption only, the case would have been simple as then the charge would have remained attached to the properties originally mortgaged. This was not done. As might naturally be expected in such a partition the properties which were ultimately allotted to Sharf-ud-din were not quite the same which had been described in the mortgage-deed as belonging to him exclusively. All the various properties were lumped together as the joint family property of the parties and the legal share of Sharf-ud-din was allotted to him. The main complexity of this case is caused by the difficulty in finding out the property which was allotted to Sharf-ud-din in lieu of the properties which he had mortgaged.

It was laid down by their Lordships of the Privy Council as early as 1874, in the case of *Bijnath Lal* v. *Ramudin Chaudhri* (1) that a mortgagor has power to pledge his own undivided share in joint villages, but it is clear that he cannot by so holding affect the interests of the other sharers in them, and that persons who take the security take it subject to the right of those sharers to enforce a partition and thereby convert what was an undivided share of the whole into a defined portion held in severalty.

This was a case of a Revenue Court partition, but the High Courts in India have applied the same principle to all cases of partition whether by award or by private agreement. Some of these cases are summarised in the judgments in the case of *Bhup Singh* v. *Chheda Singh* (2).

This being so, the mortgagees cannot now sell the property according to the descriptions given in their mortgage-deed. They are entitled to sell, in fact are bound to sell, the properties which as a result of the partition have been allo ted to their mortgagors as a substitute for the security. The decree of the Court below directing that the property which was described as belonging solely to Sharf-ud-din should be sold up regardless of the effect of the partition is grossly unjust to many of the defendants. Even in those properties Sharf-ud-din had only undivided shares which are subject to the enforcement of the right of partition by the other co-sharers and some of those

(2) [1920] 43 All. 596—58 I. C. 171—18 A. L. J. 807.

have been allotted to quite different persons.

In my opinion, therefore, the only proper decree to pass in the present case should have been to direct the sale of that part of the property allotted to Sharf-ud-din's share on partition which represented his share in the mortgaged property; for only that much can be regarded as the equivalent of the mortgagees' security which the latter are entitled to follow. If one were to allow a sale of the entire properties allotted to Sharf-ud-din it might possibly amount to an unjustified enhancement of the mortgage security.

It has been strongly contended on behalf of the plaintiff that the true interpretation of the mortgage-deed is that the three debtor's intended to mortgage their whole interest in the entire estate belonging to the family; that though they professedly mentioned only some of the properties by name the idea was that those properties represented their whole interest in the estate and they were really intending to mortgage the whole of that interest. The contention is that although only some specific properties were mentioned in the deed, it should be presumed that they were mortgaging their whole interest in those villages as well as in all the other villages not covered by the deed which were part of the family estate. On this hypothesis it is argued that Sharf-ud-din had purported to mortgage all the assets which he was possessed of and it, therefore, follows that whatever he got at the partition was allotted to him in lieu of his entire interest which had been previously mortgaged. If one were to accept this contention no further difficulty would remain in the case as one would at once admit that the plaintiffs are entitled to proceed against whole of the property which was allotted to Sharf-ud-din at the time of the partition. I am, however, of opinion that the appellant's contention is untenable. The debtors in the mortgage-deed confined the mortgage to the properties specified therein It is impossible to hold that the mortgagees could enforce the charge against any property other than that mentioned in the registered deed.

Suppose in three villages A, B and C a person owns one third share in each; altogether he owns an interest represented by $\frac{A+B+C}{3}$, and also suppose that he wrongly mortgages the whole of A, can it be said that the mortgage of A is tantamount to a mortgage of $\frac{A+B+C}{3}$? Can the mortgagee say that because that person wrongly mortgaged more than his share in A the mortgagee should be compensated out of his shares in B and C? When the law requires a registered deed for creating a mortgage, how can the mortgagor's interest in B and C be ever charged? As Sharf-ud-din actually owned a less share than that mentioned in the mortgage-deed, the charge would have had to be confined to the smaller share if dispute as against the representatives of the other members of the family had arisen. I must, therefore, take it that the charge was created only on the properties covered by the mortgage-deed and on no other. As the claim against the representatives of Asad-ullah and Zia-ullah is barred by time, it is obvious that the charge which the plaintiffs are entitled now to enforce is that which was created on Sharf-ud-din's share in the properties mentioned in the mortgage-deed. A reference to the subsequent award makes it quite clear that there was very large number of village and house properties in which also Sharf-ud-din had shares but which were not included in the mortgage-deed. On no reasonable hypothesis I feel justified in assuming that Sharf-ud-din, although he named some of the properties only, really intended to mortgage his interest in all the other properties also. In my opinion the language of the document is not capable of any such interpretation.

In the leading case of *Byjnath* v. *Lal Ramudin Chaudhri* (1), their Lordships of the Privy Council took care to point out at page 237 that it is certainly possible to conceive cases in which the security not covering the undivided share in the whole

estate, it might be difficult to determine which of the lands allotted in substitution of that share represented the mortgage premises. No such difficulty, however, existed in that case as the property allotted in substitution was easily traceable.

If a number of co-sharers own undivided shares in a number of villages constituting an estate and one of such co-sharers mortgages shares in some of the villages only and as a result of a subsequent partition the villages are redistributed, it is just and equitable that the charge should attach to that fraction of the share allotted to the mortgagor which represents the share mortgaged by him originally. The charge cannot be allowed to be enforced against the whole of the property allotted to the mortgagor as part of it obviously represents that interest of his which was unencumbered. In the case of *Hakim Lal* v. *Ram Lal* (3) in an elaborate judgment Mookerji, J. has expressed the same view. And I have no doubt in my mind that this principle is in consonance with the rules of justice, equity and good conscience.

The true way to find out the substituted security is by determining the ratio which the value of the shares owned by Sharf-ud-din in the mortgaged properties at the time of the partition bore to Sharf-ud-din's actual share in the entire family property. This will at once give us what fractional share of his interest in the entire estate he had mortgaged. Assuming that there has been no increase of his share by subsequent inheritance or other acquisition, the substituted equivalent of his mortgaged share will obviously be this very fraction out of the properties which were allotted to him as representing his entire interest at the time of the partition. To give a concrete example, suppose a co-sharer's interest in the entire family estate was represented by X+Y. He mortgaged only an interest represented by X. It is obvious that he mortgaged $\frac{X}{X+Y}$ of his entire interest in the estate. If on partition he was allotted a property Z, the mortgage security will be represented by the fraction $\frac{X}{X+Y}$ of Z.

(3) [1907] 6 C. L. J. 46.

The evidence to show the actual values of the various properties is meagre. But in the absence of any more satisfactory evidence the Government revenues assessed on the various village properties may be assumed to bear the right proportion of their respective values. These Government revenues are mentioned in the mortgage-deed as well as in the second award. The house properties were separately divided in the last mentioned award and so they need not be mixed up with the village properties.

According to the plaintiff's own admission the share of Sharf-ud-din in every bit of the property was $7\frac{11}{12}=\frac{95}{12}$ pies out of sixteen annas.

Expressed in terms of the fraction of a rupee it comes to $\frac{95}{2304}$.

The total Government revenue of the entire family zamindari by addition of the figures on page (?) = Rs. 33,332.

The total Government revenue of the properties mortgaged as given on page ? —Rs. 3,396.

Thus the Government revenue of the zamindari not covered by the mortgage-deed would be Rs 29936.

It is patent that just before the partition Sharf-ud-din had interest in two sets of properties. One of the revenue of Rs. 3,396 against which the mortgage could be enforced, and the other of the revenue of Rs. 29,936 against which it could not. On partition Sharf-ud-din received properties in lieu of both these interests. The heirs of Shaf-ud-din are, therefore, entitled to say that that portion of his allotted share which represents his unencumbered interest should be freed from the charge and this unencumbered portion obviously is $(\frac{95}{2304} \times 29,936) / (33,332 \times \frac{95}{2304})$ of the property allotted to him. This is the same thing as saying that only $(\frac{95}{2304} \times 3396)$

$(33,332 \times \frac{95}{2304})$ of the property allotted to him should be ordered to be sold.

There is one other fact which has to be taken into consideration. Between the mortgage and the partition Sharf-ud-din acquired some more fractional shares by inheritance on the death of some of his relations, with the result that his original $7\frac{11}{12}$ pies share was increased. On partition he received property not only as representing $7\frac{11}{12}$ pies but as representing this increased share. Thus in order to find out the property given to him in lieu of his original $7\frac{11}{12}$ pies, the allotted properties must be reduced by a fraction. By calculation this fraction amounts to '69 and odd = 7/10 approximately.

The properties allotted to Sharf-ud-din on partition are described in detail on page 34 of the old book.

It follows, therefore, that the property which cannot be ordered to be sold = $(\frac{95}{2304} \times 3396) - (33,332 \times \frac{95}{2304}) \times \frac{7}{10}$ of the property given to him as detailed on page 34

The last thing that remains to be considered is the effect of Sharf-ud-din having purported to mortgage more than his share in the mortgaged properties. By virtue of S. 43 of the Transfer of Property Act the charge can be enforced against any property which he purported to mortgage, although it did not belong to him and which he has since acquired. But S. 43 would of course only apply to such properties acquired by him subsequently as were actually mentioned in the mortgage-deed. If Sharf-ud-din inherited shares in other villages, they cannot be followed. If, therefore, there are any villages common to the mortgage-deed and the list at page 34 then in addition to the fraction determined by me as above, the mortgagees are entitled in those common villages to get the balance of the share up to the full extent of the share mortgaged if the village falls in the second or the third list, and up to one-third of the share mortgaged if it falls in the first list given in the mortgage-deed.

The result will be that out of the 7/16th and odd shares in the villages mentioned on page 34 if any one village also falls in the second or the third specified list of the mortgage-deed, the share liable to be sold would be increased to that extent provided that it is not already more; if it falls in the first specified list it will be increased to one-third of the share mortgaged provided that it is not already more; and if it falls in neither of those specifications then it will be $(\frac{95}{2304} \times 3396) / (33,332 \times \frac{95}{2304}) \times \frac{7}{10}$ of the seven-sixteenth and odd shares in the properties mentioned at page 34 = $[(\frac{95}{2304} \times 3396) / (33,332 \times \frac{95}{2304})] \times \frac{7}{10} = \frac{7}{10} \times \frac{3396}{3332}$.

As the true significance of the partition was not realised in the Court below, and as none of the defendants have appealed, I would give the plaintiffs an option either (1) to let the wrong decree remain as it stands, or (2) to let it be substituted by a new decree in accordance with the directions given by me above.

Since preparing the above judgment, I have had an opportunity to see the judgment proposed to be delivered by my learned brother and I wish to add a few more words. I agree that if in making the allotments the encumbrance is taken into account in valuing the share which is subject to it, the partition will not affect the security of the mortgagee. I, however, understand this to mean that in allotting the properties the proportionate encumbrance on each of the properties is deducted from its market value, and the partition made on the valuations of the equities of redemption; for example, when properties of the values say A, B and C with charges a, b and c on them are treated as worth (A.a), (B.b) and (C.c) respectively.

I myself pointed out in a previous portion of this judgment that "had the partition been made of the equities of redemption only, the case would have been simple as then the charge would have remained attached to the properties originally mortgaged." As I read the award of Mr.

Rahmatullah, that unfortunately was not what was done.

Estimated values of the houses as given in List No. 1 do not take into account the encumbrances; nor do the proportionate shares of the co-sharers in List No. 2. Similar remarks apply to lands and shares in them (Lists Nos. 3 & 4).

The profits of the properties allotted to the various co sharers as mentioned in Lists Nos. 10/1,10/2, etc. to 10/8 correspond as nearly as they can to the profits to which the co-sharers are entitled according to List No 10. In fact only the profits are estimated and not the capitalised values of the shares.

It is true that the arbitrators took great pains in working out calculations to show the proportionate liabilities of the various co-sharers. Lists Nos. 5 to 9 give the results of such calculations. The amounts were, however, not deducted from the shares in List No. 10. The arbitrators had obviously the pious hope that all the co-sharers would pay to the creditors their respective shares of the entire family debts, and thus free the whole estate from all liabilities That ideal was of course not realized. So the only useful purpose that the calculations can serve now would be in working out equities *inter se* when any question of rateable contribution arises. So far as the mortgagees, who were no parties to the award, are concerned they of course are not bound by any splitting up of the liabilities.

I would point out once again, that the effect of giving the plaintiffs a decree for the sale of the properties as detailed in the mortgage-deed, ignoring the award altogether, would be to hold that the claim is time-barred against the representatives of Asad-ullah and Zia-ullah, and yet order the sale of many items of properties which fell to their lots under the award and which are in their exclusive possession.

It is on these grounds that I still adhere to the view expressed originally.

By the Court.

In view of the difference of opinion between us regarding the relief which should be granted to the plaintiffs, we direct that the record be laid before the Chief Justice under S. 98, sub-section (2), of the Code of Civil Procedure in order that the decision of one or more of the other Judges may be taken.

The question for decision is "what relief in law are the plaintiffs entitled to ?

Opinion on Reference.

(The case was then put before Mr. Justice Kanhaiya Lal.)

Kanhaiya Lal, J.—This is a reference under S. 98 of the Code of Civil Procedure and the question referred for opinion is, to what relief in law the plaintiffs are entitled ?

The suit which has given rise to this reference was filed by the plaintiffs for the recovery of money due on a mortgage executed by Asad-ullah, Zia ullah and Sharf-ud-din on the 12th of September 1893. The mortgage comprised some properties which were described in the mortgage-deed as the joint properties of the three mortgagors and certain other properties which were stated to have been held separately by Sharf-ud-din alone. The defendants are either the heirs of the mortgagors or their transferees, or other members of the family to which the mortgagors belong and to whom some of the mortgaged properties or portions thereof have been allotted on partition by a subsequent award of arbitration.

The claim was opposed by some of the defendants on various grounds which are not material for the purposes of this reference. The Court below dismissed the claim as against the heirs and transferees of Asad-ullah and Zia-ullah on the ground that it was barred by limitation and decreed the claim against the separate properties mortgaged by Sharf-ud-din with the exception of certain properties in the possession of certain transferees on the basis of certain acknowledgments found to have been made by Sharf-ud-din. In regard to the properties described in the mortgage-deed as having been jointly held by the three mortgagors the Court below refused to grant any relief holding that it was not shown

what share thereof was owned by Sharf-ud-din.

The plaintiff's appeal. Their main contention is that in the absence of evidence to the contrary the Court below ought to have enforced the mortgage against the one-third share of Sharf-ud-din in the properties mortgaged jointly by him and the other mortgagors. An objection is also taken that the separate properties mortgaged by Sharf-ud-din against which the claim had been decreed were not correctly described in the decree, and that the amount due to Bhawani Pershad and his sons, who were impleaded as *pro forma* defendants, ought to have been separetely specified because they were found to have realized a portion of the mortgage money.

The Bench hearing the appeal came unanimously to the conclusion that at the time of the mortgage Sharf-ud-din was entitled to $7\frac{11}{12}$ pies share in the family properties, certain shares of which had been mortgaged, but while one of the learned Judges came to the conclusion that the mortgage could be enforced against the family properties mortgaged to the extent of that share in addition to the separate properties mortgaged by Sharf-ud din the other learned Judge was of opinion that it could only be enforced after partition against the substituted securities.

In regard to the properties described in the mortgage-deed as belonging exclusively to Sharf-ud-din it was not disputed before the Court below that they were liable to sale excluding such items as had been subsequently released in whole or in part from the mortgage (*vide* the statement of the defendants' pleader, dated the 17th February 1912, at p. 5 of Part II of the printed record). The principal contesting defendants have neither appeared nor filed any appeal or cross-objection; and the decision of the Court below in regard to the separate properties mortgaged by Sharf-ud-din has become final. The plaintiffs, however, point out certain mistakes or omissions in the description of the separate properties given in the decree. Those mistakes or omissions can and ought to be rectified so as to bring the decree into conformity with the judgment.

The matters in difference relate principally to the other properties mortgaged jointly by Sharf-ud-din and the other mortgagors; and the effect of the subsequent partition thereof in common with the separate properties by arbitration has also to be considered. My learned brother Lindsay, J., rightly pointed out that by virtue of the award made by M. Khalil-ud-din and Shaikh Shams-ud-din on the 26th of July, 1897, the mortgage in question was treated as a joint debt due by all the members of the family to which the mortgagors belonged and could be enforced against the properties mortgaged by Sharf-ud-din which were in their possession because the partition was made subject to that mortgage. My learned brother Sulaiman, J., pointed out with equal propriety that after the partition the mortgagees could not sell the joint properties mortgaged according to the descriptions thereof given in the mortgage-deed even to the extent of the share of Sharf-ud-dín, because some of those properties had been allotted by a subsequent partition to the shares of the other members of the family. According to his view, the mortgage could only be enforced against the substituted securities which could be determined by ascertaining the ratio which the value of the shares owned by Sharf-ud-din in the mortgaged properties bore to the actual share of Sharf-ud-din in the entire family properties forming the subject of that partition. It is manifest that if the partition be ignored the sale of the mortgaged properties according to the old descriptions would be attended with difficulties; and the protection which ought to be extended to the intending purchasers and the members of the family other than Sharf-ud-din and his heirs and assigns who have obtained the same by partition would not be adequately secured. The contingency of there being prior or subsequent mortgages on the substituted securities cannot, however, be overlooked.

No plea was raised in the defence that the sale should be confined to what is now described as the substituted securities and no issue of enquiry was directed on that point. All that appears is that the landed properties mortgaged stood recorded in the revenue papers partly in the names of Sharf-ud-din, Asad-ullah, and Zai-ullah and partly in the name of Sharf-ud-din alone to the exclusion of the other members of the family. By the award of the 26th July 1897, all these properties were treated as the joint properties of all the members of the family; and by the award of the 13th September 1901, these properties were partitioned and Sharf-ud-din was allowed a seven annas and odd *krants* share in the properties specified in List No. 10/4 appended to the same. The properties described as the separate properties of Sharf-ud-din in the deed of mortgage were included in that partition. But so far as those properties go, the decision of the Court below granting the plaintiffs decree for their sale has already become final; and the contesting defendants cannot be allowed to raise a plea in assertion of a joint right which was not taken by them during the trial and which would be inconsistent with the statement of their pleader of the 17th February 1915. The properties separately mortgaged by Sharf ud-din must, therefore, be left entirely out of account.

As regards the block of properties jointly mortgaged by Sharf-ud-din and his co-mortgagors against which the claim of the plaintiffs has been dismissed, the question is not so concluded.

Almost all the members of the family to which the mortgagors belonged were parties to the arbitration or have either no interest in the properties now in dispute or have taken no part in opposing the claim. The award of the 26th of July, 1897, declared that the properties recorded in the names of the individual members of the family did not belong exclusively to them but were the joint properties of all the members, and that the debts contracted by the individual members and charged upon specific items of property recorded in their names were in fact debts binding upon all the members of the family and upon all the family properties which they held jointly. One of the issues dealt with by the arbitrators was whether the entire property of the family was liable for all the debts standing in the names of the individual members of the family or whether they were due only by the persons in whose names they stood. Dealing with that issue, the arbitrators said :—

"As regards issue No 27, we, the arbitrators, are of opinion that the entire property of this family shall be liable for the payment of all the loans, that have been taken in the names of the members of this family. The aforesaid loans will not be a charge on the person and property of that person alone in whose name they were taken irrespective of the fact whether they may be simple or under hypothecation of that property of the executant which may be in his name. We, the arbitrators, are of opinion that any loan that was taken in this family and is still payable or that has already been paid, is jointly due by all the members of the aforesaid family. It has nothing to do with the person and property of any particular person. We cannot determine what for the loan aforesaid was taken. Just as it is a fixed rule as regards a joint family that the property that is acquired in any way by the physical and mental activities of any one, while it is joint, belongs to all its members, in the same way all the loans that were taken will be a charge on all the members of the family and on the ancestral and acquired property."

The arbitrators held in effect that all the members of the family were liable for the payment of the debts including the mortgage now in suit. The partition was made subject to a joint liability for the payment of the mortgage and the partition cannot, therefore, affect or prejudice the security of the mortgagees.

It would, however, save future difficulties if the substituted securities corresponding with the share of Sharf-ud-din in the joint properties

mortgaged is also traced and entered in the decree. As observed by their Lordships of the Privy Council in *Byjnath Lal* v. *Ramoodeen Chowdhry* (1) and *Bhup Singh* v. *Chedda Singh* (4) a mortgagee is entitled by substitution to pursue his remedy against the share or property which his mortgagor has obtained under the partition.

The share of Sharf-ud-din in the joint properties on the date of the mortgage was $7\frac{11}{12}$ pies out of the entire family share. It was enlarged by subsequent inheritance according to the award to something like 8 pies 14 *krants* share, but in the statement held by them (*vide* p. 32 of Part I of the paper book) the plaintiffs have contented themselves with a $7\frac{11}{12}$ pies share.

In order to determine the securities substituted therefor we have to find out the ratio which the profits of the share of Sharf-ud-din in the joint properties mortgaged bore at the time of partition to his actual share of the profits in the family properties which were then partitioned. The profits of the $7\frac{11}{12}$ pies share of Sharf ud-din in the block of joint properties mortgaged amount, according to the award, to Rs. 591-13-8 or roughly Rs. 592. The profit of the total share of Sharf-ud-din in the properties comprised in the partition was roughly 7/16th share of Rs. 4,564 (*vide* the list No. 10/4 attached to the ward of the 13th September 1901). The substituted securities representing the share of Sharf-ud-din in the block of properties mortgaged jointly by Sharf-ud-din and his co-mortgagers thus amounted to a $\frac{593}{7/10 \times 4564}$ share or, in other words, 2368/7967th share of the properties entered in list No. 10/4 appended to the award of the 13th September 1901.

The house mortgaged was treated as joint property by the award and allotted to Sharf-ud-din and Muhammad Yahia to the extent of their respective shares.

My opinion, therefore, is that the plaintiffs are entitled to enforce their mortgage against a $7\frac{11}{12}$ pies share of Sharf-ud-din out of the entire family share in the village properties mortgaged jointly by Sharf-ud-din and his co-mortgagors, corresponding with a 2368/7967th share of Sharf-ud-din in the properties mentioned in the partition list No. 10/4 appended to the award of the 13th September 1901. They are also entitled to enforce their mortgage against the properties described in the mortgage-deed as the separate properties of Sharf-ud-din excepting the house which will be treated as the joint property of Sharf-ud-din and Muhammad Yahia, wherein the share of Sharf-ud-din alone will be liable to sale and such other items of property as have already been excluded or released by the Court below. Any mistakes or omissions in the decree of the Court below regarding the separate properties against which a decree was passed by that Court will be rectified so as to bring it into conformity with the judgment. The other matters raised in the appeal will be dealt with by the Bench concerned before which this opinion will be laid forthwith.

Judgment.— This was a case in which by reason of a difference of opinion between the members of this Bench a reference was made to a third Judge under S. 98 of the Code of Civil Procedure. The opinion of the third Judge has now been received and we are now agreed that the appeal should be allowed to the extent we indicate. In the mortgage-deed the items of mortgaged property are set out under three heads A, B and C. Items under heads B and C represent property belonging exclusively to Sharf-ud-din one of the mortgagors and we are agreed that this property is liable to be sold in execution of the decree to which the plaintiff has been declared entitled by the Court below.

We differ from the opinion of the learned Judge of the Court below with respect to the property which is mentioned under heading A in the mortgage-deed and we have now the opinion of the majority of the Judges

(4) [1920] 42 All. 596 = 58 I.C. 171—18 A.L.J. 807.

that in this respect the decree of the Court below is liable to modification and we modify it accordingly by declaring that as to the property described in the mortgage-deed under heading A, *i. e.* the property which is there described as the joint property of the three mortgagors, the plaintiff-appellan will be entitled in execution of the decree to bring to sale a $7\frac{11}{12}$ pies out of 16 annas representing the entire family interest in the property in list A. This fraction of $7\frac{11}{12}$ pies out of 16 annas is represented by the equivalent fraction 95/2304. The decree of the Subordinate Judge is, therefore, varied to the extent indicated and as the appellant has substantially succeeded he will be entitled to his costs in this Court including fees on the higher scale. It is understood, of course, that there is nothing in the order of this Court varying the order of the Court below in so far as it dismissed the plaintiff's claim against the representatives of Asad-ullah and Zia-ullah. The decree will be only against the representatives of Sharf-ud-din.

Decree modified

✱ 1924 ALLAHABAD 591

DANIELS AND NEAVE, JJ.

Behari Lal and others—Defendants—Appellants.

v.

Shib Lal and others—Plaintiffs-Respondents.

S. A, No. 933 of 1922, Decided on 11th April 1924, from a decree of officiating District Judge of Agra.

✱ *Transfer of Property Act, S. 73—Usufructuary mortgagee agreeing to pay malikana is liable for non-payment in suit for redemption—Mortgage, usufructuary mortgage.*

Where the terms of the ususfructuary mortgage were that the mortgagees were to pay to the mortgagors nothing but Malikana and that they were not accountable to the mortgagors otherwise.

Held: **in a suit for redemption by the mortgagors that the mortgagors were entitled to redeem on payment of the principal amount of the mortgage after deducting the malikana for the years for which it was not paid by the mortgagees to the mortgagor.**

[P. 591 C. 2, P. 592 C. 1.]

Narain Prasad Asthana—for Appellants.

Baleshwari Prasad—for Respondents.

Neave, J.—This was a suit for redemption of a mortgage dated the 23rd November 1880. There had been a previous mortgage, dated the 17th November 1860 between the ancestors of the parties but this was superseded by the later mortgage. The principal terms of the later mortgage deed were that the mortgagees were to take possession and to receive the profits in lieu of interest. They were, however, to pay to the mortgagors an annual sum of Rs. 25 described as malikana, the mortgagors agreeing that they had no further claim against the mortgagees beyond this malikana. It is further stipulated in the deed that there shall be no accounting except as to the Rs. 25 which the mortgagors were to receive every year. It is not disputed that this malikana was never paid. Both the Courts below have granted a decree for redemption on payment of the principal mortgage money after deducting Rs. 25 a year from 1886 to the date of suit. In appeal three points have been taken by the learned counsel for the appellants.

The first is that as the mortgage was a usufructury one, the mortgagees were not bound under S. 77 of the Transfer of Property Act to account to the mortgagors.

The second is that if this view is accepted, the mortgagor's only means of recovering the arrears is by a separate suit and that the claim in respect of it is barred by limitation.

The third point relates to an area of 7 bighas 18 biswas which was taken up by Government at some time between 1860 and 1880 for the Canal Department. Compensation was paid for this to the mortgagees. Later on the land was restored to the original owners on repayment of the compensation money. The defendants' case was that they took this land back as owners and not as mortgagees.

The learned counsel for the appellants has relied on a ruling in *Shafi-*

un-nissa v. *Fazalrab* (1), in support of his contention that under S. 77 of the Transfer of Property Act there can be no accounting between the parties. In our opinion the ruling has no application to the facts of the present case. In that case the mortgagor had undertaken to pay a certain amount annually in addition to the profits of the land. In the present case the mortgagees undertook to pay Rs. 25 a year out of the profits. But the fact that a fixed sum was stipulated every year instead of a variable amount to be determined after calculating the profit or loss of the particular year does not appear to affect the question. In this view of the case no question of limitation arises.

In view of our finding on the first point, the second point taken by the appellants must be decided against them.

Dealing with the third point, it is clear that the intention of the Government was to return the property to the parties from whom it had been originally taken including the mortgagees, but in any case it appears from the recital in the second mortgage-deed that the property mortgaged was the same as in the earlier deed. From this it must be inferred that the parties had arrived at a settlement among themselves with regard both, to the property acquired by Government and restored to them and as to the compensation money paid.

The result is that the appeal fails on all three points and it is dismissed with costs.

Appeal rejected.

(1) [1910] 7 A.L.J, 787—7 I.C. 293.

1924 ALLAHABAD 592

MEARS, C. J.

Roshan Singh and another—Applicants.

v.

King Emperor—Opposite Party.

Crl. Rev. No. 550 of 1923, Decided on 14th December 1923, from the Order of Dt. Mag. Cawnpore D/- 14th September 1923.

Criminal P. C., S. 436—Proceedings under S. 107 are not included in the provisions of S. 436 Cr. P. C.

An order of the District Magistrate setting aside the order of the Sub-Divisional Magistrate discharging an accused under S. 107 is illegal as S 107 is not included in the provisions of S. 436 [P. 592, C. 2]

S. D. Sinha—for Applicants.

Asst. Government Advocate—for the Crown.

Mears, C. J.—This is an application in revision from an order of the District Magistrate, who set aside the order of the Sub-Divisional Magistrate on an enquiry under S. 107 of the Code of Criminal Procedure, and directed a further enquiry to be made. The Sub-Divisional Magistrate had come to the conclusion that Roshan Singh and Mannoo Chaube could not properly be called upon to furnish security for keeping the peace. The point that has been taken is that whilst the District Magistrate had power to set aside an order, he had no power to send the matter back for further enquiry. Apparently he was purporting to act under S. 436 of the Code of Criminal Procedure; but it has been pointed out by the Counsel for the applicant and accepted by Mr. Shankar Saran that the proceedings under S. 107 are not included in the provisions of S. 436. Under S. 438 the District Magistrate could have reported the result of his examination of the record to this Court, which would then have passed the appropriate orders. In these circumstances the order of the District Magistrate must be set aside, with the consequent result that the order of the first Court absolving Roshan Singh and Mannoo Chaube from any necessity to give security stands.

Order set aside

** 1924 ALLAHABAD 573

WALSH, AG. C. J. AND NEAVE, J.

Sita Ram—Applicant.

v.

Mt. Govindi—Opposite Party.

Civil Rev. No. 163 of 1923, Decided on 30th April 1924, connected with F. A. No. 214 of 1923, from an order of the District Judge of Benares, D/-11th October 1923.

*(a) *Guardians and Wards Act—The Act should not be narrowly construed.*

The provisions conferring special disciplinary powers on the Court for the benefit of minors must not be interpreted narrowly so as to leave no remedy against misbehaving guardians save by suit unless there are plain indications in the act prohibiting such a course. [P. 575, C. 1.]

** (b) *Guardians and Wards Act, S. 34 (c) and (d)—Interpretation of.*

"Account" used in connection with S. 34 (c) and (d) must mean a just and true account. Where the amount is a liquidated sum and clearly earmarked for a purpose, the Court can amend the accounts by striking out the objectionable amount or it may reject the accounts on the ground that it is an untrue account of the guardian's liability and direct the guardian to submit a fresh account within limited time. But it is the duty of the Court to decide what is the balance due and the guardian's version is not final. 21 C. W. N. 688 Dist. [P. 575, C. 1]

*(c) *Guardians and Wards Act, S. 45 (b)—Failure of guardian to pay balance makes him liable under S. 45.*

Failure of a guardian to exhibit true accounts or to pay the balance found due on such accounts would make him liable to the penalties mentioned in S. 45. [P. 576, C. 2.]

*(d) *Guardians and Wards Act, Ss. 35 and 36—Remedies by suit are not inconsistent with other remedies provided for by S. 45—Guardians and Wards Act, S. 45.*

The remedies by suit contemplated by Ss. 35 and 36 are not inconsistent with the remedies provided for by S. 45. [P. 576, C. 1.]

*(e) *Guardians and Wards Act, S. 47—Appeal.*

No appeal lies against an order refusing to take action under S. 45. [P. 576, C. 1.]

Jang Bahadur Lal—for Applicant.

Kailas Nath Katju and Pandit Madan Mohan Nath Raina—for Opposite Party.

Judgment.—This appeal raises various important questions with regard to the true interpretation of the Guardians and Wards Act, relating to the class of matters which had become the subject of controversy between this particular ward and his guardian, and also relating to the right of appeal. There being no express authority in this Court upon the subjects which have been raised before us, we hold ourselves free to take an independent view of the intention of the Legislature while at the same time paying due regard to the decisions of the High Courts in other Provinces which have been relied upon in the argument on behalf of the guardian.

So far as the facts are concerned the matter is extremely simple. The controversy relates to the conduct of the guardian and the accounts filed by the guardian when the minor was still a ward. The guardian is the adoptive mother of the ward. It appears that there is a substantial dispute as to the adoption, but this, for the purpose of this appeal, is immaterial, there being no question as to the adpotion, while the minor was her ward and continued to be her ward until he reached his majority. The minor was possessed of certain property, and the dealings by the guardian of the estate of the minor came from time to time before the District Judge. Substantially we are only concerned with two orders made by the District Judge, namely, one of the 4th of August of last year and a more or less consequential order, which is the one under appeal, made on 11th of October, 1923.

On the 4th of August certain accounts, which the guardian had been no doubt previously ordered to file, came before the learned Judge for consideration. For the present it is only necessary to refer to three matters contained in those accounts. There was some question with regard to some moveable articles, which is not now before us at all. Secondly, there was a question with regard to certain expenditure on the minor's marriage; and thirdly there was a question with regard to the expenditure by the guardian upon certain repairs to property; the two latter of course affecting the balance due from the guardian which she would be required to hand over upon the hypothesis that the items of expenditure

which she had accounted for were approved by the learned Judge.

With regard to the marriage expenses the learned Judge took a very reasonable view. The guardian improperly proceeded with the marriage and with the expenditure therefore without obtaining the necessary sanction of the Judge. The Judge upon *ex post facto* material was satisfied that in spite of the absence of the original sanction, that expenditure ought to be approved. He seems to have taken with regard to the repairs exactly the contrary view. In that case there had been no preliminary sanction and he came to the conclusion,—it is said that he did it without adequate material; that is a matter which we will deal within a moment or two,—that Rs. 900 alleged to have been expended by the guardian upon these repairs was not justified and ought to be made good. The logical consequence of that conclusion was—according to our view it could have been ordered by the learned Judge,—that the account should be amended and the balance payable by the guardian enhanced by the addition of the Rs. 900, the expenditure of which he refused to sanction. No formal order, however, of that kind appears to have been made. In October the matters came up again through an application by the minor who had then reached his majority, and who objected to various acts of the guardian including the failure to replace or refund this sum of Rs. 900; and the learned Judge with regard to that latter item made the order which is now in question. It is convenient to quote the order as made:—"I agree with the objection that no action can be taken under S. 45 with respect to the money, as this is not a sum in the hands of the guardian. It is only a matter which affects her discharge." It is difficult to follow that order. The learned Judge appears to hold that his powers are confined as regards action against the guardian to cases in which a sum of money is actually in the hands of the guardian. To take an extreme illustration of that view, it would appear to apply to a contumacious guardian who deliberately threw a box of rupees amounting to half a lakh belonging to the minor into the Ganges, and would presumably prevent, if the learned Judge's view is right, any amelioration by the Court having jurisdiction under this Act against a guardian for a wicked act of that kind. That illustration seems to suggest that there must be something wrong in the reasoning. To say that the matter only affects the discharge would indefinitely postpone the decision and seems to lead to an *impasse*, because, if the Court has no power to order the money to be refunded, the refusal of the discharge would have no effect, except that it would leave the minor unembarrassed in the only alternative remedy left to him, namely, a suit at law against the guardian to restore the money. It is obvious, therefore, that this contention put forward on behalf of the guardian, namely, that no action can be taken against him by the Court at all except with reference to actual property under his control or money in his hands raises a very serious question of the interpretation of the Act. We are of opinion that the Act must be construed with due regard to the object intended to be attained by the Legislature. The object may be summarized as the protection of the helpless minor and the control of the guardian charged with looking after his estate. In order to exercise that jurisdiction the Court has been vested with disciplinary powers which experience has shown are more effective in nine cases out of ten than the ordinary enforcement of rights by the prosecution of a suit under which individuals, who are *sui juris*, are left by the Legislature for the determination of their dispute. For example, if the guardian is threatening to destroy or make away with property belonging to the minor, and has not been called upon, possibly because of near relationship to give a bond at the commencement of his office of any substantial amount, if the District Judge's view is correct, the Court has no power to call upon him to replace what he has wasted and to submit to punishment if he does do so. The only remedy left is by an action at law, which may be indefinitely delayed by various obstruc-

tive means and prove in the end to be infructuous. It seems, therefore, to us that we ought not to cut down by narrow interpretation provisions which appear to have been made by the Legislature to enable this jurisdiction to be exercised, unless there are plain indications in the Act which prohibit us from taking what may be described as the wider view.

Coming now to the point raised by this appeal the whole discussion really turns upon the true meaning to be given to the provisions contained in S. 34 (*c*) and (*d*). It is useful to make this preliminary observation that the draftsman obviously intended these provisions to be read continuously as part of one proceeding. These sub-sections provide that the guardian shall, as and when required by the Court, and in such form as the Court shall direct, exhibit his accounts, and when required by the Court pay into Court the balance due on such accounts. The argument for the guardian is that the Court's power to direct payment of the balance is limited by such balance as the guardian chooses to show in the account which he exhibits. Indeed this argument is supported by the express language of more than one decision which has been cited to us from the reports of the High Court at Calcutta. It is not without significance that the cases cited are not to be found in the authorized Law Reports. We propose to deal with only one of them, as illustrating the argument on behalf of the guardian, namely, *Jagannath Panja* v. *Mahesh Chandra Pal* (1), which carries with it the authority of the well known Judge, Sir Ashutosh Mukerjee and of Mr. Cuming. They definitely held that in the case before them, on the accounts exhibited under S. 34 (*c*) the only order which the Court was competent to make was to call upon the guardian to bring into Court the sum so shown. We think that the learned Judges could hardly have realized the logical consequence of so holding. The word "account" used in this connection must mean a just and true account. It is inconceivable that the Legislature intended to enable the guardian to satisfy this duty under S. 34 (*c*) by saying in the account:—"As to a sum of Rs. 2,000, I yesterday paid this away to an insistent creditor of mine to prevent my arrest, and I am therefore unable to produce this sum of money, and the balance due from me is 8 annas." It is quite clear that it would be the duty of the Court on having such an account presented to it to strike out the sum of Rs. 2,000 paid away by the guardian for his own purpose, and to add it to the balance of 8 annas as shown by the guardian in the accounts, thereby making a balance due to the ward of Rs 2,000-8-0. The Court may do it of course in one of two ways. Where the amount is a liquidated sum and clearly earmarked for a purpose, it can amend the accounts by striking out the objectionable amount or it may reject the accounts on the ground that it is an untrue account of the guardian's liability and direct the guardian to submit a fresh account within a limited time. But it was never intended that it was not the duty of the Court, but the duty of the guardian, to decide what is the balance due on a true and just account. Then comes into play sub-section (*d*) of the same section (S. 34) by which the Court directs the guardian to pay the balance. If this interpretation is correct and this procedure is adopted, disciplinary action can be brought to bear on the guardian without the embarrassment from which the learned Judge seems to have sufferred in this case, and without the Court being compelled to hold that its hands were tied because the balance directed to be paid was not a sum actually in the hands of the guardian. If the guardian fails to pay the balance found by the Court on a correct account, he becomes contumacious and can be dealt with under S. 45. Sub-section (*b*) of section 45 clearly contemplated that such penalties are applicable to the misconduct of the guardian either in failing to exhibit the accounts—it would be the case, of course, if original accounts such as we have suggested by way of illustration being rejected, he fails to exhibit a true amended account—or to pay into Court the balance due as found

(1) [1916] 21 C.W.N. 688—36 I.C. 286—25 C. L.J. 149.

by the Court upon the basis of a true and just account. We think that this is the only common sense view of the matter and it is the only productive interpretation which can be put upon these provisions.

Reduced to its most concrete form the only formidable objection against this view, which Dr. Katju in his argument was able to press upon us was that Ss. 35 and 36 of the Act contemplate remedies by suit. But these remedies are not really inconsistent; they may well subsist together. As one of us pointed out during the argument, a foolish and obstinate guardian who chooses to go to prison and suffer the uncomfortable personal penalties would not thereby be relieved from his responsibility, and it is possible that those sections were merely a precautionary provision to prevent the argument that disciplinary penalties under S. 45 were intended to make an end of the matter. It is important to observe that the Legislature would have been guilty of a very short-sighted view if it had really intended that the minor should be left to a remedy by a suit in the manner we have attempted to illustrate. He may be only five years old. The extent of the untruth of the account might be successfully hidden by the guardian from the Judge, and until the minor reached some age of discretion when he was able to make discoveries which the Judge was not. In such a case it would be necessary, after the minor had discovered flagrant waste of this kind, to remove the guardian and to appoint another, and to direct the new guardian to take steps by way of suit on behalf of the minor for the recovery of the compensation due from the ex-guardian, who by the time a decree has been obtained might have disposed of any property, which would make the decree of the least value to the minor. For these reasons we differ from the view which has been pressed upon us as the view hitherto taken in Calcutta, and we have less hesitation in doing so as we are not dealing here with a question of substantive law or of legal principle, but merely of the true intention of the Legislature with regard to an administrative statute.

In conclusion we decide that the learned Judge was wrong. On the merits, if he was of opinion that the Rs. 900 was an amount in excess of what the guardian could rightly claim to have lawfully expended on repairs, he should have insisted upon fresh accounts correcting the balance due, and ordered her to pay such amount plus the Rs. 900 into Court. If he had done so he would have been able under S. 45 to accede to the application of the minor unembarrassed by the difficulties which he felt in the order under appeal. It is, however, pointed out to us on behalf of the guardian that on the other hand in arriving at this amount the learned Judge, not appreciating, according to our view, the extent of his jurisdiction, did not go as carefully as he might have done into the question of the amount, that is to say, by a summary order he accepted Rs. 900 as representing the liability of the guardian for unjustifiable expenditure, whereas in truth and in fact, according to the contention on behalf of the guardian before us, that amount might, if the learned Judge took up the matter again, be to some extent modified. We, therefore, think it our duty, if we have the power to do it, to overrule both the orders in this case, namely, the orders of the 4th of August and of the 11th of October, and to send the matter back to the learned Judge to reconsider the position of the guardian as regards these repairs in the light of what we have said and in the light of such evidence and arguments as the guardian is able to produce to satisfy him that he ought to alter his decision as regards the amount; and having come to a fresh decision in the matter to order the guardian to pay the balance due, and after giving her a reasonable time for payment of such amount, if she is ordered to pay, to exercise the powers given him under S. 45.

This brings us to the further legal difficulty raised by this appeal. Unfortunate as it may appear, we are of opinion that S. 47 does not give a right of appeal against this order. It is not an order regulating the conduct of the guardian, which is the only clause which can be suggested as

covering this case. It is rather an order inflicting a penalty upon a guardian for breach of an order. But in this particular case we hold that the learned Judge has failed to exercise the jurisdiction which was vested in him. One can understand his view if he consulted the Calcutta cases. Indeed the same view appears in at least one text book on the subject. But, taking the view we do of the intention of the Act, we come to the conclusion that he had jurisdiction to amend the account and direct payment of the balance due on the amended account and that he failed to exercise this power and perform the duty cast upon him by the Act. The appeal is formally dismissed. We allow the revision, cancel the orders of the 4th of August and of the 11th of October and send the case back to the Court below for decision of the question of accounts having regard to our views expressed above. The applicant will get one set of costs in this case.

Revision allowed.

✱ 1924 ALLAHABAD 577

PIGGOTT, J.

Kandhaiya Ojha and nother—Plaintiffs—Appellants.

v.

Mt. Jagrani Kuer — Defendant—Respondent.

Stamp Reference in S. A. No. 478 of 1923, Decided on 14th February 1924.

✱ *Suits Valuation Act, S. 8—Declaratory Suit.*

The relief claimed was that the plaintiff should be held to have a right and a perpetual injunction should be granted. The plaint stated that for purposes of jurisdiction the suit was valued at Rs. 3,038-7 and that a Court fee of Rs. 10 was paid and that relief for issue of injunction was valued at Rs. 10 and that Court fee of As. 12-0 was paid on it.

Held; that the suit was either for injunction or one for declaratory decree with consequential relief. In either case the Court fee payable is to be calculated according to the amount at which the relief sought is valued. Plaintiff in this case, by his own statement, has valued the suit and the relief at Rs. 3,038-7 and Rs. 10 and is liable for Court fee according to this amount. Under S. 8 of Suits Valuation Act, there must be the same valuation for purposes of jurisdiction as for Court fee. [P 578, C 2 & P 579, C 1]

M. L. Agarwala—for Appellants.

U. S. Bajpai—for Respondent.

Report—The suit giving rise to this appeal was brought by reversioners against a Hindu widow for the following relief:—

(*a*) It may be held that the plaintiffs have a right and a perpetual injunction may be issued by the Court to the defendant restraining her from wasting the debt realized or that may be realized in future.

(*b*) Any other relief which the Court may think just and proper with reference to the circumstances of the plaintiffs, may be granted to them.

(*c*) The cost of the suit may be charged to the defendant.

The suit was valued for purposes of jurisdiction at Rs. 3,038-7-0 but a Court fee of Rs. 10 was paid, apparently for a declaration, and 0-12-0 for injunction which was valued separately at Rs. 10-0 only. The office reported that this valuation of the relief for injunction is arbitrary which is not admissible by law. Practically the suit is for an injunction restraining the widow defendant from committing waste and as such is governed by S. 7 clause 4 (*d*) of the Indian Court Fees Act of 1870, read with S. 8 of the Suits Valuation Act of 1887. The value of the property in suit being given as Rs. 3,038-7-0 for purposes of jurisdiction is the value which determines the value for payment of the Court fee. It being so, the Court fee payable on the plaint comes to Rs. 180-0. Deducting Rs. 10-12-0 already paid there is a deficiency of Rs. 169-4 payable by plaintiffs-appellants for the Court of first instance.

The Court of first instance dismissed the suit. The plaintiffs then appealed to the lower appellate Court which Court too upheld the decree of the first Court. They then preferred this second appeal. In each of the two appellate Courts they valued their appeal at Rs. 3,038 and paid only 10-12 as Court fee. For reasons stated above the memorandum of appeal in each Court was deficiently stamped by Rs. 169-4-0.

The result is that the deficiency payable by the plaintiffs appellants for all the three Courts is Rs. 169-4-0 X 3 equal to 507-12-0.

Dr. M. L. Agarwala objected to this report on the ground that the suit is for declaration and injunction to restrain a Hindu widow from wasting the reversion. The value of the reversion is indicated as Rs. 3,038-7-0 and of the injunction as Rs. 10.

As their Lordships of the Privy Council observe in 35 Calcutta 202, "the value of the action must mean *the value to the plaintiff.*" In a suit by a reversioner to restrain waste, one can not put a figure on "the value to the plaintiff", because the plaintiff may get nothing in the end, even if he suceeds, as the person who is the nearest reversioner at the death of the widow will get the estate and that may not be the plaintiff. The relief for injunction cannot therefore be even roughly valued, or, at the most, it can be said to be incapable of valuation, so as to attract the provisions of Article 17 (vi) of the second schedule of the Court Fees Act.

The Case was referred to the Taxing Judge. On the reference being heard the following judgment was delivered :—

Piggott, J.—This matter has been laid before me as Taxing Judge, in order that I may pronounce an opinion as to the amount of Court fee legally payable by the plaintiffs in the Court of first instance, as also on their memorandum of appeal to the lower appellate Court and in second appeal to this Court There is a certain ambiguity about the wording of the plaint, although not, in my opinion, a material one. The suit was one by reversioners to the estate of a deceased Hindu against his widow in possession of the same. The relief sought is in the following words :—

"It may be held that the plaintiffs have a right and a perpetual injunction may be issued by the Court to the defendant restraining her etc."

If stress be laid on the fact that the words are 'it may be held', and not 'it may be *d*eclared', then this is a suit to obtain an injunction, classified in S. 7 of Court Fees Act (No. VII of 1870) under clause 4 (*d*). On the other hand, in stating the valuation of the suit the plaintiffs used the following language:—

"For purposes of jurisdiction the suit is valued at Rs. 3,038-7-0 and a Court fee of Rs. 10 is paid. The relief for issue of injunction is valued at Rs. 10 and a Court fee of 0-12-0 is paid on it".

If stress be laid on the wording of the above paragraph, then it must be held that the plaintiffs themselves have treated the suit as one for a declaratory decree in which consequential relief is also prayed. In that case the suit must be classified under clause 4 (*c*) of S. 7 aforesaid. In either event the Court fee payable must be computed according to the amount at which the relief sought is valued in the plaint. In arguing the case for the appellants Dr. Agarwala started with the assumption that, in so far as the suit was one for a declaration, it was subject to a fixed fee of Rs 10 under Article 17 of the second schedule to the Court Fees Act (No VII of 1870). He then took up the relief sought by way of injunction as if it had been claimed in a separate suit and contended that the plaintiffs had a perfect right to value this particular relief as they pleased, and further that in the present instance it was not unreasonable for the plaintiffs to put the value of this relief by way of injunction as low as Rs. 10. He referred in argument to clause 6 of Article 17 in the schedule aforesaid. This provides a fixed fee of Rs. 10-0 for every other suit where it is not possible to estimate at a money value the subject matter in dispute which is not otherwise provided for by this Act. This is the fundamental fallacy in the argument of the learned counsel for the appellants. Whichever way the plaint of this suit be looked at, it is one otherwise provided for by the Act. It is either a suit to obtain an injunction, or it is a suit to obtain a declaratory decree in which consequential relief is prayed. The argument for the appellants is so far correct that the plaintiffs in such a suit are entitled to state the value to them of the reliefs claimed and the Court Fee payable must be calculated according

to the amount at which the relief sought is thus valued. These provisions, however, must be read subject to S. 8 of the Suits Valuation Act (No. VII of 1887). What the plaintiffs in a suit like the present are not entitled to do is to put a high valuation on the plaint for purposes of jurisdiction, and thus obtain an adjudication on the matter from a Court of superior grade, while at the same time asking for a different and much lower valuation for the purposes of Court Fees. This is precisely the point which was considered by a Bench of this Court in the case of *Mt. Jageshara* v. *Durga Prasad Singh* (1) It is quite true, as was contended by counsel for one of the parties in the above case, that the intention of the legislature is that parties should first value their suits for purposes of Court Fees and, when this has been done the valuation for purposes of Court Fee will, in all cases falling under the operation of S. 8 of the Suits Valuation Act, be the same for purposes of jurisdiction. The present case is beyond question one to which the section above referred to applies. If the plaintiffs had stated that the value of the declaration and of the accompanying injunction was to them little more than nominal, if for instance they had fixed upon Rs. 100-0 as the value of the declaration and Rs. 10-0 as the value to them of the further injunction, or if treating the suit as one simply for an injunction, this being the substantial relief claimed, they had put a valuation of only Rs. 10-0 on the relief sought, I should not be prepared to say that they would not have been within their rights; but in that event the suit would have been filed in a Court of subordinate jurisdiction to that which actually entertained and disposed of it. The plaintiffs committed themselves to the statement that they valued the suit at Rs. 3,038-7-0, plus a further sum of Rs. 10-0 as the separate valuation placed upon the relief claimed by way of injunction. Under these circumstances they are not, in my opinion, entitled to contend that the relief sought in the suit as a whole had been valued by them in the plaint at Rs. 10-0 only. I uphold and affirm the report of the stamp officer. The plaintiffs appellants must make good the deficiency shown in the said report and I allow them one month's time within which to do so.

Stamp Officer's report affirmed.

(1) [1914] 36 All. 500—34 I. C. 670—12 A.L.J. 844.

★★ 1924 ALLAHABAD 579

WALSH AG. C. J. AND RYVES, J.

Md. Raza Khan and others—Plaintiffs—Appellants.

v.

Md. Askari Khan—Defendant—Resdent.

L. P. A. No. 157 of 1922, Decided on 16th May 1924, from a Judgment of Piggott, J. D/- 5th July 1922.

★★ (a) *Highway—Dedication or lost grant is usually presumed.*

The existence of a prior dedication with regard to an ancient public way takes very much the nature of what is called a lost grant. It is entirely different in its legal attributes and in its origin from a private way or easement which may be acquired by prescription following upon continuous user. The public cannot acquire a public way by prescription, and where a public way is found and no traces are forthcoming of its origin, the law presumes a dedication or a lost grant by the owner to whom the land belonged and who alone could dedicate it. [P 581, C 1]

(b) *Highway - English principles should be applied to cases of highways—Bengal and Assam Civil Courts Act (XII of 1887) S. 37 (2).*

It is sometimes dangerous to attempt to ascertain the law in India by the discussion of English cases. But in a matter where, legislation like the Municipalities Act, following closely upon English Local Government legislation, has left the matter at large, without following it up by modifying the general law on a topic such as public ways and highways the Courts in India are really enjoined to apply the English principles. P 581, C 2]

★ (c) *U. P. Municipal Act S. 113—In the case of public ways only the surface vests in municipality and not the soil.*

The words "vesting" and "belonging to" as applied to public ways which are vested in the Municipalities, clearly relate only to the streets, ways and passages or whatever else they may be which belong to the public.

In the case of a public way it is the surface and not the soil which constitutes the street, it is the surface along which the public have the right to pass and it is the surface for the purpose of lawful passage which defines the public right; and therefore, when the words

"belonging to" are used in the section, the Legislature did not intend to vest in the Municipalities anything more than what was necessary to constitute the street or passage and did not thereby deprive the owner of the land, who made the original dedication, of the soil which he necessarily reserved to himself when he was content to dedicate the surface to the use of the public. [P. 582 C. 1]

✱(*d*) *Damages—Special damage-very great inconvenience constitutes—C. P. C., S. 91.*

Where the plaintiff would, every day and every hour of the day when he desired to leave his house by the entrance on a particular side be compelled to go the other way and travel at least 3 or 4 times as far and 3 or 4 times as fast if he were pressed for time.

Held: that that would amount to special damage or a more particular form of nuisance suffered by him than by the general public. The Court ought to consider, even although a particular form of nuisance is not capable of being translated into rupees and annas, whether it is a substantial grievance which constitutes a wrong peculiar to the plaintiff which in the ordinary way Court of justice would remove by granting an injunction. [P. 582, C. 2.]

✱ (*e*) *C. P. Code. S., 91—Section is merely procedural.*

S. 91 is a provision for procedure. It does not purport to create a right which did not exist before nor it purports to deprive anybody of a right derived from the general law of the land. It is not a prohibitive section which prevents a person from asserting a right except in a particular way. [P. 582, C. 2.]

S. Z. Mehdi—for Appellants.

S. A. Haider—for Respondent.

Walsh, Ag. C. J.—In this case which raised a question of some importance, we regret that we find ourselves unable to agree with the view taken by the learned Judge. He says in his judgment that, he can find no case in the official reports in which the principle contended for by the appellant has been affirmed, or applied, by the Courts in India. In this, we think, he was misled. It appears that the relevant authorities were not quoted to him. The suit of the plaintiff has been dismissed on the ground that no one except the Municipal Board, in any particular place in which a public way is obstructed, has any right to complain of the obstruction in a Civil Court. We think that this is incorrect, and lays down the true principle too narrowly. The case is important, for this reason, because Municipal Boards, at any rate in these Provinces, are young, untrained and apparently not too well-equipped for the discharge of the difficult duties which they have to perform. For example, in the district from which this case comes, nobody could say that the condition of the roads, at any rate, in Allahabad, was such as would meet with the approval of an ordinary competent surveyor who was jealous of his reputation as a road authority, and the case is therefore important inasmuch as whereas considerable inconvenience might be inflicted upon individuals in these Provinces by obstruction to ways and streets which are vested in the Municipal authorities, inconvenience which cannot be compensated by cash, we are afraid that if individuals so inconvenienced had to wait until the Muncipal Board was stirred into sufficient activity to bring a suit in order to redress the grievance of obstruction they would probably have to wait a very considerable time. The point may be stated in a nutshell. The plaintiff and the defendant occupy adjoining houses in this locality. Between their two houses runs a road or lane which is obviously of great value and convenience to both of them. It is not suggested that it is a private way, jointly enjoyed by both of them. As to its origin the plaintiff's case is, and there appears to be no dispute about it, that it was originally his father's, that the road or way now vested in the public authority for use of the public was dedicated to the public by his father, that the soil still remains in his proprietorship and that, the defendant, by blocking up either end of this lane by means of pakka walls which absolutely prevent the plaintiff from using it in any shape or form, has caused not only an obstruction which must necessarily concern any member of the public who desires to use the road but which inflicts serious inconvenience and obstruction amounting to special damage upon the plaintiff. Except so far as concerns the special damage suffered by the plaintiff which is a question of fact and which has not been clearly determined by any judicial decision in the lower Courts, these facts appear to be agreed on both sides. Now the vesting in local authorities in these Provinces,

and the control exercised by local authorities in these provinces over streets, roads, lanes and ways which are public, and over which the public have a free, unrestricted right of passage, is statutory. As regards Allahabad from which this case comes it turns upon S. 113 of the Municipalities Act of 1916, or the corresponding section of the previous Act. With regard to the law of highways generally in India there is no Code. But dedication, which is the usual and almost invariable method by which land which was once in private ownership becomes, as regards its surface, reserved for the use of the public as a highway, precedes vesting and control. In other words, highways, streets and public roads are older than Municipalities, and older than the section which vests them in Municipalities; and therefore, the statement that a public way is vested in and belongs to a local authority under the Municipalities Act, 1916, is only a partial statement of the legal position, a point which we think the learned Judge overlooked. Every public road or way must have a history, and every piece of land in the Province must have had an ownership at some time or another, and land which was once in private ownership can only be converted into public use in respect of its surface, by an act of dedication. A dedication means something more than a gift. It is derived from the word "to give", but it involves a setting apart by the donor for a specific purpose. Certainly in England, and probably in an ancient country like India, it is impossible, in the vast majority of cases, to say when this dedication took place. So that, as a matter of accurate statement or historical truth, the existence of a prior dedication with regard to an ancient public way, takes very much the nature of what is called a lost grant. It is entirely different in its legal attributes, and in its origin, from a private way or easement which may be acquired by prescription following upon continuous user. The public cannot acquire a public way by prescription, and where a public way is found, and no traces are forthcoming of its origin, the law presumes a dedication or a lost grant by the owner to whom the land belonged, and who alone could dedicate it. These principles, which are really elementary, but not always clearly understood, are the law as understood and accepted by generations of lawyers in England. It is, of course, sometimes dangerous to attempt to ascertain the law in India by the discussion of English cases. But in a matter of this kind, where, in legislation like the Municipalities Act, following closely upon English Local Government legislation, the legislature has left the matter at large, without following it up by codifying the general law on a topic such as highways, the Courts in India are really enjoined to apply the English principles. That statement of the law is borne out by Act XII of 1887, more generally known as "The Bengal and Assam Civil Courts Act," which codifies and carries forward the old Bengal Regulations. S. 37 (2) enjoins upon the Court in cases not provided for by the foregoing section which deals with traditional Muhamedan and Hindu law, or by any other law for the time being in force, which of course includes a Municipal statute, the duty of acting according to justice, equity and good conscience. In the case of *Waghela Rajsanji* v. *Sheikh Masludin*, (1) the Privy Council has declared that direction is generally interpreted as meaning the application of English Principles, unless there is something in the state of Indian society which makes those principles either inapplicable altogether, or necessarily modified. We think that the case of public ways and highways is one of those cases which must be governed by the rule of equity, justice and good conscience as interpreted by the Privy Council, and that therefore, the English principles are applicable, as was argued by the appellant before the learned Judge of this Court. Without going into the case, we merely draw attention to the fact that in saying this, we are not laying down any novel proposition although it does appear to be a proposition which was overlooked in the argu-

(1) [1887] 11 Bom. 551—14 I. A 89.

ment of this case, and by a distinguished lawyer of this Court. But it is a proposition which has been clearly enunciated and accepted by at least three of the High Courts including Allahabad, if not by all of them; *Fazal Haq* v. *Maha Chand* (2), *Satku Valad* v. *Ibrahim* (3), *Adamson* v. *Arumugam* (4).

The Madras case is particularly interesting because the application of the rule of equity, justice and good consciene was used there to enforce the rule of the English law against the plaintiff, that is to say, in holding that no action can be maintained for what is a mere general obstruction of a highway affecting the whole public at large, by one person without proof of special damage, a fact which was recognised by the learned Judge in his judgment. But the right to sue, while carefully guarded as laid down in I. L. R. 9 Madras, is not destroyed as the Judge seemed to think by the fact that the road has become vested in, and belonged to, the Municipality. We might here observe lest it be thought that we are ignoring the expression "belonging to" which is contained in S. 113, of the Municipalities Act that the words "vesting" and "belonging to" as applied to public ways which are vested in the Municipalities, clearly relate only to the streets, ways and passages, or whatever else they may be, which belong to the public. In the case of a public way it is the surface and not the soil which constitutes the street: it is the surface along which the public have the right to pass, and it is the surface for the purpose of lawful passage which defines the public right. And therefore, when the words "belonging to" are used in the section, it is obvious that the legislature did not intend to vest in the Municipalities anything more than what was necessary to constitute the street or passage, and did not thereby deprive the owner of the land who made the original dedication of the soil which he necessarily reserved to himself when he was content to dedicate the surface to the use of the public. So that, the Courts in India and the Courts in England are unanimous in confining the right of suit and the right to compensation, in the case of particular individual, to person who can establish special damage. Special damage is not always easy to define or foresee, but it is well stated in the judgment in I. L. R. 2 Bombay at page 459:—

"More particular damage by the nuisance than the public in general, as if any accident occured to him, or he be obliged to go a greater distance and be thereby put to extra expense in the conveyance of his goods or otherwise."

And without in the least desiring to dictate to the lower Court, it is material to point out inasmuch as this part of the case has not really been considered in detail and it is really a question of fact, that, in this particular instance it would appear from the map that the plaintiff would, every day and every hour of the day when he desired to leave his house by the entrance on what is apparently the eastern side, and turning at right angles to the left to walk in a northern direction, be compelled to go the other way and travel at least 3 or 4 times as far and 3 or 4 times as fast if he were pressed for time. On our view that would amount to special damage, or a more particular form of nuisance suffered by him than by the general public. And we think the lower appellate Court ought to consider even although the particular form of nuisance is not capable of being translated into rupees and annas, whether it is a substantial grievance which constitutes a wrong peculiar to the plaintiff which in the ordinary way a Court of justice would remove by granting an injunction; for example, a mandatory injunction to remove the obstructing walls.

Some reference was made by counsel who argued the case very fairly on behalf of the respondent, to S. 91 of th Civil Procedure Code. We do not propose to attempt to explain to what extent S. 91 overlaps, or is parallel with, the right of a local authority like a Municipality, to sue in respect of an obstruction to a public right of way, or how far it affects sons like the plaintiff who wished to sue with the sanction of the Legal Remembrancer. We would merely utter a word of warning that S. 91 is

(2) [1875] 1 All. 557.
(3) [1877] 2 Bom. 457.
(4) [1886] 9 Mad. 463.

a provision for procedure. It does not purport to create a right which did not exist before. It certainly does not purport to deprive anybody of a right derived from the general law of the land. Sometimes it is said to be, what one may call, a prohibitive section, which prevents a person from asserting a right except in a particular way. A Court, which applies the section, must avoid treating the section as though it went further than it does and deprived a person, or individual, of a right, and we think, we may say this much at any rate, without going outside the question which arises in this case, that it cannot possibly be held to apply to this particular case. For example, a gentleman who was more inconvenienced by the obstruction to a public way in his immediate neighbourhood than any one else might be the most unpopular person in the neighbourhood. Indeed it is the fate of persons who are unpopular, to find themselves frequently more inconvenienced by the acts of their neighbours than other people, and it would create injustice if a man who happened to be so unpopular that he could not get anybody to join with him in a suit, could be deprived entirely of the use of a necessary public way merely because he could not show under S. 91 of the Code of Civil Procedure that he was one of two persons who were desirous of asserting their right. We think that we are merely declaring again the law as it has been recognised to exist for a long time past. We must allow the appeal and remand the case to the lower appellate Court to decide the following issues:—

(1) In what respect and to what extent, if any, has the plaintiff suffered a more particular kind of obstruction or inconvenience beyond that of the general public by reason of the walls built by the defendant.

(2) Would the plaintiff be adequately compensated by a sum of money as damages, and a refusal of the injunction so as to leave the walls permanently standing?

(3) Has anything happened other than the dedication of this public way and the vesting section of the Municipalities Act to take the original ownership of the land out of either the plaintiff or his father?

Either party will be at liberty to tender fresh evidence. Costs will abide the result.

Our attention is now drawn to a further authority *Tota* v. *Sardar Singh* (5) in which it is said that a zamindar does not sue as a gardian of the public in relation to a way in his village but in respect of an interference with his own rights of property. We will consider this when the case comes back with the findings on the further issues remitted.

Appeal allowed, case remanded.

(5) [1888] 10 All. 553—(1888) A. W. N. 213.

1924 ALLAHABAD 603

LINDSAY AND KANHAIYA LAL, JJ.

Mahomad Nazeer alias *Bhikhai and others*—Defendants—Appellants.

v

Sheikh Muhammad Sulaiman—Plaintiff—Respondent.

S. A. No. 1038 of 1922, Decided on 19th February 1924, against the decree of the Subordinate Judge of Jaunpur, D/- 27th March 1922,

Pre-emption—Custom of, is not abrogated by partition of a village nor by its becoming incapable of being applied in full to altered conditions effected by partition.

A partition does not abrogate a custom of pre-emption. A custom may survive but its scope may be narrowed as it often is when partition is effected. The effect of a partition may be to deprive a certain number of those, who were formerly entitled to pre-emption of their right but the custom cannot be entirely abrogated. It may still apply to other classes when the partition has not deprived of the right of pre-emption. A partition is the act of parties and even if some of the sharers in a village choose to seek a partition and bring about by their own act their exclusion from a right they formerly enjoyed, the other sharers who remain within the coparcenary body should not be deprived of the right they had. The proper view appears to be that the custom persists and is applicable to all who notwithstanding the partition continue in the same relation or relations as formerly entitled them to claim pre-emption 22 All. 1 and 13 A.L.J. 236 Foll.

[P. 604, C. 1, 2.]

Iqbal Ahmad—for Appellants.

Mushtaq Ahmad—for Respondent.

Judgment—The appellants-vendees were defendants in a suit brought by the plaintiff-respondent, Sheikh Muhammad Sulaiman to pre-empt a sale of property in two villages Rafipur and Khwajapur made in their favour by the third defendant Salika Bibi.

This lady is a first cousin of the plaintiff and she and the plaintiff are co-sharers in the same *mahals* in the two villages. The purchasers have shares in these villages but in different *mahals*. The plaintiff relied upon the custom set out in the *wajib-ul-arzes* prepared at the last revision of settlement in or about the year 1884. (The district is permanently settled).

It is admitted that since these *wajib-ul-arzes* have been prepared there has been perfect partition of both the villages in suit and it is this fact which has been relied upon by the defendants appellants in order to defeat the plaintiff's claim. It is common ground that no fresh *wajib-ul-arzes* were prepared after partition and so it was contended that the custom had been abrogated. In the alternative it was pleaded that if the custom was still in force the plaintiff had no better right than the defendants-purchasers as all are owners of shares in the two villages.

This defence was accepted by the trial Court and the plaintiff's suit was dismissed. In appeal this decision was reversed and the suit decreed.

In this Court three pleas are taken in the memorandum of appeal.

It is said in the first ground that the existence of the custom has not been proved. The second ground takes the same point in a different way : it is said that the Court below should have found that the custom had been abrogated by the partition.

Lastly we have a plea that in any case the plaintiff has no right superior to that of the purchasers.

It is not possible to sustain the argument that a partition abrogates a custom of pre-emption. That is settled by the Full Bench decision in *Dalganjan* v. *Kalka* (1) and also by the Privy Council decision in *Digambar Singh* v. *Ahmad Sayeed Khan* (2).

The question is whether the custom as recorded in the old *wajib-ul-arz* has survived the partition and whether it can be applied to the altered state of things brought about by the partition. It has been argued before us that if the custom as recorded before partition cannot be applied in its entirety in the altered conditions effected by the partition it must be deemed to have been abrogated. We do not think there is anything in either of the rulings cited above to justify this proposition.

A custom may survive but its scope may be narrowed as it often is when partition is effected, as is apparent from the decision in *Dalganian's case* (1).

The effect of a partition may be to deprive a certain number of those who were formerly entitled re-empt of their right but it never seems to have been suggested that it results from this that the custom is entirely abrogated. It may still apply to other classes when the partition has not deprived of the right of pre-emption. A partition is the act of parties and it is difficult to see why if some of the sharers in a village choose to seek a partition and bring about by their own act their exclusion from a right they formerly enjoyed, the other sharers who remain with the co-parcenary body should be deprived of the right they had. The proper view appears to be that the old custom persists and is applicable to all who, notwithstanding the partition continue in the same relation or relations as formerly entitled them to claim pre-emption.

The *wajib ul-arz* of Khwajapur provided for a right of pre-emption first in favour of sharers who were members of the same family next in favour of "*hissedaran qaribi*" and after that in favour of "*hissedaran deh.*"

In the case of Rafipur the scheme was somewhat different. The first right was given to sharers, members of the same family the next to sharers

(1) [1899] 22 All. 1—(1899) A.W.N. 111 (F.B.)

(2) [1915] 37 All. 129—42 I.A. 10—13 A. L. J. 236—19 C. W. N. 393—17 M. L. T. 193—2 L. W. 303—21 C. L. J. 237—38 M. L. J. 556—17 Bom. L. R. 393—28 I. C. 34—1915 M. W. N. 581 (P. C.)

in the same *patti*, the third to sharers in the same *thok* and the last to "*hissedaran deh.*" Now that new *mahals* have been formed some of these classes of pre-emptors have necessarily disappeared *e. g.*, the "*hissedaran deh.*" But there can be no difficulty in holding that the custom is still applicable as regards the class denoted by the expression "*sharik khandani*" who in both villages have clearly the best right of all. The vendees can only claim as "*hissedaran deh*" but under the altered constitution of both the villages they would not be entitled to pre-empt in a *mahal* in which they had no share.

The plaintiff here is clearly a "*sharik khandani*" of the vendor: they are, as has been said first cousins and undoubtedly belong to the same family being descended from a common grandfather.

The plaintiff is entitled to the benefit of the custom which, so far as the class to which he belongs is concerned must be deemed to have survived the partition.

The decree of the lower appellate Court is correct. The appeal fails and is dismissed with costs including, in this Court, fees on the higher scale.

Appeal dismissed.

✱ 1924 ALLAHABAD 605

SULAIMAN AND KANHAIYA LAL, JJ.

East Indian Railway Company, Limited—Defendant—Appellant.

v.

Lala Janki Prasad and another—Plaintiffs—Respondents.

F. A. No. 478 of 1921, Decided on 4th June 1924, from the decree of the Resident and District Judge for Railway, at Gwalior.

✱ (a) *Railways Act, S. 72—Company may limit its liability as bailee by special contract—Risk Note form B.*

A Railway Company when entrusted to carry goods from one station to another has under S. 72 the liability of a bailee. The Company can however contract itself out of that liability by a special contract in one of the forms recognised by Government. Risk Note B is one of those forms. [P. 607, C. 2]

(b) *Railways Act, S. 72—Risk Note form B—No loss of complete packages—Company is not liable for damages to package though due to its wilful neglect.*

When all the bags do arrive and none of the bags are missing the company cannot be held liable even though it be found that the bags had been damaged owing to the wilful neglect of the Railway Company. [P. 608, C. 1]

(c) *Railways Act, S. 72—Liability as bailee continues till date of delivery of goods to consignee.*

The position of the Railway Companies as carriers continues till the date of the delivery to the consignee. [P. 608, C. 2]

(d) *Civil P. C., O. 41, R. 4—Common decree against two defendants—Appeal by one defendant making other a Respondent on grounds common to both—Court may transfer Deft.—Respondent as Appellant:*

Where a joint decree was passed against two defendants but one only appealed against it making the co-defendant as Respondent on grounds common to both and the defendant respondent filed cross-objections to the decree the Court directed the defendant-respondent to be transferred from the array of respondents to that of Appellants and proceeded to determine the appeal on the ground common to both. [P. 609, C. 1]

B. K. Mukerji and *O. M. Chiene*—for Appellant.

Ladli Prasad Zutshi and *Balmukund*—for Respondents.

Sulaiman, J.—This is an appeal by the East Indian Railway Company, defendant No. 2, arising out of a suit for compensation for loss of sugar and for damages. It appears that on the 15th of May, 1919, 125 bags of sugar No. 6,713, invoice No. 2 were despatched from Kantapukar station on the East Indian Railway to Gwalior station on the Great Indian Peninsula Railway. A person said to be named Chhote Lal, purporting to act on behalf of the consignor, despatched these goods at Kantapukar station. The wagon containing the consignment was transferred at Manikpur and arrived at Gwalior on the 28th of May 1919. It is the case of both the parties that when the wagon arrived at Gwalior the seals were found intact, indicating that there had been no pilfering in transit. The goods were unloaded and placed in the goods-shed for some 2 days before they were delivered to the plaintiff. At the time of delivery, however, it was found that many of the bags were cut and a good part of the sugar had disappeared and

there was a shortage of about 83 maunds and odd in quantity.

The plaintiff claimed Rs. 1,841-6-0 as compensation for the sugar lost and Rs. 240 as interest and damages on the said amount.

The pleas taken by the two Companies in substance were that the goods despatched had been defectively packed so as to be liable to damage, leakage or wastage in transit, and the risk note Form A had been taken. They had also been despatched at a reduced rate under risk note Form B. It was therefore pleaded that under no circumstances the plaintiff was entitled to any damages for the loss inasmuch as no complete package had disappeared, and that there was no wilful negligence on the part of the Railway Companies.

At the trial the plaintiff appears to have disputed the genuineness of the risk note form A, risk not form B as well as the forwarding note, which were relied upon by the Railway Companies.

The learned District Judge, the Resident of Gwalior, came to the conclusion that it was not satisfactorily established that risk note form A had been actually executed to the knowledge of the consignor, or with his authority, but that having regard to the fact that lower rates were charged it should be presumed that the goods were despatched under risk note form B. As to the forwarding note he was rather suspicious as to whether some entries in it had not been made subsequently. He further came to the conclusion that there was wilful negligence, or theft, or both, on the part of the servants of both the defendant companies He found it difficult to attribute how much of the loss was due to the wilful negligence or how much to theft on the part of the servants of the two Railways or to apportion the liability for the negligence and theft between them. Holding that under the circumstances the defendant companies were not at all protected, he finally passed a decree in these terms :—

"I give a decree in favour of the plaintiff against the two Railway Companies jointly, *i.e.*, in equal shares for a sum of Rs. 1,675 interest on the sum at 6½ per cent. from the 20th May 1919 to date with cost".

The East Indian Railway Company has filed an appeal impleading the G. I. P. Railway Company as one of the respondents. The latter Company has filed cross-objection against the decree.

The first point which we have to consider in appeal is the terms of the contract under which the goods were despatched for Kantapukar station.

We are of opinion that the learned District Judge is not quite correct in thinking that it is not established that the goods were despatched under risk note form A. As a matter of fact we find that in the notice which was sent on behalf of the plaintiff on the 19th August 1919 to the Agent, G. I. P. Railway it was clearly admitted that "the execution of the risk note form A could not be denied." This original document had not been produced and was admitted at the trial by the plaintiff's vakil. It was also furtner admitted in that notice that there was a remark made on the railway receipt that bags were 'slack in condition.' Risk note form A is only executed when the articles tendered for carriage are either already in a bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. It is clear to our mind therefore that it must have been noticed at the place of despatch that the goods were either in a bad condition or defectively packed and it was on that account that the risk note form A was taken. In order to prove the risk note form A the plaintiff has produced one of the Railway clerks at the station of despatch who attested this document on the date it bears. He proves that he signed it on that date. It is true that no attempt was made on behalf of the defendant companies to summon Chhote Lal who purports to have signed it on behalf of the consignor. At the same time no attempt was made on behalf of the plaintiff also to produce this person, who must be the agent of his consignor, to deny his signature on this document. The plaintiff is a consignee. He had to admit that the goods were consigned by Messrs. Bhagat Ram Shiva Pratap and must have been despatched either

by the proprietors or by some one acting as their agent. Great reliance however is placed on the circumstance that the railway receipt which must have been returned to the G. I. P. Railway on delivery has not been produced. At the trial it was suggested that it must have been destroyed after the expiry of six months. Whether this is or is not a true explanation we are unable to say. The fact, however, remains that the railway receipt which was a very important document in the case in dispute is not forthcoming. In spite of this, however we are of opinion that having regard to the admission of the plaintiff himself in his previous notice it must be accepted that the goods were despatched under risk note form A and that the form which has been produced in this case and which was attested by the witness Serish Chandra Biswas is the document which was signed by the person who gave his name as Chhote Lal and who really tendered the goods for despatch to Gwalior.

The other disputed document is risk note form B. It also purports to bear the signature of the same person Chhote Lal. We have compared the signatures on forms A & B as permitted by S. 73 of the Indian Evidence Act and we are satisfied that both these documents bear the signatures of one and the same person. Furthermore form B also is proved by the witness Biswas in the same way, *i.e.*, that it was attested by him on the date it purports to bear and was written at Kantapukar station.

As regards the forwarding note the main point urged against its genuineness is the entry under the column "Condition of goods" which is as follows:—

"Gunny packing weak and strained; several bags also liable to sweat in transit due to inherent moisture. Several bags, torn, resewn and badly slack condition."

This purports to be in an ink different from the ink with which the entries above referred to were filled up. But the ink, as pointed out by the learned judge, is similar to the ink used in the marginal notes as to the condition contained in form A. We are of opinion that this entry is by no means suspicious When the plaintiff admitted that the form A was executed and when we are satisfied that form A could never have been executed unless the goods were in a bad condition or defectively packed, there is really no suspicion in finding an entry to that effect in the forwarding note. The forwarding note also purports to have been signed by the same person Chhote Lal whose signature tallies with the signatures on forms A & B. Although the defendant companies have not produced better evidence which they could have produced, yet we are satisfied that no good ground is shown for rejecting the genuineness of the three documents. We may point out that the learned District Judge himself presumed that the form B was a genuine document.

A Railway Company, when entrusted to carry goods from one station to another, has, under S. 72 of the Railways Act the liability of a bailee. The Company can however contract itself out of that liability by a special contract in one of the forms recognised by Government. Risk Note B is one of those forms. Under this risk note the consignor holds the Company harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to the said consignment, from any cause whatever, except for the loss of a complete consignment, or of one or more complete packages forming part of a consignment, due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit, over the said Railway or lines working in connection therewith, or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment, provided the term "wilful neglect" be not held to include fire, robbery from a running train or any other unforeseen event or accident.

The plaintiff had suggested that some of the bags were found missing. The finding of the Court below is

against the plaintiff and no serious attempt has been made before us to challenge that finding. We must therefore accept that 125 bags did arrive at Gwalior, although some of them had been cut or were broken and their contents had been partially removed or had disappeared. All the same it is to be conceded that under the risk note form B the company was held free from all responsibility for any loss, destruction or deterioration or damage to the consignment except when there was a loss of a complete consignment or one or more complete packages forming part of the consignment. It follows therefore that when all the bags did arrive and none of the bags were missing the company cannot be held liable even though it be found that the bags had been damaged owing to the wilful neglect of the Railway Company. It is therefore unnecessary for us to go into the question in what way the damage was caused to the sugar. We are satisfied that under the terms of the contract, which were entered into between the parties in consideration for accepting lower rates the defendant companies were free from responsibility unless a whole package had been lost.

The learned counsel for the defendant appellant has however urged that the risk note was merely an indemnity bond signed by the consignor for the benefit of the Company and could not affect the rights of the consignee, who was entitled to receive the consignment. The contention is that he must have a decree against the Railway Companies, which however, may have their remedy against the consignor. He relies in support of his contention on the case of *The Rohilkhand and Kumaun Railway* v. *Ismail Khan* (1). We are unable to accept this contention. The case relied upon was quite different inasmuch as there the loss had been caused to the plaintiff by refusal of delivery after the consignment had arrived and a subsequent unjustified sale.

It is next contended that the position of the Railway Companies was that of a warehouseman and they were liable for the loss occasioned after the consignment had arrived at Gwalior. In support of this contention reliance is placed on the case of *Bengal & North Western Railway* v. *Mulchand* (2). We are unable to accept this contention either. The contract of the Railway Companies as pointed out in that case at p. 660, was not only to carry the goods but also to deliver them. It follows that the custody of the goods with the carriers must extend beyond the period of their transit. Risk Note form B also uses the expression "during and after transit." We are satisfied that the position of the Railway Companies as carriers continued till the date of the delivery to the plaintiff. After the arrival of the goods at Gwalior and before delivery they never either expressly or impliedly agreed to hold the custody of the goods as warehousemen. Their liability therefore cannot be extended.

In this view of the matter the suit was wrongly decreed in favour of the plaintiff and against the Railway Companies.

The G. I. P. Railway has not filed an appeal against the decree but has preferred a cross-objection under O. 41, r. 22, C. P. C. A preliminary point is taken on behalf of the plaintiff-respondent that such a cross-objection does not lie. It strongly urged that the decree having been against the G. I. P. Railway Company it was their duty to appeal from it against the plaintiff and not merely file a cross-objection against the co-defendant appellant. It is not necessary for us to consider whether under the provisions of O. 41, r. 22, which differs slightly from the old S. 567, a co-respondent can file cross-objections against another co-respondent. The decree passed by the learned District Judge in favour of the plaintiff against the two Railway Companies proceeds on a common ground, and the G. I. P. Railway Company can be transposed from the array of the respondents to that of the appellant, as suggested by the counsel for the two Companies.

The position then is this. There was a decree for Rs. 1,675 with costs passed

(1) [1915] 13 A.L.J. 417—29 I.C. 207.

(2) [1920] 42 All. 655—18 A.L.J. 764—58 I.C. 1000.

jointly against both the defendants, who were to be liable in equal shares. One of the defendant companies, namely the East Indian Railway, appeals from that decree and the relief claimed by it that this Court be pleased to reverse the decree of the lower Court so far as it is against the appellant with costs, or grant such further relief as it deems fit. This appeal as originally laid, was directed against the decree so far as it affects the East Indian Railway Company and was valued at Rs. 837-8-0 *i. e.*, half the amount decreed. The G. I. P. Railway challenges the decree on the same ground. It has paid the Court fee on its half share of the total liability imposed by the decree. The E. I. Railway has paid the Court fee on the remaining half share. We direct that the G. I. P. Railway Company be transposed from the array of respondents to that of the appellant, and proceed to determine the appeal on the ground common to both. The necessary alteration will also be made in the valuation given in the memorandum of appeal. The whole case is thus before us.

We allow the appeal and set aside the decree of the Court below against the defendants, but considering the unsatisfactory way in which the case has been conducted, the omission of the Railway Companies to produce the Railway receipts and the faulty manner in which the consignor had packed his goods, we direct the parties to bear their own costs throughout.

Appeal allowed.

1924 ALLAHABAD 609

SULAIMAN, J.

Surjan Singh and others—Defendants—Appellants.

v.

Umari Singh and another—Plaintiffs—Respondents.

S. A. No. 620 of 1922, Decided on 17th July 1923, against the decree of the District Judge of Farukhabad, D/- 28th January 1922.

1924 A/77 & 78

(a) *Agra Tenancy Act, S. 167—Suit between rival claimants is cognisable by Civil Court.*

A suit between rival claimants to a tenancy one for a declaration of title by one against a rival claimant lies exclusively in a Civil Court and such a suit is not one which is covered by S. 167 of the Agra Tenancy Act. 11 I.C. 268; 8 A.L.J. 1009; 33 A. 795 Foll. [P 611 C 1]

(b) *Civil P. C., S. 11—Dispute between rival claimants once decided by Revenue Court cannot be re-opened in a Civil Court—Agra Tenancy Act, S. 167.*

Although S 167 of the Agra Tenancy Act does not apply to suits between rival claimants to a tenancy, nevertheless once a matter has been decided by a Revenue Court it cannot be re-opened in a Civil Court. This view is not based on the provisions of S. 167 nor on the principle of *res judicata* but rather on the general ground that the effect of allowing such a thing to be done would be to nullify the decree of the Revenue Court which is final and binding on the parties. 41 A. 97; Foll. [P 611 C 1]

Baleshwari Prasad—for Appellants.

Durga Prasad—for Respondents.

Judgment.—This is a complicated case in view of the multiplicity of the rulings of this Court, some of which are not easily re-concilable with others.

The present defendant No. 1 instituted a suit in the Revenue Court for arrears of rent against the plaintiffs, and the Assistant Collector by a judgment dated the 21st of January 1921 decreed the claim for Rs. 3-5-4. His judgment proceeded mainly on the presumed correctness of the entries of the Reveuue papers and his finding in effect was that plot No. 211/3 which was in dispute in that case was a sir plot belonging to the present defendant No. 1. An appeal was filed from that judgment and was pending in the Court of the Collector when the present suit was instituted in the Civil Court for a declaration that the said plot No. 211/3 as well as two other plots Nos. 211/1 and 211/2 were occupancy holdings of which the plaintiffs and the defendants were joint tenants. The cause of action alleged in the plaint was the decree for arrears of rent passed by the Assistant Collector which was said not to have become final inasmuch as an appeal from that decree was pending in the Appellate Court on the revenue side.

The defendants again asserted that all these three plots were the sir plots

of the defendants, the plaintiffs being only shikmi tenants. There were also pleas raised to the effect that the claim was barred by S. 11 of the Code of Civil Procedure as well as by S. 167 of the Agra Tenancy Act.

The learned Munsif who tried the case over-ruled the legal objections and decreed the suit on the merits holding that the plaintiffs and the defendants had a joint interest in the lands which were occupancy holdings. On appeal the findings and the decree of the first Court have been upheld by the learned District Judge.

I may mention that, simultaneously with these proceedings, the proceedings in the Revenue Court have continued. After the passing of the first Court's decree the Collector appears to have set aside the decree of the Assistant Collector and to have dismissed the suit for arrears of rent. A second appeal from that order is, I am informed, still pending before the District Judge. It is not quite clear whether the District Judge on the revenue side has or has not stayed proceedings to await the result of the final decision in the civil suit.

The main point raised in this appeal is that the claim was barred by S. 167 of the Agra Tenancy Act. In cases arising under this section there have been such a large number of rulings of this Court that it is practically impossible to summarise or even to refer to them. If the matter had been *res integrum* I would have had no hesitation in saying that the present suit was not cognisable by a Civil Court. S. 167 consists of two parts. The first part directs that "all suits and applications of the nature specified in the fourth schedule shall be heard and determined by the Revenue Courts." This apparently gives jurisdiction to the Revenue Courts to try not only suits and applications mentioned in the fourth schedule but also all such as are of the nature specified therein. The second portion of it says that "no Court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which any suit or application might be brought or made". This confers exclusive jurisdiction on the Revenue Courts. And, therefore, all Courts other than Revenue Courts must refrain from trying such questions. It is noteworthy that the expression used is not "suits and applications" but "any dispute or matter in respect of which any such suit or application might be brought or made." The section has been obviously made very comprehensive in order to include all cases in which disputes arise in respect of a matter which can be disposed of by the Revenue Courts. The object of the section to my mind clearly is that all suits, no matter in what way the plaints are framed, should be instituted in a Revenue Court provided the dispute is such as can be disposed of by that Court.

If this were the correct view there is no doubt that the true test to apply in all such cases would be to ask the question 'whether the dispute which arises in the present case is one in respect of which any suit or application could have been brought in the Revenue Court?' It is true that a suit for a mere declaration against the defendant only to the effect that the parties are joint tenants of a holding is not one which falls within the fourth schedule. But if a suit were brought under S. 95 of the Tenancy Act impleading the zamindar and asking for a declaration that the plaintiff was a tenant of the zamindar jointly with the *pro forma* defendant such a suit would clearly be exclusively triable by the Revenue Courts. It is also apparent that a mere declaration obtained in a Civil Court against the defendant would in no sense be binding on the landlord, who is no party to those proceedings and who may very well not recognise the present plaintiffs as his tenants. As against the landlord the Civil Court decree would be futile and a fresh litigation in the Revenue Court would be necessary. This being so, one would expect that the proper course to adopt in disputes about tenancy rights is to obtain a declaration in the Revenue Court both against the landlord and the rival tenant. In that view of the matter, I would have had no doubt that the dispute which arises in the present suit is one in respect of which a plaint if properly

framed, could and ought to have been filed in the Revenue Court.

However, sitting as a Single Judge, I am bound to follow Division Bench cases of this Court. The series of authority against my view is overwhelming and I am bound to submit to the rule of law laid down therein. In *Bhup* v. *Ram Lal* (1), *Jagannath* v. *Ajudhia Singh* (2), *Ganesh* v. *Kundan* (3), *Inayat-un-nissa* v. *Salim-un-nissa* (4), and *Najibullah* v. *Gulsher Khan* (5) it has been held by this Court that a suit between rival claimants to a tenancy lies exclusively in a Civil Court and that such a suit is not one which is covered by S. 167 of the Agra Tenancy Act. That being the recognised interpretation of S. 167, it must be held that the present suit, being in its nature one for a declaration of title against a rival claimant, was a suit which could only have been brought in the Civil Court.

This, however, does not dispose of the whole difficulty as previous to this suit the dispute with regard to plot No. 211/3 had in a different form been raised in a Revenue Court. What I have, therefore, further to see is the legal effect of that previous litigation. Although it has been held that S. 167 of the Agra Tenancy Act does not apply to suits between rival claimants to a tenancy, nevertheless, it has also been held that once a matter has been decided by a Revenue Court it cannot be re-opened in a Civil Court. This view is not based on the provisions of S. 167 nor on the principle of *res judicata*, but rather on the general ground that the effect of allowing such a thing to be done would be to nullify the decree of the Revenue Court which is final and binding on the parties. I refrain from referring to any apparent inconsistency. That this is the view of the law is clear from the case of *Kishore Singh* v. *Bahadur Singh* (6), which has been followed in the recent Full Bench case of *Mollo* v. *Ram Lal* (7).

In the present case, however, the Revenue Court has not yet arrived at any final decision. The matter, as I have remarked above, is still pending before the District Judge. The question is whether this fact makes any difference or not.

The present suit relates to three plots Nos. 211/1, 211/2, and 211/3. It cannot be doubted that, so far as the two former plots are concerned, the previous proceedings in the Revenue Court cannot in view of the rulings of this Court be a bar to the present claim. The decree of the learned District Judge *qua* these two plots must therefore, stand as being based on a finding of fact which cannot be challenged in second appeal. The contention of the learned Vakil, can, therefore, be sustained, if at all, in respect of plot No. 211/3 only which was in dispute in the previous proceedings in the Revenue Court.

I find, however, that in at least one case, *Jaigopal Narain Singh* v. *Umandat* (8), a Bench of this Court disposed of a civil suit finally on the ground that, although a similar dispute had been raised in a suit in the Revenue Court that suit was still pending, as the Board of Revenue in revision had postponed their final decision and were awaiting the decision of the civil suit. Whether a valid distinction can be drawn when the matter is pending not in an Appellate but a Revisional Court is not a question which I take upon myself to decide. There is the precedent quoted above which I can follow.

I have already remarked that in the previous case the judgment of the learned Assistant Collector proceeded mainly on the presumed correctness of the entries in the revenue papers, whereas the judgment of the Collector on appeal was based entirely on the decree of the Munsif in the civil suit. The only Court which has really gone into the merits of the case thoroughly is the Civil Court and in

(1) [1911] 33 All. 795—11 I.C. 268—8 A.L.J. 1009.
(2) [1912] 35 All. 14—17 I.C. 376—10 A.L.J. 408.
(3) [1912] 15 I.C. 33.
(4) [1915] 29 I.C. 568.
(5) [1909] 31 All. 348—1 I.C. 594—6 A.L.J. 343. (F.B.)
(6) [1918] 41 All. 97—48 I.C. 470—16 A.L.J. 933.
(7) [1920] 43 All. 191—58 I.C. 772—18 A.L.J. 1030.
(8) [1911] 8 A.L.J. 695—10 I.C. 573.

this civil litigation there are the concurrent findings of two Courts on the merits to the effect that the plaintiff and the defendant are jointly entitled to the lands which are really occupancy holdings and not sir plots.

If it were the fact that the final decision of the Revenue Court has been intentionally withheld with a view to see the result of the Civil Court litigation, I would have no hesitation in affirming the decree of the District Judge and leaving the revenue case to be disposed of in accordance with this decision. As, however, there are no materials on the record which would show to me the stage at which the second appeal before the District Judge has reached, I direct that the parties should file before me affidavits within a month from this date explaining the true situation. If on the perusal of those affidavits I am satisfied that the decision of the other case has been intentionally postponed awaiting the result of this suit I would then pass the final order dismissing the appeal.

Case adjourned.

1924 ALLAHABAD 612

DANIELS, J.

Mt. Ganga Dei—Plaintiff—Appellant.

v.

Sukhdeo Prasad—Defendant—Respondent.

F. A. No. 212 of 1922, Decided on 24th June 1924, under the Court Fees Act.

Court Fees Act, S. 7 (IV) C—Suit for declaration with consequential relief though framcable as a suit for possession falls not within S. 7 (V) but within S. 7 (IV) (C.)

Where the suit as framed is clearly one for a declaration with consequential relief, though the suit might have been framed purely as a suit for possession :

Held: the plaintiff has to pay Court fees on the relief which he seeks to obtain by the suit. The relief which he claimed being a declaration that the deed of gift is invalid against her with consequential relief of possession of the property conveyed by the deed, the fee is payable under S. 7 (IV) (C).

44 A. 629 Foll. [P 612 C 2]

Mohan Lal Sandal—for Appellant.

Peary Lal Banerjee—for Respondent.

Daniels, J.—This is a reference under the Court Fees Act. The plaintiff appellant *Mt.* Ganga Devi is the wife of Beni Prasad *alias* Tirbeni Prasad. The latter has been adjudged a lunatic and the plaintiff sues as manager of his property. Previous to his being adjudged a lunatic but while the proceedings were pending Tirbeni Prasad executed a deed of gift in favour of the defendants, and they have taken possession of the property thereunder. The plaintiff alleges that Tirbeni Prasad was a lunatic at the time when this deed of gift was executed and she has brought the suit for the following reliefs :—

(*a*) that it may be declared that the deed of gift executed by Tirbeni Prasad in favour of the defendant is invalid and void and that the defendant has thereby acquired no right in the property mentioned in the deed.

(*b*) for actual possession of the land conveyed by the deed, and

(*c*) for the recovery of the amount which the defendant has recovered under the deed.

The Court below has found that Tirbeni Prasad was of sound mind when he executed the deed and has dismissed the suit. The plaintiff has preferred a first appeal from this decree. The question to be decided is whether the suit is one for a declaration with consequential relief on which Court fee is payable under S. 7 (IV) (c) of the Court Fees Act or whether it can be treated as a suit for possession under S. 7 (V). Now the suit as framed is clearly one for a declaration with consequential relief. It is therefore beside the mark to suggest that the suit might have been framed so as to ask for different reliefs, or in other words that it might have been framed purely as a suit for possession. The plaintiff has to pay Court fees on the relief which she seeks to obtain by the suit. The relief which she claims being a declaration that the deed of gift is invalid against her with consequential relief of possession of the property conveyed by the deed, the fee is payable under S. 7 (IV) (c). As to this I agree with the remarks of Piggott, J. in *Rup Narain* v. *Bishwa*

Nath (1). The appellant must therefore make good the deficiency in Court fee in this Court and in the Court below in accordance with the office report. I allow her two months' time to do this. If the Court fee is not made good within the time allowed the appeal will be laid before a Bench for orders as being insufficiently stamped.

(1) 1932 All. 358—44 All. 629=20 A.L.J. 587.

1924 ALLAHABAD 613

LINDSAY AND KANAHAIYA LAL, JJ.

Kunj Behari Lal and another—Plaintiffs—Appellants.

v.

Abdul Hadi—Defendant—Respondent.

S. A. No. 326 connected with No. 327 of 1921, Decided on 5th June 1922, from a decree of the Additional District Judge, Moradabad.

(a) Civil P. C, S. 100—Question of Lambardar's negligence is one of fact and law.

In a suit by cosharers against lambardar for profits the question of negligence of lambardar is a question of mixed fact and law and it is open to review in second appeal. [P 613 C 2]

(b) U. P. Land Rev. Act, (1901) S. 36—Lambardar alone cannot be blamed for not applying for assessment.

Under S. 36 of the Land Revenue Act, the rent of ex-proprietary holdings ought ordinarily to be assessed at the time of the mutation proceedings and under sub-section (4) of the same section it is provided that if for any reason an order assessing the rent is not passed at the time of mutation then an application can be made either by the landholder or the tenant or any co-sharer directly interested in the matter to have the ex-proprietary rent assessed. It is not the exclusive duty of the lambardar to apply for the assessment of ex-proprietary rent and if neither the lambardar nor the other co-sharers apply for the same they are just as much to blame as the Lambardar. [P 614 C 2]

(c) Lambardar—Powers.

A lambardar cannot be held liable for rents realised by an unauthorised person. He should in a suit for profits be given credit for sums spent by him in ejecting certain tenants. [P 615 C 1]

Iqbal Ahmad, R. K. Malaviya and *K. N. Malaviya*—for Appellants.

Raza Ati—for Respondent.

Judgment. — These appeals arise out of two suits for profits brought by two plaintiffs, Kunj Behari Lal and Baldeo Prasad. In both cases the defendant Abdul Hadi is the Lambardar.

It appears from the evidence on record, and is also admitted by Counsel here, that the two plaintiffs and the defendant joined together in purchasing the village in execution of the decree. They bought the property for a sum of Rs. 141. It seems that the proprietors were persons whose estate was very heavily encumbered and this probably accounts for the small sum which was paid for the purchase of the property.

The plaintiffs came into Court suing for their share of the profits for the years corresponding to 1916, 1917 and 1918. The defendant joined issue and the result of the trial in the First Court was that the plaintiffs were given decrees, the learned Assistant Collector assessing the sum which was due to them on the gross rental of the village.

The reason why the Assistant Collector did this was that in his opinion the defendant Lambardar had been guilty of negligence and, therefore, not entitled to have the profits assessed upon the actual collections for the years in suit.

In appeal the learned District Judge has differed from the Court of first instance and has come to a finding that in the peculiar circumstances of the case the defendant Lambardar was not guilty of negligence which rendered him liable to have the account for profits taken upon the gross rental.

The first ground which has been taken in both the appeals (the grounds in both the appeals are identical) is that the learned Judge of the Court below was wrong in his finding regarding this question of negligence.

It has been ruled by this Court that in cases of this kind the question of negligence is a question of mixed fact and law which is open to review in second appeal.

The reasons given by the learned Judge in support of his finding are (1) that the collections made by the

Lambardar amounted to 70 per cent. of the present assets, (2) that the situation of the parties was a peculiar one inasmuch as they were recent purchasers of this property and that their tenure of the property was precarious inasmuch as the estate which they purchased was very heavily encumbered.

In these circumstances the learned Judge agreed with the plea put forward by the defendant that the plaintiffs could not reasonably expect him to incur large expenditure in litigation against the tenants of the village without the plaintiffs themselves taking a share and contributing to the costs of bringing suits.

There is evidence on the record which appears to indicate that the work of collecting rents in this village is not an easy one, and we further notice that a considerable area of the village is still held by the ex-proprietors who set up the claim that they were entitled to hold these lands as sir lands.

Having regard to the admitted facts of the case it seems to us that we ought not to disturb the finding of the lower Appellate Court on this question of negligence. The points which were brought to the notice of the learned Judge are really not in dispute and, in the circumstances, we are not prepared to say that in this case the defendant Lambardar is proved to be guilty of any default which in the circumstances might properly be called negligence. We think that the learned Judge was entitled to say that in the circumstances the defendant discharged his duty as far as it was reasonably possible for him to do.

The next question we are asked to consider in these appeals is with respect to the rents of ex-proprietary lands. The learned Judge for certain reasons given in his judgment was of opinion that in assessing the profits divisible between the parties the rent of the lands held in ex-proprietary tenure should not be taken into account. According to the Judge it would be unreasonable, in face of the ex-zamindar's contention that they were in proprietary possession of these lands, to expect a Lambardar, unsupported by his fellow co-sharers, to sue the ex-zamindars for rent. This is not a very good reason which the learned Judge gives. There is, however, a much stronger reason apparent from the facts which are before us. It appears that although mutation had taken place, and the names of the new purchasers of this village had been brought on the Revenue Records, no steps had been taken to obtain the assessment of rent upon the very large holding which still remains in possession of the ex-proprietors.

It is useless for the plaintiffs to argue that the Lambardar is solely to blame for this. That is not the case. Under S. 36 of the Land Revenue Act the rent of these ex-proprietary holdings ought ordinarily to be assessed at the time of the mutation proceedings and under sub-section (4) of the same section it is provided that if for any reason an order assessing the rent is not passed at the time of mutation then an application can be made either by the landholder or the tenant or any co-sharer directly interested in the matter to have the ex-proprietary rent assessed.

We do not think it is the exclusive duty of the Lambardar to apply for the assessment of ex-proprietary rent and if this has not been assessed, as it obviously has not been in this case, then the plaintiffs are just as much to blame as the Lambardar. We may further point out that inasmuch as no rent has been assessed on these lands no suit for arrears would lie. This disposes of the point regarding the claim for a share of ex-proprietary rent.

The third point which has been argued before us is with respect to a sum of Rs. 25. According to what is stated in the judgment of the learned District Judge this sum of Rs. 25 in dispute was collected in 1324 F. by a person not authorised to collect it. It appears that the person who got possession of this sum of money was a lady named Hassanara who is the wife of one of the ex-proprietors; and it further appears from certain evidence on record that this sum came into her possession by the sale of

certain trees situated in the village. If this lady claiming to be a co-sharer sold these trees and pocketed the money, we very much doubt whether for the purposes of a suit of this kind the sum realised in the manner by her ought to be treated as collections for which the Lambardar would be liable to account to the other co-sharers. So far as we can see this lady is not a co-sharer at all and the proper remedy of the present co-sharers would seem to be to join together and bring a suit in the Civil Courts for the recovery of this sum which has been misappropriated by the person in question. We think the Judge was right in not taking this sum of Rs. 25 into account in assessing the profits payable to the plaintiffs in the suits. So far, therefore, as the appeals are concerned we find that there is no reason to interfere with the judgment of the Court below.

Cross objections have been filed by the defendant. One of the points raised is that the Courts below were wrong in their statement of the Government revenue of the village. It seems that the plaintiffs gave one figure and the defendant gave a lower figure, and the patwari, who probably knows more than either of the parties, gave a figure which the Courts below have accepted. We have no reason to believe that the patwari was likely to be mistaken in such an important matter.

The other matter which is raised in cross objections is that the Courts below ought to have allowed the defendant certain costs amounting to Rs. 9-1-0 which had been incurred in ejecting certain tenants. Copies of the decrees are on the record which support the case that a sum of Rs. 9 was spent by the defendant Lambardar in ejectment cases against certain tenants. These costs were not awarded to him by the Revenue Court but they were incurred all the same. In the circumstances we think the plaintiff in each case is liabe to be debited with one-third of this sum, i. e., Rs. 3 in each instance. The result, therefore, is that the appeals fail and are dismissed with costs including in this Court fees on the higher scale, if any. The cross-objections are allowed to the extent that the sum awarded in each instance by the Court below will be reduced by Rs. 3. We make no order as to costs regarding the cross-objections.

Appeal dismissed.

1924 ALLAHABAD 615

DANIELS, J.

Aidal Singh—Appellant.

v.

Gyan Singh—Respondent.

S. A. No. 230 of 1924, Decided on 14th March 1924, against the decree of the Additional Subordinate Judge of Aligarh.

Agra Tenancy Act, (II of 1901) S. 79—Illegitimate son in possession of ex-proprietary holding after tenant's death-Suit for recovery of possession by deceased tenant's brother is covered by the section.

An ex-proprietary tenant died and his illegitimate son got into possession. In a suit by the brother of the deceased tenant to recover the possession of the holding against the illegitimate son and the landlord.

Held: the case was clearly one under S. 79 and the fact that the zamindars did not defend the suit was immaterial. The nature of the suit is not affected by the question whether it is resisted or not. S. 79 covers constructive as well as actual possession. 36 A. 55 Fol.

[P 616 C 1]

Daniels, J.—This is a suit by a tenant against his landlord and a person claiming under his landlord to recover possession of an ex-proprietary holding. It is on the face of it a suit of the nature described in S. 79 of the tenancy Act and as such not cognizable by the Civil Court, and the Court below has so held. The appellant disputes this view.

Tikam Singh was an ex-proprietary tenant. He died three years before the suit leaving two illegitimate sons, one of whom is dead and the other is a defendant in this case. Tikam Singh in his lifetime agreed to pay an enhanced rate of rent. After his death the zamindars recognised his sons as tenants and the latter have been in possession of the holding on

payment of rent, The plaintiff is a brother of Tikam Singh and sues the zamindar and Tikam Singh's surviving son to recover possession of the holding. The case is clearly one under S. 79 and the fact that the zamindars did not defend the suit is immaterial. The nature of the suit is not affected by the question whether it is resisted or not. The appellant contends that S. 79 is not applicable because he has never held possession of the holding. This contention is negatived by the authority of *Badri Kasaundhan* v. *Sarju Misir* (1). That suit was substantially on all fours with the present case. It was a suit brought three years after the late tenant's death by a reversioner who had never obtained possession. This Court held that S. 79 applied and that it covered constructive as well as actual possession. Referring to an earlier ruling which they followed the learned Judges say:

" The principle underlying that ruling seems to be, that where a person claiming to have succeeded to a tenancy by right of inheritance finds that, on endeavouring to take possession of the same, his right is denied and his possession ousted by the zamindar, he has suffered an ejectment at the hands of the landlord within the meaning of the section, and his appropriate remedy is by a suit under the tenancy Act as indicated above. "

The appellant refers to case in 13 A. L. J., page 329, but there the right under which the plaintiff claimed, namely, a purchase under a mortgage decree, did not come into existence ill three years after the original tenant had been ejected. The principle of *Badri Kasaundhan's* case (1) was in no way dissented from but was recognised as good law.

The appeal fails and I accordingly dismiss it under Order 41, rule 11.

Appeal dismissed.

---

(1) [1914] 36 All. 55=22 I.C. 668=12 A.L.J. 29,

1924 ALLAHABAD 616

BOYS, J.

Khalbal—Applicant.

v.

Muhammad Yusuf—Opposite Party.

Cr. Ref. No. 255 of 1924, Decided on 5th June 1924, from the District Magistrate of Hamirpur.

(a) *Workmen's Breach of Contract Act—Amendment Act (XII of 1920)—Complaint.*

Complaint should be brought within 3 months from the neglect to perform contract. [P 616 C 2]

(b) *Criminal P. C., Sch. 2— Offence — Workmen's Breach of Contract Act, S. 2.*

An offence under S. 2 of the Workmen's Breach of Contract Act is triable by a second class Magistrate. [P 617 C. 1]

(c) *Workmen's Breach of Contract—Amendment Act (XII of 1920)—Offence under S. 2 of the Act of 1859.*

On conviction for an offence under S. 2 of the old act of 1859 some period of grace—the length of the period being determined by the Magistrate in his discretion—should be allowed to the accused for the repayment. [P 617 C 1]

Parties not Represented.

Judgment.—This is a reference by the District Magistrate of Hamirpur recommending that this Court set aside the conviction and sentence of three months' rigorous imprisonment passed against Khalbal under S. 2 of Act XIII of 1859. He recommends this on two grounds:—

(1) That the complaint was not brought within three months of the neglect to perform the contract as required by the Amending Act XII of 1920, and

(2) That the trying Magistrate of the second class only had no jurisdiction to try the case.

As regards the first point the date of agreement was the 2nd of June, 1922, and the money paid Rs. 114 was paid on the 7th of June, 1922. Work to the value of Rs. 40 was done in June and July, 1922, and it should have been completed within one year of the date of agreement, *i.e.*, before June 7th, 1923, as appears from the statement of the complainant. The accused neglected to do any further work after July, 1922. In reference to this the trying Magistrate explains that he overlooked the Amending Act XII of 1920, because he is not supplied with copies of such Acts

nd when he sent for Act XIII of 1859 from the library of the District Magistrate he was not supplied with a copy of the Amending Act, XII of 1920. It is very reasonable explanation on his part and I consider that he was in no way to blame for the oversight. At the same time the defect is one which goes to the root of his order and on that ground alone the order must be set aside.

As to the second point the learned Honorary Magistrate respectfully points out that the District Magistrate is in error in holding that he had no jurisdiction to try the case. He refers to the end of Schedule 2 of the Code of Criminal Procedure by the last entry and the penultimate entry in which an offence punishable under a law other than the Penal Code with imprisonment for less than one year is triable by any Magistrate and less than three years by any Magistrate of the second class or by a more senior Magistrate, etc. The learned Honorary Magistrate does not therefore appear on this ground to have committed any error in trying the accused. A third point that I notice myself is that the learned Honorary Magistrate having convicted the accused has ordered him to pay or in default to go to jail for three months. It seems to me clear that under S. 2 of Act XIII of 1859 as amended by Act 1920 the Magistrate should have ordered him to repay "within such period" as he, the Magistrate, thought fit. It is clear that some period of grace, what the period should be is in the discretion of the Magistrate, was intended to be allowed to the accused. For this oversight the learned Honorary Magistrate is again not to be blamed as the provision occurs in Act XII of 1920 of which he had no copy. For the reason that the complaint was not made within three months of the accused's default, I set aside the order. The accused having been released on his own bond under the orders of the District Magistrate need not surrender and his bond is discharged.

Order set aside.

✱ 1924 ALLAHABAD 617

DALAL, J.

Motilal—Applicant.

v

Agent, O. R. Railway and others — Opposite Party.

Civ. Rev. No. 22 of 1924, Decided on 1st April 1924, against the order of the Judge, Small Cause Court of Saharanpur.

✱ *Railways · Act, S. 77—Delivery not given for more than 6 months-section applies.*

Where consignee does not get delivery of goods until 6 months have expired from the date of consignment his remedy is when the six months are about to expire and the goods have not been delivered to him to give notice to the agent under S. 77 and so preserve his right of suit. [P 618 C 1]

A. P. Dube—for Applicant.

L. M. Banerji—for Opposite Party.

Dalal, J.—This is an application in revision against a decree dismissing the suit of the plaintiff for damages for the loss of a cask of methylated spirit consigned to him by the Managing Proprietor of the Indian Distillery, Cawnpore. The claim is brought both against the Railway and the consignor and has been dismissed against both. The facts set out in the plaint are that the cask in question was consigned from Cawnpore to the plaintiff at Roorkee on 25th July 1921, that it was lost by the Railway staff in transit and never reached its destination, and that in June 1922 the plaintiff was given delivery of a cask which on being opened was found to contain water. The Railway pleaded S. 77. of the Indian Railway's Act in bar of the suit against them. It is admitted that no notice in accordance with the section was given to the Agent of the Railway. The plaintiff urges that the section is not applicable because he did not discover the substitution of water for methylated spirit till June 1922, more than six months after the goods were consigned. This however does not exclude the case from the plain letter of the section. The section is one which, as has been pointed out many times, works hardship in a number of cases. In para 1 of the plaint the claim is distinctly based on the

ground of loss so that it comes definitely within the section. The plaintiff's remedy, however, was when the six months were about to expire and the goods had not been delivered to him, to give notice to the agent under S. 77 and so preserve his right of suit. It is fair to the railway company to say that in this case an offer of compensation was made without prejudice during the course of the negotiations and was refused by the plaintiff as being insufficient.

As regards defendant No. 3 the suit has been dismissed on the ground that the plaint contained an admission that methylated spirit was duly consigned by this defendant. Applicant now says that this statement was merely based on the rail receipt and is to be construed as meaning that these goods purported to have been consigned, but no such qualifying words are to be found in the plaint.

The application therefore fails, but under the circumstances I make no order as to costs,

Application dismissed.

1924 ALLAHABAD 618

MEARS, C. J.

Govind Ram,—In re

Cr. Rev. No. 320 of 1922, Decided on 28th June 1923.

Criminal P. C., S. 517—Conviction for importing opium—Currency notes on the accused's person raises no irresistible inference that they represented payment of imported opium—They should not be confiscated.

The essential of S. 517 is that property or document must be proved to have been used in the commission of the offence. Where currency notes were found on the person of a man convicted for importing opium into BritishIndia in contravention of the Opium Act, but where it was held that no irresistible inference was possible that they represented payment of the imported opium.

Held: they should not be confiscated,

[P. 620, C. 2.]

G. P. Boys and *A. Aziz*—for Accused.

The Assistant Government Advocate—for the Crown.

Mears, C. J.—Govind Ram applies in revision against the order of the 2nd Additional Sessions Judge of Cawnpore who had modified an order of the Magistrate of the first class of Cawnpore. The appellant was convicted under S. 9 (e) of the Opium Act 1878 as being a person who in contravention of the Act had imported opium into British India. He was sentenced to 12 months rigorous imprisonment and a fine of Rs. 1000/.— His application does not of course relate in revision to either of these matters but it has reference to a sum of Rs. 9000/ which when produced before the Court were represented by notes cut into halves forming two bundles. One was in the possession of Govind Ram when he was arrested and the other halves were in the possession of one Kanhaiya Lal. Also there was found on Govind Ram a sum of Rs. 4700/- in whole notes. The Magistrate ordered the confiscation of Rs. 4700/- and of the two halves of Rs. 9000/- notes representing a total value of Rs. 13700/-. The Additional Sessions Judge of Cawnpore modified this order, declaring that there was no evidence by which the notes for Rs. 4700/- could be associated with the commission of any offence, but as regards the other sum of Rs. 9000/- comprised in the two bundles of half notes, he accepted the theory of the Crown that these notes represented the payment of imported opium. The question is whether this money consisting of half notes of Rs. 9000/- was used in the commission of offence or not. The learned Judge says,

"There is no direct evidence and it is suggested on behalf of the Crown that the inference is irresistible that the half notes were intended to be paid at Cawnpore to the person who has supplied opium while the other half of these notes had already been paid at Kotah. This argument appears to be plausible and I accept it."

We must now see whether the inference is as irresistible as the counsel for the Crown put it or whether there is an equally plausible defence. Indeed unless the Crown proves beyond all fair doubt that this money was part of the machinery employed for the purpose of importing the opium the case for the Crown fails. The matter

is a curious one and the facts which are necessary for an understanding of the position are as follows. Beyond any question opium was being imported from the Native State of Kotah to Cawnpore in the very early days of January, probably the 1st, 2nd and 3rd. It was in fact running into Cawnpore on the morning of the 3rd January, Govind Ram lives at Kasganj and information was conveyed to an official that Govind Ram had taken to the smuggling of opium. The official therefore followed Govind Ram from Kasganj to Cawnpore travelling down with him in the train which arrived on the morning of the 3rd of January Govind Ram and another man Jangi Rai made their way to a dharamsala and Sakhavat Ali Khan the Excise Inspector went there also, After proper formalities Govind Ram was searched and so also was Jangi Rai and Rs. 4700/- were found on him in whole notes and also half notes which represented originally the value of Rs. 9000/—.On him were also found a railway receipt and a document of an extremely cryptic nature. The railway receipt showed that a consignment of "maize" contained in 111 bags was about to arrive at Cawnpore. They went to the station and the train having come in, some of these bags were examined and they did contain maize. They also contained in the centre of the maize, opium and the total amount of opium which was carried into Cawnpore on that morning and which was covered by the railway receipt amounted to no less than 13½ maunds. Counsel for the Crown have stated that the decision in this matter really turns essentially upon the meaning which can be extracted from the document written in Hindi which was found at the time of search on Jangi Rai. Jangi Rai, it may be remarked, is a servant of Govind Ram. I have had a translation made of this document and the translation has been agreed to be correct. The document is unsigned. In form it is a message from one person to another. It is conceivable that it is the message of Govind Ram to the exporter at Kotah announcing the arrival of the goods and announcing that the final payment will be made by sending the second batch of the half notes On the other hand there is some ground for argument, which I will develop later on, that this letter may be that of a man who was a buyer from Govind Ram. If this is a letter from a buyer of Govind Ram then it seems that these documents are unconnected entirely with the offence of importing opium because what the persons were bargaining about was opium which had already been imported and has come into the physical possession of Govind Ram. The letter begins "I am coming". Now if that was the letter of Govind Ram as importer there seems no reason why Govind Ram should be about to undertake another journey to Kotah State, but if it was the letter of a man who knew that Govind Ram was importing stuff to Cawnpore he might very well begin by saying "I am coming". The next phrase is "I have received the goods". That may ofcourse refer, on the theory that the letter was that of Govind Ram, to an assertion that goods which had not then been received by him were known to be coming on the rail, and on the point of being received. This letter was not intended to be despatched until after the goods came into his possession, but it may very well refer to some previous dealings which the writer of the letter had had with Govind Ram on another occasion. At all events that is not an impossible interpretation. "Have the goods ready for me". That seems to relate to the first three lines of the message which say "I am coming". "Have the goods ready for me." This is an entirely inappropriate expression for Govind Ram if he was the writer of the letter to use, because the goods were known by Govind Ram to be running to Cawnpore but it is exactly the expression, a man, who is dealing with Govind Ram as a buyer of imported opium, would use because he would want to have as little delay as possible in making away with the goods. "Have the goods ready for me. I shall arrive at the spot." That again appears to me to be an expression which Govind Ram would not use in writing to his Kotah buyer becaus

that had been done. The goods had been made ready and there was no reason for Govind Ram to go anywhere. Then he writes certain figures which are unintelligible but the first figure coincides with the number of bags namely 111 and that no doubt is a direct reference to the consignment. Now up to the present as far as this letter goes it is a letter which has phrases completely inapplicable to the position of Govind Ram communicating with Kotah but entirely applicable to the position of a man communicating with Govind Ram at Cawnpore. Then there follow a series of figures which are wholly unintelligible. Then follow the days of the week and it may be that his reference "I shall arrive at the spot" and the figures subsequent to 111 may be a code by which Govind Ram would know that he would arrive on Monday, Tuesday or Wednesday, or such a day, but at all events it is a letter of a man who is coming somewhere to get delivery of something. As far as Govind Ram was concerned he had already got the delivery, that is to say the opium was nearing Cawnpore and there was no object in his saying 'I am coming' or requesting that some one should "have the goods ready for me". Now the letter continues "I have sent money through the man". "I have sent half notes through the man,'. That again is consistent with a buyer of this opium communicating with Govind Ram and saying "I have already sent some, the first half notes through the man, and will send the other halves by post'. Then there is some repetition "I have sent the half notes through the man and will bring the other halves with me". How could Govind Ram be saying that he would bring the other half notes with him on this Kotah transaction. How also would he be concluding this letter by saying "allow the man to weigh and pack the goods" when he knew that those goods were already on rail and he held the railway receipt. I have got to decide whether in my view the letter is one written by Govind Ram or written to Govind Ram and the considerations I have pointed out do not appear to have been presented to the Additional Judge of Cawnpore. At all events I feel safe in saying this that on an analysis of that letter there is certainly no irresistible inference as was suggested to the Judge that this letter relates to the importation transaction. I do not think myself it does. I think it relates to a subsequent transaction. It may probably relate to the particular consignment of opium which was captured by the Excise Inspector but that is not enough. First of all, as regards confiscation, the Act of 1878 provides that in any case in which an offence under S. 9 has been committed the poppy from which the opium is going to be prepared and the cultivated opium itself may be confiscated. It then has a general clause permitting confiscation of vessels, packages and coverings used in carrying the opium and declaring also that vehicles and animals shall likewise be liable to confiscation. It is not suggested that these rupee notes of the value of Rs. 9,000 can be attached under any section of the special act but it is sought to bring them in under the general provisions of S. 517 of the Criminal Procedure Code. The essential of that section is that the property or document must be proved to have been used in the commission of the offence and this order of the Additional Sessions Judge of Cawnpore must be set aside unless the Crown makes out that these documents formed part of the transaction of importing opium. I do not believe they do. I believe that there was some person who had an agreement with Govind Ram to take off his hands either a part or the whole of the 111 packages and in numerals which follow after the figure of 111 may be some fractional part of 111 as well as perhaps indicating the time and day upon which this person, purchaser, would arrive. Believing as I do that this sum of Rs. 9,000 was money paid after the process of importing opium had come to an end I am of opinion that the Crown has no right to ask for the confiscation of these notes. The order therefore will be that as regards the halves of the notes of Rs. 9,000 which were found upon Govind Ram these must be returned to Govind Ram. The Court

has apparently held for the time the other halves which were produced by Kanhaiya Lal, As regards the halves which were taken by the Court from Kanhaiya Lal he is not before the Court in any capacity but on his making an application to the lower Court for restoration, the Court will consider on what grounds they profess to be holding them as against Kanhaiya Lal. I am of opinion that in the circumstances Kanhaiya Lal is entitled to their return. The application in revision is therefore allowed.

Application allowed.

✱ 1924 ALLAHABAD 621

DANIELS AND NEAVE, JJ.

Firm Gopal Rai Phul Chand — Plaintiffs—Appellants.

v.

Great Indian Peninsula Railway — Defendants—Respondents.

S. A. No. 1225 of 1922, Decided on 21st May 1924, against the decree of the District Judge of Ghazipur.

✱ *Railways Act, S. 72-Risk-note B.-"Robbery" is synonymous with "theft"-Claim based on wilful neglect fails on proof of theft from running train.*

As used in risk note B. the word "robbery" is synonymous with "theft" Where the plaintiff depends for his cause of action for loss on wilful neglect on the part of either the Railway administration or any of its servants, he cannot succeed if it in shown that the loss of goods was due to theft from a running train, 39 A. 418 ; 1923 All. 79 Ref. 44 B. 769 at 773 Ref. [P. 622 C. 1 & 2]

Uma Shankar Bajpai and Surendra Nath—for Appellant.

Ladli Prasad Zutshi—for Respondent.

Judgment.—These three connected appeals have been heard together. They relate to claims by different plaintiffs against the G. I. P. Railway Company. In this judgment we refer in particular to the facts of the Second Appeal (No. 1225 of 1922), but the facts of the others are admittedly on all fours with them and the points for decision are the same.

On 26th November,, 1920, a bale of cloth was delivered to the G. I. P. Railway Company at Victoria Terminus, Bombay, for despatch to Railway Station Yusufpur on the B. and N. W. Railway. The goods were never delivered. It is also admitted that they never reached the B. and N. W. Railway. A risk note in form B. was executed in respect of this consignment by one Hari Gobind whom the learned District Judge finds to be the person who delivered the goods to the Railway Company. The learned Judge finds that the loss of the goods was due to theft from a running train, that the guard of the train knew that theft was being committed but that he is not shown to have been negligent in not stopping the train in order to prevent the theft or recover the goods.

The two questions which have been argued before us are :—

1. Whether the risk note was validly executed within the meaning of section 72 of the Indian Railways Act?

2. Whether the Railway Company is protected by it ?

As to the former point section 72 provides that the note must be signed by or on behalf of the person sending or the person delivering the goods to the Railway Company. In this case Hari Gobind purported to sign on behalf of the sender R. Ramdeo. The learned Judge finds that he is not proved to have been R. Ramdeo's agent, but he finds that he was the deliverer of the goods to the Railway Company. This is a finding of fact which we must accept and it is sufficient to bring the note within the terms of section 72.

If the decision of the second issue depended on our being able to accept the learned Judge's view that there was no negligence on the part of the Railway Company's servants we might have difficulty in up-holding it. We find, however, that under the terms of the risk note the Railway is absolutely protected in case of robbery from a running train which in this case is proved. It has been held

in two cases of this Court, *E. I. R. Co.* v. *Nathmal Behari Lal* (1) and *G. I. P. Railway Co.* v. *Bhola Nath Debi Das* (2 , that as used in risk note B. the word " robbery " is synonymous with " theft." It has been argued on behalf of the appellants that the Railway is not protected if the robbery was due to negligence on the part of the Railway Company's servants. We think that the form of risk note is not capable of this construction. A risk note in the first instance holds the Railway Company free from responsibility for any loss or destruction of or damage to the goods from any cause whatever. To this there is an exception, namely, that when loss of a complete consignment is due to one of three causes the Railway Company can be held liable. These three causes are :—

1. Wilful neglect on the part of the Railway administration.

2. Theft by the servants of the Railway.

3. Wilful neglect of the servants of the Railway.

There is however an exception to the exception in the shape of a further proviso which lays down that wilful neglect is not to be held to include fire, robbery from a running train or any other unforeseen event or accident. Where therefore the plaintiff depends for his cause of action on wilful neglect on the part of either the Railway administration or any of its servants he cannot succeed if it is shown that the loss of the goods was due to theft from a running train. This view of the risk note was at least impliedly taken in the second of the cases referred to above, namely, *G. I. P. Railway Co.* v. *Bhola Nath Debi Das* (2). It is directly laid down in *B. B. and C. I. Railway Company* v. *Ranchhodlal Chhotalal* (3). The material passage which is on page 773 is as follows :—

" In the absence of proof of wilful neglect or theft by the Railway servants the administration is to be held free from responsibility. If however neglect or theft by Railway servants is proved the administration will escape liability for loss if proof is given of robbery from a running train "

We think, therefore, that the decision of the lower Court is correct and dismiss all three appeals. In view of the fact that in our opinion there was gross negligence on the part of the G. I. P. Railway Company we allow to that Company no costs of the appeals. The other Railway Companies who have been impleaded in Second Appeals Nos. 1504 and 1507 of 1922 are entitled to their costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) [1917] 39 All. 418=39 I. C. 130=15 A. L. J. 321.
(2) 1923 All. 79=45 All. 56.
(3) [1919] 43 Bom. 769=52 I. C. 516=21 Bom. L. R. 779.

1924 ALLAHABAD 622

WALSH, AG. C. J. AND NEAVE, J.

Sukhdeo Rai — Applicant—Appellant.

▼

Ram Chander Rai and another—Opposite Party—Respondents.

F. A. F. O. No. 115 of 1923, Decided on 1st May 1924, from an order of the District Judge of Ghazipur.

★ (a) *Guardians and Wards Act, S. 25—Father cannot be deprived of the society of the child because of quarrel with his wife or distrust in her moral character or because of his handling the child to female relatives during infancy, nor because of his immorality.*

A father cannot be appointed guardian under the Guardians and Wards Act. He can delegate the performance of the daily duties of looking after the child and for that purpose place the child under the custody of some one else. If he does so, it then becomes the question under S. 25 for the Court to decide when he applies for the restoration of the custody, whether it is for the welfare of the minor. Where an application is made for the restoration of the custody of the child by the father the court should see what is his right over the child, rather than try to see what the character of the father is. Thus a quarrel with the mother of the boy or distrusting the mother's moral character are not sufficient to deprive

him of the custody of the child. Nor the fact that he left the infant child (girl) of his in the charge of his wife's family relatives.

[P 623 C 1, 2]

★ *Guardians and Wards Act, S. 19—Father cannot be appointed guardian.*

A father cannot be appointed a guardian because he is the natural lawful guardian and nothing can take that from him. [P 623 C 1]

Uma Shankar Bajpai — for Appellant.

Lakshmi Narayan Tiwari—for Respondents.

Walsh, Ag. C. J.—This is an appeal from a refusal to appoint a guardian. The whole thing appears to have been misunderstood by everybody from beginning to end. Irrespective of the merits which will hereafter have to be enquired into, the simple facts are that the minor is a girl, who is unmarried, and who was born in August in 1916, and is, therefore, eight years old. She has lost her mother and her father applied to the District Judge to be appointed guardian. That application in itself was a fallacy. You cannot appoint a father guardian under the Guardian and Wards Act. He is the natural lawful guardian already of his own minor children, and nothing can take that from him. As the Privy Council have said: "It is a sacred duty of which he cannot divest himself, if he he wishes." He can delegate the performance of the daily duty of looking after the child and for the purpose place the child in the custody of somebody else. If he does so, it then becomes a question under S. 25 of the Guardian and Wards Act, for the Court to decide, when he applies for the restoration of the custody, whether it is for the welfare of the minor. The Court has made no enquiry of any kind in this matter, and the defendants have resisted the application of the father to be appointed guardian, with all the enthusiasm possible for a litigant to show against an order which a Court entertains. But of course, all this power is misapplied, because an application to the Court for the appointment of a guardian is outside what is reasonably possible in contemplation of the law. The matter will, therefore, have to go back to the learned District Judge to be treated, after hearing the evidence, as an application under S. 25 by the father for the return of the custody of the child to himself. The Court will do well, after hearing the merits of this application and the evidence which either side may tender, to consider the following passage of the Privy Council in the well-known case of *Besant* v. *G. Narayaniah* (1) "The father is the natural guardian of his children. This guardianship is in the nature of a sacred trust and he cannot, therefore, during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian entrust the custody and education of his children to another, but the authority he thus conferred is essentially a revocable authority, and if the welfare of his children requires it, he can, notwithstanding any contract to the contrary, take such custody and education once more in his own hands." In certain cases however, Courts will interfere to prevent the revocation of the authority That is what is meant by S. 27. The Court ought to be satisfied that it is for the child's welfare. But a Court dealing with such a matter ought to acquaint itself with the fundamental principles at stake. It is not true to say that a father is liable to be deprived of the society of his child, or the control of his child, because he quarrelled with the mother or distrusted the mother's moral character It would not be true to say so of a father who was leading an immoral life. An immoral father has just as good a right to his own children as a moral man and in many cases he is just as likely to see that his children are properly brought up, even if he himself does not live properly. The mere fact that a father has left an infant girl in the charge of two of the mother's family relatives, is no ground for depriving him of the custody of the child, if he wishes it restored to him. It would be an inhuman principle to lay down. The first seven years of a girl's life are just the time when a man may

(1) [1914] 38 Mad. 807=41 I.A. 314=27 M. L.J. 30=18 C.W.N. 1089=1 L. W. 530=(1914) M. W. N. 585=16 M. L. J. 165=20 C.L.J. 253=24 I.C. 290=16 Bom.L.R. 625=12 A.L.J. 1155 (P.C.)

reasonably think that it would be better to have nothing to do with the child and to leave it with the female relatives. But when a girl is approaching a marriageable age in India as in England, it is not only natural, but right, that the father should desire to have the child in his own custody. He may think that 7 years is long enough to have been separated from his child, and that if he does not exercise his parental right, the child will never come to his side or show any filial affection for him. All these matters the learned Judge will have to take into consideration, but he must not allow himself as the defendants seem inclined to ask him to do to try the character of the father, but rather to consider what is his right over the child, having regard to the fundamental right of a father and to give due consideration to the particular characteristics of this particular father. The case in which the Privy Council refused to allow a father to revoke his authority was an exceptional case and, if I am not very much mistaken, is the only case known in the whole of the Law Reports in either England or India. There a certain lady belonging to a religious society had taken away the boys with the father's consent to educate them in England and bring them up in a University. They had nearly grown to man's state when the father wanted to put an end to the arrangement. They appeared themselves before the Privy Council by Counsel and alleged that they desired to remain in England for the purpose of continuing their University education, and it was under these circumstances that the Privy Council held that it was right to refuse the father the claim which he made.

The appeal must be allowed and the whole matter remitted to the District Judge to dispose of it, having regard to the directions which we have attempted to lay down. Costs will follow the result.

Appeal allowed.

1924 ALLAHABAD 624

BOYS, J.

Qalandar Singh—Applicant.

v.

Mohammad Raza Khan and others—Opposite Party.

Cr. Ref. No 203 of 1924, Decided on 22nd April 1924.

Criminal P. C. S. 338—No appeal by Government against acquittal—Reference by Sessions Judge is not entertainable.

It is not in accordance with the practice of Allahabad High Court to interfere on a reference by a Sessions Judge where the Government could have appealed under S. 417 of the Code of Criminal Procedure and has not done so. [P. 624, C. 2.]

Boys, J.—This is a reference by the Sessions Judge of Mainpuri recommending that the acquittal of one of the two parties in the cross riot cases be set aside on the ground that the finding that the persons acquitted had exercised a right of private defence was wrong. It is, I believe, not in accordance with the practice of this High Court to interfere on a reference by a Sessions Judge where the Government could have appealed under section 417 of the Code of Criminal Procedure and has not done so. I am confirmed in this view by the Government Advocate. In this case the acquittal was brought to the attention of the Sessions Judge by an application in revision by a private complainant though he himself says further that even apart from such application he would have thought it desirable to refer the case to the High Court in consequence of the view that he had formed and expressed in trying the other appeal in the cross-case. It was similarly open to the applicant to move the District Magistrate, to move the Government and this was the proper course for him to adopt. As this is merely a question of procedure by which I am bound not affecting the merits into which I have not entered, I direct in returning the reference to the Sessions Judge, that the record be placed before the District Magistrate for his consideration.

Application dismissed.

_ 1924 ALLAHABAD 625.

LINDSAY AND KANHAIYA LAL, JJ.

Must. Phulwanti Kunwar...Defdt.—Appellant.

v.

Janeshar Das.....Plff.—Respondent.

F. A. No. 228 of 1921 decided on 12th March, 1924, from the decision of the Subordinate Judge of Saharanpur dated the 6th May, 1921.

(a) *Evidence Act, S. 13.*—

Contra *Kanhaiya Lal, J.*

Statements contained in a judgment relating to a case in which the parties were different are not relevant.

(b) *Civil P. C., O. 32, R. 7—Decree against minor without sanction is merely voidable against minor—Suit must be within 3 years of majority of minor.*

A compromise decree entered into on behalf of a minor even without the leave of the court first obtained is not void and a nullity but is voidable only. It is binding upon all the parties except the minor and the only person who can call it in question is the minor himself. If the minor does not elect to avoid the decree it will be binding all round. 26 B. 109 Foll. Any suit to avoid the decree ought to be brought within three years of minor reaching the age of majority.

(c) *Decree—Setting aside—Remedies to set aside voidable decree are review of suit—Art. 120 applies—Time runs from decree.*

A decree which is voidable can only be set aside by a regular suit or by bringing an application for review to the court that passed the decree. The period prescribed is given by Article 120; where a decree is voidable it is voidable from the very date on which it is passed and consequently limitation for a suit to set aside such a decree upon the ground that it is voidable begins to run from the date of the decree itself.

(d) *T. P. Act, S. 6 (a)—Contingent interest can be transferred.*

Where there is a gift over to a class of which the plaintiff claims to be a member then there is created in his favour a contingent interest which is something very different from the mere *spes successionis* referred to in Section 6, Clause (a). There is nothing in Section 6 to prohibit the transfer of a contingent interest.

(e) *Will—Defeasance clause—Performance of condition subsequent which was a defeasance clause, being impossible, estate becomes absolute.*

Where by Clause 4 of the will each of the sons was given an absolute estate in the properties specified in the lists contained in the will, and Clause 13 purported to provide for the termination of this absolute estate and for its passing over to the class described as *fasmandagan* in case certain conditions are not fulfilled, and the words which denoted the conditions were as follows:—"*ba halat aisa na karne ke*" (In case he fails to do so)—

Held the clause indicated that the failure to act in the manner directed by the testator was to work a defeasance of the estate. It is not correct to say that if performance of the condition was possible at the time of the will the fact that it subsequently became impossible would not render the condition void. If performance of a condition subsequent be rendered impossible the estate to which it is annexed becomes by that event absolute. "A condition may be one which is intended to be performed in a presumed state of facts which do not or cannot exist; according to the intention shown the condition then either operated conditionally on that state of facts existing and therefore in the circumstances does not take effect at all or else operated in any event but it is impossible to perform. If a condition intended to be performed in any event is precedent and is originally impossible to perform or is possible of performance at the date of the will but afterwards becomes impossible by the Act of God or circumstances over which neither the donee nor the testator had any control the performance of the condition is not excused and accordingly the gift does not vest. Where however the condition is subsequent, in such a case the gift takes effect free from the condition."

(f) *Hindu Law—Joint family—Property got by collateral succession is self-acquired unless acquired with joint funds or thrown into common stock.*

Under the Hindu Law the property obtained by collateral inheritance is regarded as the separate property of the person by whom it is inherited. An exception is, however, made where joint family funds are used in the process of its acquisition or where it is voluntarily thrown into the common stock, or is otherwise impressed with the character of joint family property by subsequent treatment.

(g) *Legal Practitioner—Right.*

During the progress of the hearing of a suit, a counsel has the privilege of examining such documentary evidence as he may have summoned from a witness or a party, before tendering it in evidence.

(h) *Evidence Act, S. 65.*

In the absence of the original account books, a summary of the result of that examination, as given by a person who had examined them for a pleader is admissible in evidence under Section 65.

M. L. Agarwala, O'Conor, S. N. Sen, and K N. Katju for the Appellant.

Tej Bahadur Sapru and P. L. Banerji for the Respondent.

Lindsay, J.:—The plaintiff in the suit out of which this appeal has arisen is one Lala Janeshar Das and the defendent Mt. Phul Kunwar *alias* Phulwanti Kunwar is the widow of the plaintiff's deceased brother Lala Badri Das.

The father of the plaintiff and Lala Badri Das was one Lala Paras Das, who died on the 2nd of May, 1903. Paras Das in addition to the plaintiff and Badri Das left another son named Dharam Das who died several years before the present suit was brought.

At the time of their father's death Badri Das and Janeshwar Das were minors.

On the 16th of November, 1902, Lala Paras Das executed a will dealing with all the property belonging to himself and to the joint family. He executed a codicil to this will on the 12th of March, 1903, and a second codicil on the 17th of April, 1903.

The will and the codicils were deposited in the office of the District Registrar of Saharanpur and were opened in the presence of one Girdhari Lal on the 9th of May, 1903. Girdhari Lal, under the will of Paras Das, had been appointed the guardian of his two minor sons Badri Das and Janeshar Das and it is proved that Girdhari Lal was a witness to the first and second codicils though he does not appear to have witnessed the will of the 16th of November, 1902.

On the 15th June, 1903, Dharam Das, the eldest son of Paras Das, filed a suit for partition in the Court of the Subordinate Judge of Saharanpur. That suit was numbered as Suit No. 96 of 1903 and a certified copy of the plaint, Ex. C is to be found at page 135 of the printed record.

The original defendants to this suit were the two minor brothers of the plaintiff and when the suit was first instituted their mother, Mt. Ruhli Kunwar was appointed as their guardian *ad-litem* for the suit. Ruhli Kunwar, however, asked to be joined as a defendant to the suit in order that she might establish her right as a Hindu widow to a share on partition. Her application to be made a defendant was accepted and the consequence was that Girdhari Lal was appointed the guardian *ad-litem* of one of the minors Badri Das whilst one Jambu Das was appointed the guardian *ad-litem* of the other minor Janeshar Das.

The defendants to this partition suit did not put in any written statement but on the 17th of July, 1903, a petition of compromise was put in before the Subordinate Judge and on the same date applications were made by Girdhari Lal and Lala Jumbu Das for permission to engage in the compromise on behalf of the minor defendants.

The original record of this partition suit was before the court below in this case and has been produced before us, and it appears that this petition of compromise after having been put into court on the 17th of July, 1903, was ordered to be put up again on the 23rd of July, 1903. The case was not taken up on that date but on the following date, namely, the 24th of July, 1903, and on that date the Subordinate Judge made a record of his proceedings which is to be found in Ex. F at page 151 of the printed record.

At the present stage it is not necessary to describe in detail what was done with reference to this petition of compromise. It is sufficient to say that on the date in question, that is to say, the 24th July, certain items of zemindari and house property were allotted to the three sons of Lala Paras Das. Lots were drawn in the presence of the court and in the presence of the guardians and the pleaders who were concerned.

The learned Subordinate Judge then proceeded to make an order for the appointment of a Commissioner who was to arrange for the division of the rest of the family property including movables, debts, etc. and ultimately on the 19th December, 1904, a complete division of all the property having been effected, a final decree in the partition suit was drawn up. A copy of this, Ex. A, is to be found at page 209 of the printed record. This decree embodies the compromise arrived at on the 17th July, 1903, and describes in detail the various properties allotted to each of the parties.

It may be noted here that after the lots relating to the zemindari property were drawn on the 24th July, 1903, applications were made to the Revenue Court by the various parties in order to obtain mutation and there are on the record several copies of the orders which were passed showing that mutation in respect of the revenue-paying property was made in favour of one or other of the sons. The orders purport to have been based on the title of the sons by way of inheritance and partition.

There can be no doubt that the parties got possession of these properties immediately after the 24th July, 1903, and remained in possession in accordance with the decree.

It has been mentioned already that Mt. Ruhli Kunwar had applied to be made a party in the partition suit in order that she might claim the one-fourth share which she was entitled to have under the Hindu Law. The decree, however, shows that no fractional share of her deceased husband's property was allotted to her. In lieu of her share she accepted an arrangement for maintenance by

which each son was to put her in possession of certain items of property out of the shares allotted to him in order that she might enjoy an income of Rs. 1,200 per annum. The arrangement was that on the death of the lady these items of property were to revert to each of her sons. There was a further arrangement provided by the decree for the lady's residence if she elected not to live with one or other of her sons.

Since the time this partition decree was made Dharam Das has died. In the month of November, 1903, Dharam Das's wife, Mt. Bachcho Kunwar brought a suit against her husband for possession of certain items of property comprised in the shares allotted to him under the partition decree. She lost her suit in the court of first instance but in appeal she got a decree from this Court (see the copy of High Court's decree, Ex. 5 at page 229 of the record). The date of this decree was the 15th January 1906.,

Mt. Bachcho Kunwar is still alive and in possession of the property which she obtained under this decree and is also in possession of whatever was left of the rest of the share allotted to Dharam Das at the time of the partition. It in is evidence that a great deal of the property which Dharam Das got on partition was alienated either during his life-time or after his death for the purpose of satisfying his debts.

Dharam Das, it is to be mentioned here, died without leaving any male issue.

The second son, Badri Das, died in the month of April, 1920, leaving a widow, the present defendant appellant and a daughter. He left no male issue.

Having recited these facts by way of introduction I turn now to the nature of the claim in the present suit.

The property in suit is a portion of certain property which came to Lala Prasad Das in the following way:—It appears from a pedigree which is set out at page 54 of the printed record that one Pardaman Kunwar was a collateral relation of Lala Paras Das. He and Paras Das were descended from a common ancestor, one Lala Din Dayal.

Pardaman Kunwar died possessed of an estate. He left no male issue and the result was that on his death the property came into possession of his mother Mt. Jawantri Kunwar. This lady died on the 25 June, 1898. Thereupon a suit was brought by Lala Paras Das and his cousin, Lala Umrao Singh, for possession of the property which had belonged to Pardaman Kunwar. This was suit No. 1 of 1898 instituted in the Court of the District Judge of Saharanpur on the 6th of August 1898.

That suit was contested by a minor named Dip Chand who resisted the claim on the ground that he had been taken in adoption by Mt. Jawantri Kunwar. The plaintiffs in that suit denied the adoption and laid claim to the whole of the property as being collateral heirs of equal degree. Each of them claimed one-half of the entire estate of Pardaman Kunwar. The claim was valued at Rs. 660,000.

A compromise was arrived at between the parties and the decree of the court of the District Judge is to be found at page 51 of the record. It is marked Ex. 6. Roughly speaking, the result of the decree was to give to each of the plaintiffs, namely, Paras Das and Umrao Singh a 4 annas share in the immoveable estate of Pardaman Kunwar. The remaining moiety was to become the property of the minor defendant, Dip Chand.

The value of Paras Das's share came therefore to about Rs. 1,65,000 and it is this property which is referred to by Paras Das in his will as the property he inherited from Pardaman Kunwar. In referring to this property I shall describe it in this judgment as the Pardaman Kunwar property. Turning now to the will which was made by Lala Paras Das it appears that the testator purported to dispose of this property as well as the ancestral property of the family.

It was the desire of the testator that after his death the whole property, that is to say, the ancestral property and the Pardaman Kunwar property should be divided in equal shares among his three sons and in order to secure a fair division of the property and to avoid disputes afterwards at the time of partition, Paras Das drew up certain lists of the immoveable property and expressed his desire that the property should be divided in accordance with the scheme of division set out by him in the will.

He drew up three lists of the zemindari property and three other lists of house property and directed that lots should be drawn for the purpose of awarding their due shares of each kind of property to the three sons,

In the present suit the plaintiff, Janeshar Das, treating this will as being a valid document in so far as it purports to dispose of the Pardaman Kunwar property—this being according to the plaintiff's case the self-acquired property of Lala Paras Das—claims that, on the death of Badri Das, his brother, he is entitled to get the property in suit which was in Badri's possession and for this purpose he relies upon clause 13 of the will to which reference will hereafter be made.

It is to be understood that the claim of the plaintiff is confined to that portion of the immoveable property originally belonging to Pardaman Kunwar which was allotted to Badri Das under the partition decree.

Such being the nature of the plaintiff's claim, I turn now to the defence to the action which was set up by Mt. Phulwant Kunwar, the defendant.

She pleaded in the first instance that the will upon which the plaintiff was relying was invalid inasmuch as the entire property described in the will was joint ancestral property over which Lala Prasad Das had no disposing power. She next pleaded that in any case the direction contained in clause 13 of the will was invalid inasmuch as it purported to lay down a scheme of devolution contrary to the Hindu Law of inheritance. The third plea was that, effect having been given to the partition decree and the position of the parties having been altered, it was no longer competent to the plaintiff to rely upon the will and ignore the partition decree. She further set up a defence that being still competent to make an adoption to her husband clause 13 of the will upon which the plaintiff was relying could not be enforced. And lastly she took up the line that after the death of Lala Paras Das, the sons had ignored the will and had made a division of the entire property which had been carried out under the decree of a competent court passed upon a compromise. She pleaded that the plaintiff was not entitled to go behind the decree which was made in December, 1904, 16 years before the suit and that he was not entitled therefore to maintain the present suit.

The Subordinate Judge overruled the pleas for the defence and has decreed the plaintiff's claim.

He has found that the Pardaman Kunwar property was the self-acquired property of Paras Das and that he was entitled to dispose of it by his will. The execution of the will was proved (and this is not a matter in dispute in this Court). The Subordinate Judge was further of opinion that the decree in the partition suit was no bar to the maintenance of the present suit, holding that the compromise which was embodied in the decree was not binding upon the minor parties because the leave of the court had not been sought and obtained by those who were representing the minor defendants in that litigation as guardians ad-litem. A further ground upon which he held the decree not to be binding was that the Subordinate Judge who decided the partition suit could not and did not purport to deal with or adjudicate upon what the Court below describes as "the reversionary rights of the minor defendants." The learned Judge was further of opinion that the altered situation of the parties which was created by this partition decree could not stand in the way of the plaintiff's claim in this case so as to deprive him of his right under the will to recover the property in suit. And lastly on his interpretation of clause 13 of the will he held that the plaintiff was entitled to a decree.

These findings of the court below are challenged in appeal.

I think it will be convenient to deal first with the issue raised in the first ground taken in the memorandum of appeal.

The plea is that the court below was wrong in holding that the property which originally belonged to Pardaman Kunwar and which came into the possession of Lala Paras Das was his self-acquired property. It is pleaded that on the evidence it is established that this property was acquired by Paras Das with the aid of joint family funds and that in any case it had been thrown by him into the common stock, the result being that he was not competent to dispose of this property by will.

I have already mentioned that the Subordinate Judge on this issue found that the property was self-acquired property. There can be no doubt that the title under which Paras Das had a right to claim this property was a title by collateral inheritance and if after the death of the widow Mt. Jawantri Kunwar the property had come to him without contest it would without question have been self-acquired property in his hands. It is the fact, however, that Paras Das had to

resort to litigation in order to obtain a share of the property in question and it has therefore to be considered how this fact has any bearing upon the position.

The case for the defendant in this matter is that the property must be treated as joint family property on the ground that money belonging to the joint family funds was spent in acquiring it. It is said that for the purpose of prosecuting the suit to which I have already referred a sum of Rs. 9,000 or Rs. 10,000 was spent.

On the other hand, the case which the plaintiff sought to make out by his evidence was that while a sum of money was taken in the first instance from the joint family chest by Lala Paras Das, it was taken merely by way of loan and certain evidence was put forward for the purpose of showing that the money so borrowed was repaid into the joint family fund by Paras Das in the course of a year or two, the repayment being made out of the annual income of the property which Paras Das obtained as the result of his suit.

The evidence on this point is somewhat meagre. There ought to have been documentary evidence in the shape of account books which would have settled this question once for all. Neither side produced any account books in the court below. The plaintiff produced no accounts himself but called upon the defendant to produce hers. She produced none on the ground that there were no account books in her possession. The plaintiff did not go into the witness-box to deny that he had got any accounts. The position is an unsatisfactory one, for there cannot be the least doubt that the account books belonging to the joint family were divided at the time of the partition into three lots, one lot being assigned to each of the sons.

The question, therefore, has to be decided upon the evidence of two witnesses named Hardwari Lal and Atma Ram.

[His Lordship then dealt with the evidence of Hardwari Lal and proceeded].

* * * *

In the court below the decree of the High Court which was passed in the appeal brought by Mt. Bachcho Kunwar against her husband Dharam Das (Ex. 5 at page 229) was put forward on behalf of the plaintiff as evidence for the purpose of showing that the Pardaman Kunwar property was the self-acquired property of Lala Paras Das. The Judge of the court below says in his judgment that the High Court in that case distinctly found that the property which came to Paras Das from Pardaman Kunwar was self-acquired property and had never been treated as joint family property. The learned Subordinate Judge goes on to say that the decision of the High Court is the best guide in this case.

I take it therefore that the learned Judge of the court below admitted this judgment in evidence against the defendant. It has been argued before us, and, in my opinion, rightly, that this judgment was not admissible as evidence. It clearly was not a judgment *inter partes* nor is it claimed that the judgment could in any way operate as *res judicata*. On the other hand, it has been contended on behalf of the respondent here that the judgment is admissible under Section 13 of the Indian Evidence Act and reference is made to the doctrine laid down in the Full Bench case of *Palakdhari Singh* (1).

Speaking for myself I cannot accept the contention that there is anything in that ruling which would justify the acceptance of the High Court's judgment in this case as evidence relevant to the issue, that issue being whether the Pardaman Kunwar property was acquired at the expense of the joint family funds or not. I do not think that any statements relating to the entries in the account books contained in the judgment of the High Court are receivable in evidence upon this issue.

It is quite true that we may look at this earlier judgment of the High Court as a guide to the principles which should be observed in applying rules of law to particular facts but I cannot treat as admissible in this suit any statements contained in a judgment relating to a case in which the parties, now before me were not concerned. That judgment is *res inter alios acta*.

We have, therefore, on this part of the case only the bare statement of Hardwari Lal which I am not prepared to accept as sufficient proof of the fact that the Pardaman Kunwar property was acquired by Paras Das with money borrowed from the firm which he afterwards repaid. As I have mentioned he is a servant of the plaintiff and therefore likely to be partial and he has to rely upon his recollection of some accounts which he had seen some 17 or 18

(1) (1890) 12 All. 1.

years before he gave evidence. It appears to me by no means improbable that the knowledge which Hardwari Lal displayed in the witness-box in the court below was derived from the statement of facts contained in the High Court's judgment in the appeal in the case of Bachcho Kunwar *versus* Dharam Das, a copy of which as I have stated was admitted in evidence in the court below.

I think it safer to discard altogether the evidence of Hardwari Lal.

Pausing here therefore and considering the situation in the light of the evidence so far referred to, it seems to me that it must still be taken that the property which Paras Das undoubtedly acquired under a title as collateral heir was his self-acquired property.

It does not, however, follow that because the property when it first came into the hands of Paras Das was self-acquired property it necessarily remained so, and here we have the further case for the defendant, namely, that there is satisfactory evidence on the record to show that after the property had been acquired by Paras Das it was dealt with by him as joint family property. In other words it is claimed to be proved that Paras Das threw this property into the common stock.

As against this the plaintiff's case is that the same evidence shows that Paras Das never treated this property otherwise than as his self-acquired property.

How does the evidence stand on this point?

[His Lordship then dealt with the evidence of Atma Ram and continued.]

* * * *

We have not been referred to any other evidence in this connection except that of Hardwari Lal upon which I am not prepared to rely but I believe the evidence of Atma Ram and so far as it goes it leads me to the conclusion that in the matter of keeping the accounts relating to this Pardaman Kunwar property, Paras Das was treating the properly as separate and self-acquired. There is no evidence to satisfy me that there was any such confusion of income in the accounts of the Pardaman Kunwar and the ancestral properties as would justify the conclusion that Paras Das had thrown this property into the common stock.

The fact that the same staff of servants carried out the business of collecting the revenue of all the villages together and that no part of the cost of maintenance of this collection staff was debited against the private account of Paras Das would not be any safe ground upon which to found the conclusion that the property was thrown into the common stock.

There remains the question of the will. Is there anything in that document which affords ground for holding that Paras Das had amalgamated his self-acquired with the joint property of the family?

On the one side our attention is drawn to the declarations contained in the will to the effect that Paras Das still considered the Pardaman Kunwar property to be his self-acquired property with which he could do what he liked. On the other side stress is laid upon the manner in which Paras Das dealt with the property in his will when he comes to express his intentions regarding its disposal. Speaking for myself, I think it would be difficult to deduce from the language of the will the conclusion that Paras Das had thrown his self-acquired property into the common stock. It is no doubt the fact that in drawing up his scheme for the division of the property he lumped both kinds of property together in such a way as to award unequal shares. In two of the lots there is a preponderance of ancestral property. In the 3rd lot which ultimately fell to Badri Das the proportion of the Pardaman Kunwar property which was awarded to Badri Das comes to something like 70 per cent. At page 36 of the printed record there is a statement showing the composition of the various lots of Zamindari property prepared by Lala Paras Das in his will and in accordance with which the property came to be divided eventually under the partition decree.

I admit that there is some substance in the argument which is founded upon the method by which Paras Das was seeking to dispose of the entire body of property consisting of the ancestral and self-acquired property. On the other hand it is to be remembered that Paras Das was dealing with the property by a will which he was at liberty to revoke at any time before he died. On a review of the whole of the evidence relating to this issue I come to the conclusion that it cannot be said that there is any clear

proof that before his death Paras Das threw this Pardaman Kunwar property into the common stock and it seems to me therefore that it being admitted in the first instance that this property having come to Paras Das by a title based upon collateral inheritance the presumption that such property was his self-acquired property has not been overturned by any evidence which is available in this suit. I therefore find that the Pardaman Kunwar property at the death of Paras Das was still his self-acquired property.

I come now to deal with the second important question which arises for decision. This question is raised in different ways in the 2nd, 3rd, 4th, 5th and 6th grounds of the memorandum of appeal which relate to the effect of the decree passed in the partition suit on the 19th of December 1904 As I have mentioned already, the broad case put by the defendant in the court below was that the existence of this decree was a bar to the present suit, and in the sixth ground of the memorandum of appeal the plea is taken that the Subordinate Judge was wrong in fact in holding that the leave of the court had not been sought and obtained by the guardians *ad-litem* of the minor defendants in that suit to the compromise which was ultimately embodied in the final partition decree.

Before proceeding to discuss the effect of the decree in question mention must be made of our order of the 29th February, 1924, passed upon a petition presented to us on behalf of the defendant appellant for the admission of certain additional evidence relating to the question of fact whether the sanction of the court had been sought and obtained to the compromise which led up to the final partition decree.

In the order just referred to we have given our reasons for admitting fresh evidence and it may be said at once that this evidence clearly establishes that the two guardians *ad-litem* of the two minor defendants in this partition suit (Suit No. 96 of 1903) did inform the court that they proposed to enter into a compromise and did ask for leave to do so, and it is further established that on each of the applications presented by the two guardians *ad-litem* the Subordinate Judge recorded an order signed by him saying that the reasons for entering into a compromise were good and sufficient (wajah maqul hai) and that he accorded sanction in each instance.

In dealing with this question therefore I disregard as erroneous the statement made by the learned Judge of the court below that the permission of the court to enter into this compromise was not sought and obtained by the two guardians *ad-litem* Lala Girdhari Lal and Lala Jambu Das.

I proceed now to a consideration of the facts which have to be dealt with in connection with this suit for partition. We have it in the first place that the suit was filed by Dharam Das, the eldest son of Paras Das, on the 15th June, 1903, some six weeks after his father's decease (see plaint Ex. C, page 135 of the printed record). It has already been mentioned that the original defendants were the two minor brothers of the plaintiff and that subsequently Musammat Ruhli Kunwar, their mother was impleaded as she was a necessary party being entitled under the Hindu Law to claim one-fourth share of the property. Mention has already been made of the appointment of Girdhari Lal and Lal Jambu Das as guardians *ad-litem* to the minor Badri Das and Janeshar Das respectively. With regard to Lala Jambu Das it should be mentioned here that Girdhari Lal had been appointed the guardian of both the minors under the will executed by Paras Das and it must also be mentioned that Lala Jambu Das who with the consent of Girdhari Lal was appointed guardian *ad-litem* of Janeshar Das in the partition suit was the maternal uncle of the girl who afterwards married Janeshar Das. Janeshar apparently was not married at the time the suit was brought. In his application to the court Jambudas described himself as being a well-wisher and a relation of the minor.

It is clear that the plaint which was filed by Dharam Das in the partition suit makes no express reference to the will of Paras Das. It was stated in that plaint that Paras Das and his sons constituted a joint Hindu family at the time of the former's death and that the property sought to be divided was joint ancestral property.

In paragraph 8 of that plaint Dharam Das expressed his willingness to accept as his due share the properties mentioned in one or other of the several lists which were attached to the plaint and he offered to accept a division by drawing of lots if the parties were agreeable; otherwise he stated that if a division was not made in the way so proposed he would insist on the court's proceeding

to divide the entire property so as to give him his share of one-third.

It must be mentioned here that the lists which were attached to Dharam Das's plaint corresponded exactly with the lists set out in the will of Paras Das ; that is to say, there were three lists of the zamindari property and three corresponding lists of house property. So while it may be that there was no express reference to the will in the plaint it is absolutely certain that Dharam Das and the other people who were concerned in this suit knew all about the will. I have already mentioned that the will had been deposited with the Registrar of Saharanpur and was opened by him in the presence of Girdhari Lal on the 9th May, 1903, one week after the death of Paras Das. Girdhari Lal, as I have said, had been appointed guardian of both the minors under the will and he was also a witness to the two codicils. There can be no doubt whatever that Girdhari Lal knew all about the will and its contents and he has admitted so much before us when we examined him in this Court.

It is true that there is no direct evidence to show that Lala Jambu Das was cognizant of the will and certain statements made by Girdhari Lal before us might be taken to indicate that Jambu Das was not aware of the provisions of the will but it appears to me that the circumstantial evidence in the case leads to the conclusion that the will and its provisions were well-known to Dharam Das and to the two guardians *ad-litem*. The recital in the petition of compromise which was filed in the court on the 17th July, 1903, indicates that the question of the division of the estate had been considered by respectable members of the community and it is declared in the preamble of the petition that it was with a view to avoid disputes which would bring about the ruination of the family and would lead to 'many misfortunes that the decision to come to a compromise had been arrived at. I cannot doubt for a moment that the fact that Paras Das had left this will and the two codicils was perfectly well-known to all the members of the community who were consulted before this petition of compromise was brought before the Subordinate judge.

The plaint was filed as above described and no written statements of defence were filed.

On the 17th July, 1903, the petition of compromise was put in before the Subordinate Judge, a certified copy of it is Ex. B at page 143 of the record.

The original record of this suit is before us and we find from a reference to the order-sheet that when the petition was put into court on the 17th July, 1903, it was found that the signature of Musammat Ruhli Kunwar who was a defendant in the case had not been obtained and in order to get her signature it was ordered that the case was to be brought up again on the 23rd of July. On the 23rd of July the Judge had no time to attend to the case and so it came up on the 24th July. I have already indicated briefly what took place on that date in the presence of the parties and their pleaders. The proceedings of the court are all set out in the rubkar, Ex. F. printed at page 151.

Without going into unnecessary particulars the petition of compromise informed the court that it had been arranged that the three sons should divide the zamindari and house properties in accordance with the lists attached to Dharam Das's plaint. Those lists as I have already said correspond with the lists prepared by Paras Das in his will.

The only variation in the scheme devised by Paras Das was that under this compromise it was agreed that lot No. 1 of the house property should be assigned without drawing to Janeshar Das. The other lots were to be drawn, and they were drawn on the 24th July, 1903, in the presence of the court. The result was that Dharam Das got Lot No. 1 of the zamindari property and Lot No. 3 of the house property. Badri Das got Lot No. 2 in both properties while Janeshar Das got Lot No. 3 of the zamindari property and Lot No. 1 of the house property. I have already mentioned that after these lots had been drawn the Subordinate Judge gave directions for the appointment of a Commissioner who was to arrange for the division of the movable and other property and I have also referred to the fact that ultimately the final partition decree was drawn up on the 19th December, 1904.

It is not and cannot be disputed that the three sons obtained possession of the property of various kinds in accordance with the compromise and decree. I have referred to the fact that orders for mutation were passed thereafter in respect of the zamindari property

and I have also mentioned that Musammat Ruhli Kunwar instead of getting a one-fourth share which she was entitled to under the Hindu Law agreed by this compromise to abandon her right to that share in consideration of the arrangements which were being made for her maintenance and residence.

I have also referred to the death of Dharam Das and to the fact that his widow is still in possession of some property which was assigned to Dharam Das under this partition. Badri Das, as has been said, died in April, 1920, and his widow is still in possession of the share which was allotted to him while the plaintiff, Janeshar Das, has been and is still in possession of the property which he obtained under this decree.

This being the state of things in the year 1920 when the present suit was filed, the question which arises is whether the plaintiff Janeshar Das is entitled to go behind the decree and fall back upnn the provisions of his father's will in order to succeed on the claim he is now making. It cannot be pretended that he was not a party to the decree. It is clear that he was and that he was represented in the partition suit by a duly appointed guardian *ad-litem*, Lala Jambu Das.

It is significant that in his plaint in the present suit he makes no reference whatever to the partition suit nor to the compromise and the decree, both of which he affects to ignore, and the first matter to be discussed is whether he is entitled to take up this attitude. As said already the learned Subordinate Judge appears to have been of opinion that he is, on grounds, one of which we have shown to be untenable, namely, that the decree was not binding because the permission of the court to the compromise had not been sought and obtained by the guardians *ad-litem*.

Let us examine the law relating to compromise decrees in cases where minors are concerned. That law is laid down in Order 32, Rule 7 of the Code of Civil Procedure. This rule says that no next friend or guardian for the suit shall, without the leave of the court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

Sub-rule 2 provides that any such agreement or compromise entered into without the leave of the court shall be voidable against all parties other than the minor. It is apparent from this language that a compromise decree entered into on behalf of a minor even without the leave of the court first obtained is not void and a nullity but is voidable only. It is binding upon all the parties except the minor and the only person who can call it in question is the minor himself. *Virupakshappa* v. *Shidappa* (1). If the minor does not elect to avoid the decree it will be binding all round.

Now if that is so what is the position? Clearly it is not open to a minor to treat the decree as void and a nullity as has been done in the present suit in which as I have said the plaintiff affects to ignore the decree entirely. There is not a word in the plaint to show that the plaintiff treats the decree as void or even voidable on any ground of fraud or defect of procedure. The decree is simply not mentioned at all. In my opinion that position cannot be assumed. The decree being voidable only must be treated as binding until it has been got rid of and the period for that having passed the plaintiff must now be bound by the decree. At the time of his father's death he was between 8 and 9 years of age (see the statement in the will). He must have been born in the year 1894 and must consequently have reached the age of majority in the year 1912. Any suit to avoid the decree ought to have been brought within three years of his reaching the age of majority and a suit for that purpose might therefore have been entertained up to the year 1915. The suit with which we are now dealing was filed in the year 1920.

A decree which is voidable can only be set aside by a regular suit or by bringing an application for review to the court that passed the decree. Neither of these courses was open to the plaintiff at the time the present suit was filed. The only article of the schedule to the Limitation Act which provides a period of limitation for setting aside a decree is Article 95 and that applies to cases where it is sought to set aside a decree obtained by fraud. The period for such a suit is three years. This article could have no application to a suit brought to set aside the decree with which we are now dealing on

(1) (1902) 26 Bom. 109=3 Bom. L. R. 565.

the ground that it was voidable. If there is any period for such a suit it must be the period prescribed by Article 120 and in that case a plaintiff would have six years to bring a suit from the date when the right to sue accrues.

As, however, Janeshar Das was a minor, the period of limitation for such a suit brought by him would be that which is prescribed by Sections 6 and 8 of the Act and it is clear from those provision, that in no circumstances could Janeshar Das have brought a suit to avoid this decree after three years had elapsed from the time when he attained the age of majority.

It is sought to be argued here that no cause of action for a suit for the avoidance of this decree accrued to Janeshar Das until the date of Badri Das's death, which was April 1920. It is said that it was only on the death of Badri Das that the plaintiff acquired the right to claim the property which he is now seeking in this suit and that consequently the partition decree could not have in any way affected his right to bring this suit before the date of Badri Das's death.

I am unable to accept this argument. It appears to me to be perfectly clear that where a decree is voidable it is voidable from the very date on which it is passed and consequently limitation for a suit to set aside such a decree upon the ground that it is voidable begins to run from the date of the decree itself.

I hold therefore that the rights of the parties were finally settled by the partition decree which was finally passed in the month of December, 1904, and consequently it is not open to the plaintiff in the present suit to go behind the decree and to contend that he is in a position to set up any rights under the will of his father.

As regards the scope of the partition decree that must be collected from the language of the decree itself and there can be no doubt that this decree awarded to each of the sons an absolute estate in the properties allotted to them. And so, Badri Das got as full owner the property specified in the two lists which includes the property which is now being claimed by the plaintiff. Badri Das having died, his widow the defendant appellant, is entitled to remain in enjoyment of the whole of his estate for her life-time and she cannot be called upon to hand over any portion of Badri Das's estate to the plaintiff Janeshar Das.

It has, however, been sought here to limit the scope of the decree by saying that the decree did not and could not deal with what is called "future rights". It is said that the right which the plaintiff is now setting up under clause 13 of the will had not and could not have come into existence at the time the decree was passed.

This argument was also advanced in the court below and seems to have been accepted by the learned Subordinate Judge who says in his judgment that the "reversionary rights" of a minor cannot be dealt with by his guardian. The learned Subordinate Judge further observed that it was abundantly clear that the court which made the partition did not purport in any shape or character to deal with or adjudicate upon the "reversionary rights" of the infants, and so he was of opinion that the right which the plaintiff is now seeking to enforce was not extinguished by the decree.

I find it difficult to understand the observations of the learned Subordinate Judge, nor is it at all clear to me what he meant by the "reversionary rights" of the minors.

In the course of argument here I was led to understand that what was meant by the reversionary right of the plaintiff was the chance of his succeeding to the estate of Badri Das when the latter died. It is, however, to be observed that the right which the plaintiff is putting forward in this case is a right created under the will. He is not claiming to succeed to the property in dispute as an heir of Badri Das. On the contrary he says that his right to get the property in suit is a right which was created in his favour by the bequest contained in the 13th clause of the will. In other words, the case which he is setting up is that by this clause a gift over of the property in dispute was made to him in the event of Badri Das's having died without having made an adoption in accordance with the directions of the testator. In the course of argument the learned Counsel for the respondent referred to Section 6 (a) of the Transfer of Property Act for the purpose of showing that the right of his client was incapable of transfer and could therefore not be affected by any of the provisions of the partition decree. In other words the argument seems to be that the

plaintiff's right was what is called a mere *spes successionis* or to quote the words of Section 6 (a) " the chance of an heir apparent succeeding to an estate." It is obvious, however, that the right which plaintiff is now setting up is not a *spes successionis* or the chance of his succeeding to any estate as heir apparent. If the clause in question contains a gift over to a class of which the plaintiff claims to be a member, then it follows that there was created in his favour a contingent interest which is something very different from the mere *spes successionis* referred to in Section 6, Clause (a). There is nothing in Section 6 to prohibit the transfer of a contingent interest. The interest created by clause 13 of the will, if it be construed as making a gift over in favour of a class, was a contingent interest which might afterwards become vested. It is not correct, therefore, in my opinion to say that the scope of the partition decree can be limited for the reason suggested. The contingent interest had already come into existence on the death of the testator and it was in existence at the time the parties were before the court in the suit which was brought by Dharam Das to enforce the partition.

As I have already said the partition decree having become final and unimpeachable, it is not open to the plaintiff now to seek to set it aside or to modify it in any way by reliance upon the will of Paras Das. The partition decree is in my judgment *res judicata* between the parties and the fact that it was based upon a compromise does not alter the situation. It is a clear case of estoppel by judgment and none of the parties to that decree can now go behind it.

My decision on this question therefore settles the whole case and in my opinion the claim of the plaintiff must fail. Under the partition decree which regulates the rights of the parties Badri Das obtained an absolute estate in the properties which were allotted to him and he having died his widow is entitled to retain possession of all those properties for the course of her life-time.

In view of this finding it is not necessary for me to discuss the other questions which have been raised before us in appeal but it may be as well for me to express my opinion upon the other matters which have been debated in the course of argument. I proceed to do so shortly.

It is argued on behalf of the defendant appellant that whatever other view might be taken of the case the compromise which was arrived at between the parties to the partition suit operates as a family sttlement which cannot now be disturbed. It was pointed out that at the time the compromise was entered into all the parties who could claim any interest in the estate of Paras Das, namely, his three sons and his widow, were before the court. It is also argued that will or no will, the parties were entitled to treat the property as being joint property belonging to all of them and to come to any arrangement they chose for the purpose of avoiding future disputes and in order to protect the property from waste.

It is further contended that this arrangement having continued for some seventeen years before the present suit was brought cannot now be disturbed, particularly as the parties or their legal representatives can no longer be remitted to their original position.

I have already mentioned the fact that in coming to a division of the property the two kinds of property, that is to say, the ancestral and the self-acquired property were divided in varying proportions with the result that out of the Zemindari property which fell to the share of Badri Das some 70 per cent. consisted of the Pardaman Kunwar property which, as I have found, was the separate estate of Lala Paras Das. The other two brothers on the contrary obtained in their shares a very large proportion of the ancestral property. I have furthar adverted to the fact that since the date of the compromise and the decree Dharam Das has died and a considerable portion of the ancestral property which was allotted to him by the partition decree has been alienated in order to satisfy his debts.

As against this it is contended that the case is not one of a family settlement at all. It is argued that there was really no dispute between the parties nor could there be any. Dharam Das as one of the three sons had a right to obtain a partition which could not be contested by the other defendants and it is said that there could be no real dispute regarding the amount of the shares. Further it is argued that it cannot be conceived that the case was one of a dispute regarding doubtful titles, for it is said that the parties ignored the will altogether and there is

nothing to show that the terms of the will were ever discussed before the compromise was arrived at.

Lastly it is maintained that it cannot be pretended that the compromise was in any way directed towards the preservation of the family estate.

It seems to me as I have said already that on the circumstantial evidence it must be taken that all the parties to this compromise were fully aware of the contents of the will. It may, of course, be that they were not in a position to thoroughly understand the purport of all the provisions of the will; but at any rate, it could hardly have been unknown to them that the will was not a valid document in so far as it purported to dispose of the joint ancestral family property.

It may further be observed that it does not seem to be true to say that no dispute had arisen between the parties. There is some evidence that Dharam Das had raised a dispute regarding the division of the family estate. There are allegations in the plaint which he filed in that suit to the effect that he had called upon the other members of the family to come to a division and that they were seeking to avoid a partition by having the family estate placed under the care of the Court of Wards.

It is further to be noted that when the plaint in the partition suit was filed Dharam Das's mother Musammat Ruhli Kunwar who had not been impleaded as a party in the first instance came forward in order that she might assert her right to the share which she was entitled to on division under the Hindu law namely, a one-fourth share. Her claim if insisted upon would have defeated to a certain extent the claim of Dharam Das to a one-third share of the property. If her rights were recognized Dharam Das could not have obtained more than a one-fourth share of the whole property on partition. Again I cannot accept the argument that the arrangement which was entered into between these parties was not an arrangement for the protection of the family property. The opening words of the petition of compromise (Ex. B page 143) which was put into court on the 17th July, 1903 indicate clearly what the object of the compromise was. It is stated there that on the advice of respectable members of the community to which the parties belonged, and having regard to the fact that disputes would bring about the ruination of the family and that the minors would be put to loss by being dragged into court in order to maintain a protracted litigation, it had been decided that a compromise should be entered into in the terms which were set out in the petition.

It is not to be doubted that if Dharam Das insisted on a partition, as he had the right to do, and if the partition suit dragged on for a long period, as such suits are apt to do, especially in cases where large family estates are concerned, the parties, and in particular the minors, would have had to incur great expense.

In his plaint Dharam Das had offered to agree to a division in accordance with the scheme which had been devised by his father under the will. It cannot be denied that this scheme drawn up by Lala Paras Das was a perfectly just and equitable scheme. It provided for division of the whole estate of the family into three absolutely equal shares and it would in my opinion have been impossible for any court to have made a more proper and just division of the property than that designed by Paras Das in his will. The advantage of entering into a compromise in these terms was that the parties avoided all the anxiety and expense which the division of the estate by a Commissioner appointed for that purpose would have entailed. It did away with all risk of contest regarding the division of particular items of the family property and got rid of complications which might have arisen upon allegations that the property was not being divided equally or in a manner convenient to the interests of the parties concerned. In these circumstances I do not see how it can be maintained that this compromise was not designed for the preservation of the property in the sense that it provided an arrangement by which the parties were protected against the expenditure of large sums of money which might have impoverished them. For these reasons, therfore I hold that the arrangement ought to be regarded in its truest sense as a family settlement which the parties to it are no longer entitled to avoid, more particularly in view of the long time which has elapsed since it was entered into and acted upon and also by reason of the fact that in view of the changed circumstances the parties could not now be remitted to their former position.

Another reason which influences me in this connection is this: I have already mentioned

that Musammat Ruhli Kunwar, the widow of Paras Das, by this arrangement gave up her right to a one-fourth share of the whole of the property and accepted in lieu of that share the arrangements which were made under the compromise for her maintenance and residence. It cannot therefore be argued that there was no consideration for the agreement into which the parties entered when the compromise was made. I accept therefore, the argument that apart from all other considerations this compromise should be treated as a family arrangement and should be acted upon as such and so I hold that in no case ought the plaintiff to be allowed by the present suit to disturb the arrangement in question.

Lastly, assuming for the sake of argument that the plaintiff is entitled in this suit to rely upon the provisions of clause 13 of the the will I proceed to examine the clause in question and to see whether or not the plaintiff has any right under that clause which would entitle him to recover the property in suit.

The clause in question is to be found at page 114 of the printed record but it has not been well translated The following is an accurate translation of the clause :—

"With a view to the perpetuation and preservation of my family I also declare by this will that if (God forbid) it should so happen that any one of my sons should have no issue, that is to say, should have no son he will not have the right of taking in adoption any one out of another family. But he shall have the right to adopt any of the issue of his own (full) brothers whom he may choose and to constitute him owner. In case he fails to do so the property he may leave (matruka) shall pass to the survivors (pasmandagan) in the same manner in which property passes in an undividedHindu family".

The case for the plaintiff on this clause is that Badri Das died without leaving any issue. He also died without having made an adoption in the manner prescribed by the clause. Consequentely the plaintiff says that for these reasons he is entitled to claim the property in dispute which is property left by Badri Das on the ground that he the plaintiff is one of the survivors (pasmandagan).

The case for the defendant regarding this clause was that it was void for several reasons. One reason given was that the clause purported to lay down a rule of succession at variance with the Hindu law of inheritance. And in this connection a reference is made to the direction that the estate (matruka) is to pass to the survivors in the same manner in which property passes in an undivided Hindu family. It is pointed out that the rule of survivorship could no longer apply after the sons had come to a partition and it is argued therefore that Paras Das by this clause was giving a direction that property belonging to one member of a divided family should pass exactly in the same way as if the members of the family had remained joint and had never come to a partition. The language of the clause is somewhat obscure and it may well be doubted whether this argument can be maintained. The case for the plaintiff is that the clause contains a gift over to a class of persons described as *pasmandagan* in the event of any one of the sons dying without issue and without having adopted one of his own brother's sons. It is claimed that the word *pasmandagan* should not be interpreted in the artificial sense in which it is often used to describe the members of a joint Hindu family who remain after the death of one of the co-parceners. There can be no doubt that the expression is frequently used in this sense and is in a way a technical expression. Ordinarily the plaintiff here would not be entitled to call himself a "pasmanda" (survivor) after he and his brothers had arrived at a partition.

Treating the clause in the sense contended for by the plaintiffs it is still argued on behalf of the defendant that the condition is void because it was impossible and that consequently even if the clause be held to apply the gift over fails and the plaintiff is not entitled to recover.

An examination of the language of clause 13 shows that the first part of the clause deals with adoption. The testator is imposing a restriction upon the right to adopt. He is saying that if any of his sons happens to have no male issue he must exercise the right of adoption in a particular way. He is not to be allowed to adopt from another family but must make his selection from among the sons of his brothers. Then follows the other clause which must be treated as a defeasance clause. By clause 4 of the will each of the sons was given an absolute estate in the properties specified

in the lists contained in the will, and clause 13 purports to provide for the termination of this absolute estate and for its passing over to the class described as *pasmandagan* in case certain conditions are not fulfilled. The words which denote the conditions are as follows :—" ba halat aisa na karne ke".

In case he fails to do so—the question is in case he fails to do what? Clearly these words mean in case he fails to make an adoption from among his brother's sons. It seems to me that the clause indicates that the failure to act in the manner directed by the testator is to work a defeasance of the estate.

The condition therefore which had to be fulfilled in order to prevent the termination of the estate on the death of Badri Das was that Badri Das should take in adoption one of the sons of his own brothers.

I have already mentioned that Dharam Das died without having had a son and that up to the time the present suit was brought, and certainly up to the time when Badri Das died, the plaintiff Janeshar Das had no son who could be taken in adoption. It is quite clear therefore that Badri Das, even if he had been willing to act in obedience to the directions for adoption contained in clause 13, could not possibly have complied with them. The thing was physically impossible, and so it is argued, and I think argued correctly on behalf of the defendant appellant that the condition having become impossible was void and that the absolute estate conferred upon Badri Das by clause 4 of the will could not be divested or pass over to any surviving member of the family.

It was suggested in argument that the condition could not be treated as a void condition unless it was impossible at the time of the death of the testator. It was said that if performance of the condition was possible at this time the fact that it subsequently became impossible would not render the condition void. This, however, does not appear to be a correct statement of the law. The condition the non-fulfilment of which was to lead to a defeat of the absolute estate conferred upon Badri Das by clause 4 of the will was in my opinion a condition subsequent, and I understand the law to be that if performance of a condition subsequent be rendered impossible the estate to which it is annexed becomes by that event absolute.

The following statement of the law is taken from Lord Halsbury's Laws of England, Vol. 28 page 590, paragraph 1163 :—

" A condition may be one which is intended to be performed in a presumed state of facts which do not or cannot exist; according to the intention shown the condition then either operates conditionally on that state of facts existing, and therefore in the circumstances does not take effect at all or else operates in any event but it is impossible to perform. If a condition intended to be performed in any event is precedent and is originally impossible to perform or is possible of performance at the date of the will but afterwards becomes impossible by the act of God or circumstances over which neither the donee nor the testator had any control the performance of the condition is not excused and accordingly the gift does not vest.

" Where however the condition is subsequent in such a case the gift takes effect free from the condition ".

So far as Badri Das was concerned, in order to avoid a defeasance of the absolute estate conferred upon him it was necessary for him to perform the condition in his life-time, that is to say, the condition of taking in adoption one of his own brother's sons. That, as has been said, was for him an absolute impossibility. The performance of the condition could never have become possible in the life-time of Badri Das unless one or other of his brothers had sons, and it is found that they had not. Here then is a case in which the performance of the condition became impossible, either it may be said by the act of God or at any rate by reason of circumstances over which neither the donee (Badri Das) nor the testator Paras Das had any control. The fact that neither Dharam Das nor Janeshar Das had a son in the life-time of Badri Das was a matter altogether beyond the control of Badri Das.

I am of opinion therefore that in the circumstances the plaintiff cannot be heard to say that he has a right to claim the property in suit after the death of Badri Das by reason of a gift over contained in clause 13 of the will. The condition, the non-fulfilment of which was to defeat the absolute estate conferred upon him, was one impossible of performance and consequently it ought to be held that the gift to Badri Das took effect free from the condition in question. In this view therefore the plaintiff

has no case upon which he can succeed. For the above reasons therefore I hold that this appeal must succeed. I would therefore allow the appeal, set aside the decree of the court below and dismiss the suit of the plaintiff in both courts with costs including in this court, fees on the higher scale.

Kanhaiya Lal, J.—I agree generally with the conclusions at which my learned brother has arrived, except as regards the effect of the compromise filed in the suit brought by Dharam Das against his brothers in 1903 and the decree for partition passed on its basis, on the rights now claimed by the plaintiff. In order to understand the precise bearing of that issue on the claim of the plaintiff, it is necessary to recapitulate briefly some of the facts and circumstances established by the evidence, which lead up to that question.

The parties to the suit are Jains. Lala Paras Das was one of the leading members of that community at Saharanpur. He possessed considerable landed and house property, which was the ancestral and joint family property of himself and his three sons, Dharam Das, Badri Das and Janeshar Das. From a collateral branch of the family, to which Lala Paras belonged, was descended Pardaman Kunwar, who died in 1895 without leaving any issue. Parduman Kunwar was succeeded by his mother, Musammat Jiwantri Kunwar, who is said to have adopted a boy named Dip Chand. Lala Paras Das and his cousin, Umrao Singh, filed a suit for the recovery of the property of Parduman Kunwar and obtained on the 10th October, 1878, by compromise a decree, which secured to each of them a one-fourth share in the said property.

It is not disputed that, under the Hindu Law, the property obtained by collateral inheritance is regarded as the separate property of the person by whom it is inherited. An exception is, however, made where joint family funds are used in the process of its acquisition or where it is voluntarily thrown into the common stock, or is otherwise impressed with the character of joint family property by subsequent treatment. The question for consideration here is whether the property obtained by Lala Paras Das by virtue of the compromise with Dip Chand was blended by him with the ancestral or joint family property or kept apart as his separate property till his death. The court below found that it was his separate property.

It appears that the money required by Lala Paras Das for the expenses of a suit for the recovery of that property was taken by him from the joint family funds, and subsequently repaid out of the profits of that property after he had succeeded in obtaining a decree by a compromise with Dip Chand. The account books of the joint family firm of Paras Das Bahadur Singh, which contained an account of the family property and business, were divided after the death of Lala Paras Das between his three sons, each of whom got a separate set of books, which, though different in form, were complete by themselves. (Vide Ex. B.) Neither party has produced those account books in this case. They were summoned from the defendant and from Musammat Bachcho Kunwar, the widow of Dharam Das, by the plaintiff, but both of them stated that they were unable to trace them. The plaintiff did not produce his own set of books nor came into the witness-box to explain why he could not produce the books given to him at the time of partition.

Some of the account books had, however, been produced in the suit filed by Musammat Bachcho Kunwar against Dharam Das. They had been examined by the Subordinate Judge, who heard the suit, and by the High Court on appeal. From a summary of the result of that examination, so far as it affects the matter now in issue, as noted by the High Court, it appears that Rs. 9,654 had been spent by Lala Paras Das in that suit up to Savan Sudi 9th, Sambat 1956, the whole of which was debited to the personal khata of Lala Paras Das in the family account books, and that the same was subsequently discharged out of the profits or income derived from the Parduman Kunwar property, leaving at the end of the year a balance of Rs 8,987-12-10 standing after the said payment, to the credit of Lala Paras Das in his personal account (Ex. 5.) Acting on those entries, this court found that the joint estate suffered no appreciable detriment by the transaction, and that it would be unduly extending the principle of Hindu Law, applicable to acquisitions by the aid of joint funds or joint exertions, to hold that the property, which came to Paras Das by inheritance from a collateral branch of the family, had thereby become joint family property.

Hardwari Lal, an agent of Janeshar Das, states that he had an opportunity of examin-

ing those account books on behalf of Dharam Das during the hearing of that suit at the instance of Babu Oudh Behari Lal, who appeared for Dharam Das in that case, and that Babu Oudh Behari Lal had got the books given to him for the purpose. His recollection of the result of that examination, as now given by him in round figures and without dates, tallies with the result of the examination of those books, which was noted by the High Court in its judgment. It has been pointed out that the account books had been produced in court in that suit on the 11th February, 1904, during the course of the hearing which had lasted many days, and that the witness ought not to be believd because no application for the inspection of the record of that or of a subsequent date was traceable on the record. But during the progress of the hearing of a suit, a counsel has the privilege of examining such documentary evidence, as he may have summoned from a witness or a party, before tendering it in evidence, and there is nothing improbable in his having obtained the account books from the Court or from the persons producing them on the date of hearing without any formal application for inspection, and got them examined for his assistance by a person who knew the character in which they were written

In the absence of the original account books, a summary of the result of that examination, as given by Hardwari Lal and corroborated by the judgement of the High Court, is admissible in evidence under Section 65 of the Indian Evidence Act, and affords proof of considerable value of the fact that whatever money was taken by Lala Paras Das for the expenses of the suit against Dip Chand was repaid by him out of the profits of the property decreed in that suit, and that there was no appreciable detriment to the family funds in the process of its acquisition. As an instance of a transaction in which the nature of the right held by Lala Paras Das in the Parduman Kunwar property was determined, the judgment of the High Court, above referred to, cannot be wholly disregarded. The property acquired was of considerable value. In the suit filed by Lala Paras Das and Umrao Singh, the value of the property claimed was assessed at over Rupees six lakhs and a half, and out of it a separated half share was decreed in favour of the then plaintiffs. The expenses incurred in the litigation were not in fact heavy, as the suit was compromised soon after its institution. They bore a very insignificant proportion to the aggregate value of the property recovered, and such expenses, as were incurred, were actually repaid out of the profits soon afterwards.

It appears, moreover, from the evidence of Atma Ram that the income of the Parduman Kunwar property used to be credited in the separate khata of Lala Paras Das in the family account books. The staff employed in the collection of rents of the family property and of the property inherited from Parduman Kunwar was the same, because many of the villages or properties were common. It is significant, at all events that no portion of the joint family expenses was incurred out of the income of the Parduman Kunwar property or from the income entered in the separate khata of Lala Paras Das. The entire income from that property was also entered, according to Atma Ram, in a separate set of account books relating to that property, maintained by Lala Paras Das. Despite the compromise, Lala Paras Das seems to have apprehended that Dip Chand might, on attaining majority, seek to avoid the compromise. He, therefore, took care to keep the income of the Parduman Kunwar property apart and did not allow it to be blended with the family income.

On the 16th November 1902, Lala Paras Das executed a will, in which he stated that he held two kinds of property, namely (1) the ancestral property and such other property as had been acquired with the aid of ancestral funds and (2) the property which he had received by right of inheritance from Parduman Kunwar. He significantly excluded the latter property from the category of property acquired with the aid of ancestral funds. He proceeded to declare that after his death his three sons shall be the owners and possessors of all the immoveable and moveable properties in equal shares, and directed that, if they chose to separate after his death, each of his sons should arrange to take one of the three lots of landed and house properties, prepared by him and appended to the will, without any addition or alteration, either by mutual agreement or by drawing lots before a court of justice or in the presence of arbitrators appointed for the purpose. In the scheme of partition so prepared and appended to the will for future adoption, he took care to blend the ancestral and separate properties thinking probably that by so doing his eldest son, Dharam Das, whom he had begun to distrust on account of his vicious habits and

improper ways would have no greater power of disposal over the portion of the Parduman Kunwar property falling to his lot than he would have over the ancestral portion. Every fond father hopes that his sons would have male issue. By the method he adopted, he kept his own hands free but sought to provide a curb for his sons, if they happened to have any male issue.

The blending was with that end made to take effect on a partition taking place after his death. The terms in which he spoke of Dharam Das preclude the idea that he had thrown the property into the common stock in his life-time. In his subsequent codicil of the 17th April, 1903, he referred again to the vicious habits and immoral ways of Dharam Das, and laid stress on the two classes of properties, of which he was in possession, namely (a) the ancestral property or that acquired with the ancestral funds, which he could not transfer to any body and (b) the property inherited under a decree from Parduman Kunwar, which he said was his own property and which he was competent to bequeath to any one he liked (Ex. 11). He then proceeded to set apart a portion of the latter property yielding an annual income of Rupees twelve hundred for the maintenance of Musammat Bachcho Kunwar, the wife of Dharam Das, and directed that if Dhram Das offered any obstruction to the mutation of names in her favour or to her possession or occupation, he shall be totally deprived of the entire property, which might be allotted to him out of the estate of Parduman Kunwar, and the said property shall in that case devolve upon Musammat Bachcho Kunwar for her life without any power of transfer. He was throughout anxious to maintain the separate character of the estate inherited by him from Parduman Kunwar and keep its income separate in his personal khata and account, and he asserted and reiterated from time to time his full power of disposal over the same as long as he lived. The finding of the court below on that point cannot, therefore, be assailed.

Lala Paras Das died on the 2nd May, 1903, leaving his widow, Musammat Rohli Kunwar, and his three sons: Dharam Das, Badri Das and Janeshar Das, surviving him. On the 15th June, 1903, Dharam Das, sued for a partition of his one-third share, without making any reference to the wills and codicil which had already been opened on the application of Girdhari Lal, the nominated guardian of the other sons. But he appended to his plaint a copy of the three lots of landed and house properties, given in the will, and asked that a partition might be effected in accordance with those lots by each of the brothers drawing one of them, or by an independent division, if the other brothers so desired.

It cannot be said that Dharam Das was unaware of the terms of the will or of the dispositions it contained, when the above plaint was filed. In fact he referred in paragraph 3 of the plaint in a vague and veiled manner to what he described as the many plans hostile to the plaintiff, which had been devised by his father but which, he said, were not binding on him so far as they were prejudicial to his interest. Badri Das and Janeshar Das were then minors and both were represented in the suit by their mother, Musammat Rohli Kunwar, as their guardian.

On the 17th July, 1903, Musammat Rohli Kunwar applied to be impleaded as a co-defendant, and claimed to be entitled to a one-fourth share in the property of her husband. On the same day she was added as a defendant, and her name was removed from the guardianship of her minor sons and that of Girdhari Lal substituted as the guardian *ad-litem* of Badri Das, and that of Jambu Pershad, as the guardian *ad-litem* of Janeshar Das.

The plaintiff and the guardians *ad-litem* of Badri Das and Janeshar Das, and Musammat Rohli Kunwar then filed a petition of compromise, settling all their disputes and accepting the lots of landed and house properties prepared by Lala Paras Das and appended to his will for future allotment, and also setting apart certain properties, yielding a rent of Rupees twelve hundred per year for the maintenance of Mussammat Rohli Kunwar. They asked the court to assign the lots to each of the three brothers by allowing the then plaintiff, Dharam Das, and the guardians *ad-litem* of Badri Das and Janeshar Das to draw the same; but what is significant is that in the petition of compromise they made a provision for almost every important matter covered by the will and adopted the directions contained in the same with certain variations, which have no bearing on the present issues. This would not have been possible, had the will of Lala Paras Das not been present to the mind of the parties to the compromise, when it was drafted and filed.

Both Girdhari Lal and Jambu Das, acting on behalf of Badri Das and Janeshar Das respectively, applied for permission to enter into the compromise, on behalf of the minor defendants, stating that the compromise was for their benefit. The court granted the requisite sanction, and as a result of the drawing of the lots, Dharam Das was given lot No. 1 of the landed properties, and lot No. 3 of house properties, Badri Das was given lots No. 2 of both the landed and the house properties, and Janeshar Das was given the remaining lots. A decree was passed in accordance with that compromise on the 24th July, 1903, and it was made absolute after certain outstandings and moveables were further divided on the 17th December, 1904.

The result of the divis on, so effected, was that though the lots were equal in their aggregate value, the ancestral property and the Parduman Kunwar property were blended and allotted to the three parties in unequal and varying proportions, as suggested by Lala Paras Das in his will. Out of the ancestral property, Dharam Das got landed property yielding an income of Rs. 4,579-5-6 per year; Badri Das got landed property yielding as income of Rs., 1843-13-3 per year; and Janeshar Das got landed property yielding an income of Rs 4,686-4-9 per year. Out of the Parduman Kunwar property, Dharam Das got landed property yielding an income of Rs. 875-10-6 per year; Badri Das got landed property yielding an income of Rs. 3,669-1-9 per year; and Janeshar Das got landed property yielding an income of Rs. 676-6-3 per year. The division of the house property, both ancestral and inherited from Parduman Kunwar, was similarly unequal.

But for the compromise, Musammat Rohli Kunwar would have been allowed a one-fourth share, and Dharam Das and his minor brothers would have got one-fourth each. The division may not, in that case, have been made in the form suggested by Lala Paras Das in his will and accepted and adopted by his heirs. Among the items of property given to Musammat Rohli Kunwar by the compromise for her maintenance there were two shops situated on the back of the house of the Rana of Jasmur in Saharanpur, which formed a part of the Parduman Kunwar Estate (Vide item No 18 of Lot I of the residential property in Ex. VI.)

As the will of Lala Paras Das was invalid under the Hindu Law in regard to the ancestral property and valid in regard to the separate property, inherited by him from Parduman Kunwar, and each of his sons was declared by the will to be the owners of the same after his death in equal shares, the minors, Badri Das and Janeshar Das, were as much benefited by the compromise and settlement of their disputes as the then plaintiff, Dharam Das. The parties accepted the recommendation of Lala Paras Das as to the manner in which the properties should be divided after his death, whenever a partition was desired by any of his sons, and though the effect of the adoption of the scheme of partition appended to the will was to blend the two kinds of properties referred to in the will and to divide the same in three equal shares with varying ingredients from each block or kind, it is not now open any longer to the parties to go behind that compromise and the decree passed on its basis, so far as they settled the rights and interests then in question.

It is presumable from the facts above narrated that the court had done all that was necessary to consider how far the compromise operated to the benefit of the minors, when it granted its sanction; and, though Girdhari Lal does not say that clause 13 of the will of Lala Paras Das regulating the future devolution of the estate, was specifically considered or discussed or taken into account, when the compromise was entered into, it is not open to Janeshar Das to repudiate the compromise, so far as it affected the rights he then possessed, on any ground whatever.

As observed by their Lordships of the Privy Council in *Rani Mewa Kuer V. Rani Hulas Kuer* (2) a compromise is in a sense a recognition or acknowledgment of some antecedent right, but where an exchange or transfer is effected by a compromise between different persons in respect of different kinds of properties to be held in varying proportions, a minor, who feels aggrieved by such an exchange or transfer effected under the guise of a compromise, can repudiate the transaction within three years of his attaining majority or within the period ordinarily allowed by law for a suit for that purpose, whichever is longer. A compromise effected by a guardian *ad-litem* in

(2) (1873-74) I. L. A. 157 = 13 Bl. R. 312 (P. C.)

contravention of the terms of Section 462 of the old Code of Civil Proceedure is only voidable at the instance of the minor. It is not void. If the minor on attaining majority does not repudiate it or seek to avoid it in the manner and within the time allowed by law, it binds him to the same extent and in the same way, as if it had been validly effected by a person who had then been of full age. On attaining majority in 1911 or later in 1914 when the certificated guardian was removed, the plaintiff was bound to exercise his option of repudiating it or affirming it. He took no steps to repudiate it within the time allowed by law. On the other hand, he ratified it by remaining in possession and enjoyment of the profits of the properties assigned to him by the compromise and has been so in possession and enjoyment up to this date. Since attaining majority, he has enjoyed the profits of the property for a period of nearly 10 years. Both as a compromise and as a family settlement of the disputes then pending between Dharam Das and his brothers and their mother Musammat Rohli Kunwar and of other claims in regard to the family property, as affected by the will of Lala Paras Das of the 16th November, 1902 and his codicil of the 12th March, 1903, the compromise and the decree passed on its basis, so far as they go, cannot now be impeached.

It is necessary, however, to consider how far that compromise and decree could estop the parties from claiming any rights, which had not till then arisen or which, owing to all the brothers being then alive, none of them could have positively or with any reasonable certainty claimed as his own. Dharam Das died without leaving any issue in 1907 or 1908. He left a widow, Musammat Bachcho Kunwar who got such property, as Dharam Das had left unsquandered, in addition to what she had already recovered by a decree against her husband, based on the codicil of Lala Paras Das of the 17th April, 1903. Badri Das died without leaving any male issue on the 26th April, 1920. He left a widow, Musammat Phulwanti Kunwar, who is the present defendant-appellant. She obtained possession of the property left by her husband, and obtained mutation of names in respect thereof in her favour. The present suit is confined to that portion of the property in her possession which had been allotted to the share of Badri Das out of the Parduman Kunwar Estate.

That Estate, as has already been pointed out, was the separate or self-acquired property of Lala Paras Das and was devised by him to his three sons along with the ancestral or joint family property in three equal shares (Vide Para 4 of the will of the 16th November, 1902). By the compromise of the 17th July, 1903, the two kinds of properties were blended in accordance with the lots recommended by Lala Paras Das and dealt with as if they had been the joint family property of the three brothers without any distinction, and Badri Das was assigned lot No. 2 of the landed and house properties, which included a smaller portion of the ancestral property and a larger portion of the Parduman Kumar property, while Janeshar Das was given a larger portion of the ancestral property and a smaller portion of the Parduman Kumar estate

The contension of Janeshar Das is that by reason of clause 13 of the will of Lala Paras Das of the 16th November, 1902, he became entitled on the death of Badri Das to the portion of the Parduman Kumar property allotted to Badri Das at the time of partition, because Badri Das had died without leaving any issue. Clause 13 of the will was to the following effect :—

"With a view to the perpetuation and preservation of my family, I do further make a will to the effect that if, through (ill) luck, God forbid, any of my sons should remain childless (*Lawald*), that is, should have no son, he would not have the power to adopt out of another family. But he would have the power to adopt any one he pleases from among the sons (*aulad*) of his own brothers and make him the owner of his estate (*Matruka*). In case he does not do so, his estate (*matruka*), shall devolve on the survivors (*Pas nandagan*), as in a joint Hindu family".

If the testator gave an absolute estate to each of his sons he had no power to restrict the right of any of his sons, happening to be childless, to adopt a son from any family or line allowed by custom or law. But he could make the grant of the estate to his sons defeasible, if they or any of them disregarded the directions given by him in his will and direct the transfer of the object of his bounty on the happening of that contingency to any other person living at his death, and at the time the contingency happens. He could not lay down a scheme of inheritance; but he could, subject to the provisions of the Hindu Law before its modification by Act XV of

1916, point to the surviving members of his family, who could take the estate, if a certain contingency happened. This is substantially what he did. He told each of his sons that he should not, if childless, adopt any person from outside the family to the exclusion of a son of any of his brothers, and that if he did so the estate of the person so adopting an outsider would be diverted from such adopted son or his successor to the other survivors of the family. He contemplated the possibility of his sons separating and making a partition after his death, and had prepared a scheme of partition which if adopted, as it eventually was, was to operate as if the whole estate, including the Parduman Kunvar property, had been their joint family property. He was deeply opposed to the property going under the pretext of adoption to a person outside the family and he consequently declared that, if an adoption was made by any of his sons from among the members of another family and not from among the sons of his brothers, such adopted son would not be entitled to his estate, and the property would be diverted to the surviving members of the family, as if the family had continued to be joint.

A remote and uncertain contingency, resting on assumptions, none of which may eventually turn out to be true, cannot stop the partition of a family estate, if it is otherwise divisible. The compromise and the decree for partition naturally made no reference to clause 13, because all the three brothers were then alive and the specific donee entitled on defeasance could not have been ascertained till the contingency, referred to in that clause, had arisen. Two of the brothers were of very tender years, and it could not be said which of them would have no male issue. In fact, it could not then have been foreseen which of the three brothers would survive whom, and no rights had till then arisen in favour of Janeshar Das, to which Section 6 of the Transfer of Property Act could have applied, or which the compromise or the decree for partition could have prejudiced.

The word *Pasmandagan* (Survivors) is somewhat ambiguous and may mean either the surviving sons or the surviving members of the family, including any grand-sons or other children alive at the death of the testator and on the happening of the said contingency. The contingency did not, however, arise, for Badri Das made no adoption and no nephew was available. Dharam Das had no child born to him. Badri Das had a son, who had died in his life-time. Badri Das left a daughter alive but no male issue. Janeshar Das, the plaintiff-respondent, has yet no children.

There was no male child thus available in the family, whom Badri Das could have adopted. Indeed, he chose not to contravene the direction given by his father and made no adoption. If Janeshar Das has any male children hereafter born to him, the widow of Badri Das may take any of them in adoption to her husband. Till a son is born to Janeshar Das and is available for adoption, the enforcement of the penal condition, if it is a penal condition limiting the field of choice, is wholly impossible. A right to adopt is optional, but a testator can make a grant restricting that right. The failure of a person to make an adoption cannot be punished, though a disregard of the instructions given may involve a forfeiture of his rights.

No forfeiture of the rights of Badri Das during his life was here intended, for the defeasance was only to take place after his death if he ignored the restriction. The restriction in this case was never ignored, for no adoption was made; and the claim of the plaintiff must, therefore, fail. The words "*bahalat aisa na Karne ke*" (in case he does not do so) imply the doing of an act in contravention of the restriction and do not suggest that the mere dying of a man, without leaving any male issue, would attract that penalty. A defeasance clause must be strictly construed, if its effect is to divest a person in whom an estate has already vested, and a penalty, which applies to one state of circumstances, cannot be enforced in another state of facts. The contingency contemplated, namely the adoption of an outsider to the exclusion of the son of a brother, has not yet arisen, and no cause of action has, therefore, accrued to the plaintiff.

The claim must therefore fail, and I agree in allowing the appeal and dismissing the suit with costs here and hitherto, including fees in this Court on the higher scale.

Appeal allowed.

* 1924 ALLAHABAD 645.

MUKERJI, J.

King-Emperor..... .....Petitioner.

v.

Kishen Lal and others...Accused—Opposite Party.

Criminal Appeal No. 859 of 1923 decided on 6th February, 1924.

(a) *Criminal Trial—Identification must be immediate otherwise loses in value.*

In no dacoity case, a court would convict a person who was not identified in the jail or before a proper authority, immediately after the arrest, simply on the strength of identification conducted in the Court of the Committing Magistrate or the Sessions Judge. Where the safe-guard of an *earlier identification* is non-existent the court is bound to insist on something being said by a prosecution witness to indicate why and how he happens to remember the faces long after the event. [P. 650 Col. 1].

(b) *Penal Code, S. 332—Knowledge of complainant being public servant is necessary.*

An intention on the part of the accused person, namely to prevent or deter a public servant from discharging his duty is an ingredient of the offence. If the accused persons were unaware of the fact that the persons confined were public servants the offence is not committed. [P. 651 Col. 2].

(c) *Criminal Trial—Right of private defence can be found though not pleaded.*

Even where a right of private defence is not pleaded the court on finding on the evidence before it, that the accused acted in the exercise of his right of private defence, is bound to take cognizance of this fact. 16 A. L. J. 169 Foll. [P. 651 Col. 2].

(d) *Penal Code, S. 99—Right against the public officer.*

A right of private defence exists in a case where the alleged offender does not know and has no reason to believe that the person doing the act was a public servant. [P. 651 Col. 2].

Nihal Chand, Thompson and D. C. Banerji for the Accused.

The Government Pleader for the Crown.

Judgment:—This appeal relates to a very unfortunate incident which occurred in a village known as Dhariwala in the district of Muzaffarnagar. 24 persons have been convicted by the learned Sessions Judge on charges under Sections 148 and 333 read with Section 149 of the Indian Penal Code. The original charges on which the appellants and some others were committed to the Court of Session were Sections 148 and 332/149 I.P.C. In the Court of Session the charges were amended and instead of Section 332, Section 333 was substituted. But from the judgment of the learned Sessions Judge it would appear that he took no notice of Section 149 of the Indian Penal Code.

The facts which have been undoubtedly established in the course of the trial are shortly these:—

The Bijnor Police wanted two persons Ganeshi and Bhagwana who were implicated in a case of dacoity. They got some information that these men were staying in Dhariwala, in the district of Muzaffarnagar. A small council of Police Officers was held at the village of Tissa in the district of Muzaffarnagar on the 19th of May. It was then decided that, the City Kotwal, Ram Ratan Lal, of the district of Bijnor, the three constables who had accompanied him namely Rumal Singh, Chhote Singh and Niaz Ahmad, the Sub-Inspector Tahawwar Ali of the Police Station of Bhopa in the district of Muzaffarnagar and a Police Constable Shiva Ram of the same Police Station, should go into the village of Dhariwala in search of the two persons who were wanted.

Early in the morning, the party started from where they were staying and arrived at Dhariwala at 8, on the morning of 20th May, 1923. The hour is important from various points of view. It is to be noted that in the judgment of the learned Sessions Judge it is mentioned at one place that the party arrived at 6 in the morning. But that is clearly due to an oversight. The party having arrived at Dhariwala, left their tongas outside the village habitation and proceeded on foot. They met one Nanhwa who was loading a cart of manure. They enquired of him where Ganeshi and Bhagwana were. Nanhwa directed the party to the quarters of Jogis. One of these Jogis namely Faqira was questioned and he directed the party to the house of one Debi Chauhan. This house was surrounded by the Police. Some of the Police Officers were near the house, some were at some distance. One of the Officers entered into the house of Debi. He noticed that an old woman was removing a bundle and he followed her into a hut. What happened thereafter is not very clear. It appears that at about this stage of affairs the Police Officers who were at or near Debi's house were assaulted by a number of villagers. The Sub-Inspector of Binjor Ram Ratan Lal came in chiefly for the assault. Tahawwar Ali, the other Sub-Inspector, got the news and hurried to the rescue. It appears that there

was a free fight; for we find that some of the villagers (more or less 14 in number) also received injuries in the course of the scuffle. Sub-Inspector Tahawwar Ali fired some shots and one of these hurt the accused person, Shera. Thereafter 4 out of the Police were overpowered and captured and two ran away. A party went in search of them and caught them. All were then taken to the zemindar's *dera* or collection house; thence they were removed to a hut which has been described as *Dobari*. The Police were kept confined the whole day and night. In the course of the night one of the party managed to run away. In the meanwhile, Pullu, one of the man who had driven the tongas, ran away and gave information. Early in the morning some Police Officers including the Deputy Superintendent of Police of the district of Bijnor and many of the villagers arrived and rescued the Police Officers. Then there was a more or less indiscriminate arrest of able-bodied persons and a parade was held for identification by the Police Officers. Many arrested persons were let go. About 30 were sent up to the custody. Shera and his brother Mangal who were in the meantime in the hospital were arrested there. Thus 32 men were placed before the Committing Magistrate—the learned District Magistrate himself. He discharged two and committed 30 to stand their trial before the Court of Session. The learned Sessions Judge acquitted 6 and convicted, as already stated, 24.

The case which has been very fully argued on both sides divides itself into four portions:—

(1) We have to see what was the motive of the attack on the Police Officers;

(2) Next we have to see who were the persons who were connected with the attack;

(3) Thirdly we have to see what are the offences under the Indian Penal Code that they committed.

(4) Last but not least is the question of punishment.

On the first point the learned Sessions Judge has found himself unable to give a clear answer. He begins his judgment by saying: "The facts of this case are not seriously in dispute, but it will never be known why the accused attacked the police who were merely going to arrest a couple of dacoits in the course of their ordinary duty". Then he put two alternative probabilities before himself. He thought that there could only be two reasons for the offences; either the Police Officers maltreated the village people or the accused persons were determined from the very first to prevent a search of their houses "because they were all involved in a series of dacoity cases that had taken place recently". He came to the conclusion that the latter was the more probable reason. Further he said that as the accused persons had not set up any clear case and had contented themselves mostly with pleading *alibis* it was impossible to tell with certainty how the quarrel arose. Having gone through almost the whole evidence that was before the learned Sessions Judge I have come to the conclusion that the theory set up in argument before the learned Sesssions Judge—namely, the officers were mistaken for dacoits or robbers who had come to extort property on false pretences, was the true one. The Deputy Superintendent of Police, Mr. Hasnain, who as I have said, was an officer from Bijnor, said that between Bijnor and Tissa the officers never put on any uniform for the purpose of concealing their identity. The party met people on the way and told them that they formed a marriage party. It is to be noted that the party from Tissa arrived at 8 in the morning in the village. They came on tongas drawn by bullock carts which they left outside the village. It would have been subversive of the object for which the officers came, namely the arrest of dacoits who had taken shelter in the village, to have come in their uniforms. It is not the case that all the officers came suddenly on horse back and surprised a certain house where they knew the persons wanted were. They did not know definitely where to find Ganeshi and Bhagwana. They had to make enquiries and they did make enquiries, as I have already stated. If they had been in uniforms it would have been impossible for them not to reveal their identity, with the result that the dacoits whom they wanted would take notice and run away. It seems to me, therefore, to be certain that the officers were without any uniforms. This theory is supported by a good deal of circumstantial evidence. I am not ignoring the fact that all the police officers and some other witnesses for the prosecution say that

the officers were in uniforms, but I have serious doubts on the point. The witnesses differ as to where officers were stripped of their uniforms. The next morning, the whole village was raided by a large body of men when arrests were made. It is not said that any of the uniforms were recovered. It would not have been easy for the villagers to do away with the uniforms of six men. Besides, they were acting or supposed to have been acting in utter defiance of law. Under the circumstances it would not be likely that they would think it necessary to destroy the uniforms.

The prosecution witness Rumal Singh (199 of Judge's notes) says that no uniforms were taken off in the *dera* in his presence. Niaz Ahmad, prosecution witness No. 5, says that the uniforms were taken off at the *dera* (219 ibid.) The police officers were all kept together and this discrepancy is inexplicable. Rumal Singh says that, when the villagers beat the party they said among themselves that the party were dacoits. Niaz Ahmad also says that the crowd which assaulted the police party called them dacoits. Ram Ratan Lal, prosecution witness No. 6, says that when he had first attacked one or two people said that he was a dacoit.....Banwari, prosecution witness No. 16, says that when he went inside the room in which the police had been kept in confinement he recognised the thanedar of Bijnor and that he told the accused Mehar Singh that, the party were police but the answer given was that they were not police officers but were dacoits. He further said in his cross-examination that the party were in plain clothes (the word in vernacular is *sada* which would mean plain clothes). The learned Judge has translated it as white clothes. The person who was first accosted by the police officers namely Nanhwa was produced on behalf of the defence. He too says that the officers were in plain clothes. He further says that when he was asked the whereabouts of Bhagwana, then he thought that they were police officers and the police officers themselves told him that fact. There is therefore substantial body of evidence to indicate that there were circumstances which made the villagers to suspect that the party of six were robbers who had come to rob the villagers on a pretext of searching for dacoits. When the villagers wanted to arrest the police officers there was a free fight (as I have already stated, about 14 persons out of the accused were hurt), between the villagers and the police officers and in the course of the fight revolvers were fired. This last incident must have confirmed the villagers in their belief that the party were genuine dacoits who had come armed.

As against the theory of the learned Sessions Judge that the village people resented the proposed arrest of Bhagwana and Ganeshi "because they were all involved in a series of decoity cases", it has been pointed out that there is no evidence to substantiate it. Not a word has been said indicating that Ganeshi and Bhagwana had any relations in the village. There is nothing to show that the village people or some of them were suspected to have been dacoits. Indeed the very fact that the police officers did not think it necessary to have a larger party than they themselves formed goes to show that no serious consequences were ever feared. The learned District Magistrate was examined in the court below and he said that he never heard the name of the village of Dhariwala till the incident occurred. This shows that the village had no bad reputation. The learned Sessions Judge had the accused persons before him for several days and he observes in his judgment that they were men of exceptionally poor physic and of a very low type of intelligence. Indeed, there is on the record evidence of incidents which show how poor in intellect all these men really are. The learned District Magistrate, when the party of the accused persons were brought before him on the 21st of May, 1923, asked them if any of them had received any injuries and none of them told him that they had. The learned District Magistrate put the question only to satisfy himself as to whether the villagers had been illtreated but the villagers had not the intelligence enough to understand him and kept quiet. It was only, says Mr. Darling, that after he had seen the medical report that he came to know that several of the accused persons had received injuries. Under the circumstance it cannot be the case that, the whole village or a considerable part of the inhabitants were involved in a series of dacoity cases. The incident of an old woman removing something from Debi's house, may have been accidental or due to an anxiety to save property from being taken by the supposed robbers.

Let us now consider the conduct of the villagers themselves, to find out what they

actually thought about the party. After the villagers had overpowered the police party they took them to the zemindar's *dera* and then confined them in a hut. They mounted guard day and night lest the party should escape. If they had any suspicion that the party were a body of police officers they would not have acted as they did. They would have simply beaten them and let them go. There could be no object to be gained in keeping them alive and intact in the hut, mounting guard against their escape, knowing it all the while that the news would get out and a larger body of officers and men would come and take them to task. The presence of the 3 Government or semi-Government officials, the patwari, the chaukidar and the mukhia also point to the same conclusion. The learned Sessions Judge has at one place in his judgment remarked that the villagers did not know what to do with these men. That can hardly be correct. They knew quite well what they were about. They were guarding them, so that authorities might come and arrest the party in confinement. There could have been no idea of killing them and disposing of the bodies, though one of the police men has suggested it. If such had been the idea, the night was the right time, but the confined men saw the light of the next day safe and alive. That the villagers did not inflict more injury than was inevitable in a free fight between unequal numbers and subsequent capture, is abundantly clear. The injuries on 5 of the Police Officers (though numerous in some cases) were all "simple." Only one sustained a "grievous hurt", but even that was not serious. They knew that Shera on receiving the bullet injury had gone to the authorities to make a report. It is in evidence and has been satisfactorily established that Shera and his brother Mangal went away to complain. Of course, the villagers could not tell where Shera and Mangal actually went. Shera and Mangal went directly to the District Magistrate of Muzaffarnagar and laid a written application before him stating a part of the incident. Shera and Mangal have been described as ringleaders in the affair. But if Shera and Mangal knew that they were in the wrong, they would not have themselves gone to the highest district authority. It is clear, therefore, that, the villagers never knowing or suspecting that they had police officers in confinement were guarding them so that police officers might come and arrest those whom they themselves had arrested. I am, therefore, clearly opinion that the whole affair is (not a comedy but) a tragedy of errors.

Now let us see who were the people who took part in the affair. On this point unfortunately the judgment of the learned Sessions Judge gives this court no assistance. He has given reasons, and very good reasons too, for acquitting six of the accused persons before him. Then he finishes the case against the remaining 24 accused persons by a single sentence, viz., by saying that he considers that they had taken part in the riot. Fortunately, however, the Counsel for the appellants and the Crown have taken great pains and the Crown Counsel had the assistance of the Prosecuting Inspector. I am in full possession therefore of the entire body of evidence that is against the individual appellants.

Among the appellants there are three persons who are more or less connected with the Government, namely the Patwari Kishan Lal, Gopi, the Mukhia and Ghasita, the Chaukidar. As against these, the police evidence is clearly to the effect that not only they took part in the riot but excited others in causing hurt to the police officers. Only in one case, there is one of the police officers namely Shiva Ram, who says that the Patwari Kishan Lal interfered in his (Shiva Ram's) being further maltreated. The learned Sessions Judge has not believed any portion of this evidence and very rightly too. He says :—"There are three officials, Gopi, Ghasita and Kishan Lal Patwari. The police complained that none of these three did anything to save them from injury but rather encouraged the villagers than otherwise. I do not think it very likely that they encouraged the villagers, but they probably found that their position was a helpless one". I have heard the entire evidence and I can say that I am in a position to fully agree with the opinion formed by the learned Sessions Judge, who saw the witnesses himself. It is clear then that the case against these persons has been very much exaggerated. I am prepared to believe the witnesses so far that these men were found among the body of villagers who had collected about the police officers and that some of these came and went where the officers were kept in confinement. This would be in consonance with the theory set forth above namely that, the policemen were taken to be dacoits. I forgot

to mention, but it is important to do so, even now, that all the police officers except Shiva Ram were *utter strangers* to the village. Shiva Ram alone says that he had visited Dhariwala just a few times before. There would be nothing strange then that, even the Patwari, the Chaukidar and the headman should have been ignorant of their identity. Shiva Ram has not said that he met any one in the village who was already an acquaintance of his. If he had met any such person his identity would have been disclosed and matters would not have been so bad.

Having acquitted these three men of taking any deliberate part in the riot or exciting the rioters, the learned Judge convicts the three persons of not making "strenuous efforts to prevent the riot and the subsequent disgraceful torture". This is his language. "Gopi, however, is a man of fairly good position in the village and there is no reason to think that he wanted the police to be seriously injured. On the other hand, neither he nor the Patwari nor the Chaukidar seems to have made strenuous efforts to prevent the riot and the subsequent disgraceful torture and I am not prepared to let them off lightly. It may have been cowardice rather than deliberate wish to injure the police that brought them into the quarrel, but they are certainly responsible for not trying to moderate the violence of their more ignorant comrades. The Chaukidar ought to have escaped long before the quarrel became universal and made a report at the thana". I am afraid the reasons given by the learned Sessions Judge cannot be any sufficient ground for convicting men of offences under the sections of the Indian Penal Code under which they have been convicted. On the learned Judge's finding therefore these men must be acquitted. In the circumstances, I do not feel called upon to discuss in detail the particular evidence that may be against these men.

Sarjit, Mukh Ram, Debi Sahai, son of Bansi and Rahwa as well as Gopi were represented by Mr. Thompson. I have already acquitted Gopi. I will now consider the case of the remaining four. Before I enter into the evidence I will dispose of a point of law. It appears that the depositions of two of the witnesses namely Chhote and Niaz Ahmad (P. W. Nos. 3 and 5) taken before the learned Committing Magistrate were admitted into evidence at the close of their depositions before the learned Sessions Judge. A question arose how far this evidence recorded by the learned Committing Magistrate could be treated as evidence. It appears that the witnesses failed to identify all the accused persons whom they had identified before the learned Magistrate. It was found that over two months had elapsed between their examination before the learned Magistrate and the date on which they were examined before the learned Sessions Judge and it was likely that the witnesses should forget the faces. Under these circumstances I think it was entirely within the discretion of the learned Sessions Judge to admit the evidence. The evidence was admitted before the cross-examination began and the defence could therefore cross-examine the witnesses on the statements that they had made before the Committing Magistrate.

It will be necessary to go into the history of the case before examining what evidence there is against the individual appellants. On the morning of 21st May, 1923, when the Deputy Superintendent of Police, Mr. Hasnain, arrived with a large body of men and rescued the five police officers who were still in confinement, he ordered the arrest of all able-bodied men in the village. These men numbering between 70 and 80, were put up in an open space of land and the police officers were called upon to identify them. It is in his evidence that those who were identified by less than two of the police officers were let go and those who were identified by two or more of the police officers were arrested and sent up to Muzaffarnagar. This was no doubt a very proper thing to do. But most unfortunately, no record whatsoever was kept of these identification proceedings. Indeed the proper thing to do was to send the men, after identification on the open field, at once to the custody and then to conduct a fresh identification proceeding in the jail before a Magistrate and to keep a record. This is always done in dacoity cases. The Police Officers were utter strangers to the village and it would be very difficult for them to remember the faces long after the occurrence. It was therefore necessary to keep a record of the identification which took place soon after the incident. The learned District Magistrate started an enquiry into the case on the 5th of June 1923. Then as usual, the accused persons would be brought unveiled to his Court and would be kept outside the Court till the case was called on. The

prosecution witnesses would thus have an opportunity to see the accused persons over and over again. In these circumstances, the utility of identification in the Court of the Committing Magistrate and later on in the Court of Session is very much diminished. In no dacoity case, a court would convict a person who was not identified in the jail or before a proper authority, immediately after the arrest, simply on the strength of identification conducted in the Court of the Committing Magistrate or the Sessions Judge. This being the case the evidence in this case loses its entire value. A further difficulty is created in the case by the fact that the witnesses are, generally speaking, unable to say what part what accused person took in the affair. I recognise this would be impossible for the prosecution witnesses to do in most of riot cases or of dacoity cases. But, where the safe-guard of an *earlier identification* is non-existent the court is bound to insist on something being said by a prosecution witness to indicate why and how he happens to remember the faces long after the event. The witnesses, again speaking generally, said before the courts that, they saw such and such of the accused persons, either in the riot or in guarding the police officers in the hut. Thus, the second safeguard against the inaccuracy and deliberate perjury is also taken away. I will quote an example. As against Debi Sahai. son of Bansi, there is the evidence of Shiva Ram. He says " I can recognise by appearance the following.....Debi Sahai, son of Bansi ". The witness does not say what part Debi Sahai, son of Bansi, took in the riot.

Coming to individual cases, Sarjit is mentioned by only one witness namely Chhote in the Court of the Magistrate. There is no other evidence against him. On this ground alone he is entitled to an acquittal. It is unsafe to base a conviction on the statement, of one identification.

As against Mukhram there is only one witness, namely, Niaz Ahmed, who has purported to identify good many people. It is unsafe to base a conviction on the testimony of one identifying witness, so he too is entitled to an acquittal.

As against Debi Sahai, son of Bansi, there is the evidence of one witness only, namely, Shiva Ram, Masita mentions one Debi but that is clearly the other accused person. For Debi, son of Bansi, has always been described as Debi Sahai and not as mere Debi. For the reasons given above, Debi Sahai, son of Bansi, is also entitled to an acquittal.

As against Rahwa there is no evidence recorded by the learned Sessions Judge. His conviction, if any at all, must be based on the statements of Niaz Ahmad and Chhote recorded in the court of the learned Magistrate. I consider that it would be unsafe to rely for conviction on the statements of those two witnesses only, specially as no record was kept of the initial identifications and the witnesses had an opportunity of seeing the accused persons before the Magistrate.

I will now take the case of the appellants represented by Mr. Bajpai.

As regards Shera he is the man who received the bullet wound. His presence is clearly established, It will be a matter for consideration whether he should be convicted or not and, if so, of what offence.

Mangal's presence is sworn to by no less than five witnesses and I must hold that he too was present at the commotion.

Against Saktu we have got the evidence of Niaz Ahmad alone and I would not convict him.

As regards Shadi we have evidence of three witnesses, namely Shiva Ram, Rumal and Masita. His presence on the occasion must therefore be taken to be practically certain.

As regards Bhagwana we have the evidence of three witnesses, namely Shiva Ram, Masita and Mukha. His presence too is therefore assured.

Partap. son of Narpat, has been mentioned by only one witness namely Niaz Ahmad and I would not convict him.

As against Sukkha, son of Behari, we have no less than the testimony of five witnesses namely Shiva Ram, Niaz Ahmad, Ram Prasad, Masita and Mukha. His presence is therefore assured.

As against Jugna, the only person who mentions him is Niaz Ahmad who has mentioned a lot of people. I would not convict him.

Against Jhabba we have the evidence of two persons namely Niaz Ahmad and Masita. Jhabba does not belong to the village of Dhariwala. He is the son-in-law of Shera and he says that he happened to come to the village on the morning of the

21st of May, 1923 and was arrested. I doubt his complicity and give him the benefit of it. I would not therefore convict him.

As against Mula we have the evidence of only two persons,—namely Shiva Ram aad Niaz Ahmad. Actlng on the principle already laid down for my conduct I would acquit him also.

As against Debi, son of Behari, we have no less than six witnesses-namely Ram Ratan, Shiva Ram Chhote, Niaz Ahmad, Ram Prasad and Masita. It will be remembered that he is the man whose house was going to be searched when the resistance took place. There can, therefore, be no doubt about his presence in the fight.

Now come the appellants who are unrepresented in this Court. They are six in number, namely Mehar Singh, Hardewa, Purna, Siria and the two Sukhrams.

As regards Mehar Singh we have at least six witnesses testifying to his presence in the riot. His presence on the spot is therefore entirely assured.

Hardewa is identified by at least 5 and his presence may therefore be taken as established.

As against Purna there is but the testimony of Niaz Ahmad. I would acquit him.

As against Siria we have three witnesses namely Chhote, Niaz Ahmad and Masita who prove his presence. I hold that he was present in the riot.

As against Sukhram, son of Chhajju, he has but one witness against him namely Chhote Singh. I would acquit him.

As against Sukhram, son of Sarjit, there is no evidence whatsoever. He must, therefore, be acquitted.

Now the question is whether the nine persons namely Shera, Mangal, Shadi, Bhagwana son of Behari, Sukha Debi son of Behari, Mehar Singh, Hardewa and Siria ought to be convicted of any offence and if so of what offence. I have already held that the whole affair was the outcome of a grim error which has resulted in maltreatment of six officers of the Government. But the question is whether these men are to be sacrificed simply because six honest Government servants have suffered at their hands or whether the act may be excused on the ground of want of true knowledge on the part of the accused persons. This brings me to the consideration of the law on the subject. The first section to be considered is Section 333 of the Indian Penal Code. It is not necessary to consider at present whether Section 332 is applicable or Section 333. The learned Magistrate has discussed the point very clearly in his judgment and I am entirely at one with him in thinking that Section 332, when it is applied with Section 149 to the circumstances of the present case, is the more appropriate section. However both the sections require as an ingredient of the offence, the presence of an intention on the part of the accused persons, namely, to prevent or deter a public servant from discharging his duty. If the accused presons were unaware of the fact that the persons confined were public servants the offence has not been committed.

Now coming to Section 148 it is clear that the accused persons were armed with lathis, for most of the injuries deposed to by the Civil Surgeon were caused by lathi blows. It does not appear that the lathis were actually produced and every lathi cannot be a deadly weapon. Section 148 further involves an offence under Section 147 in which there must be a common object and there must be an unlawful assembly. The common object in this case was the arrest of persons believed to be dacoits or robbers who wanted to enter the house of Debi on the supposed pretext of searching for dacoits. The persons, therefore, who opposed these men were acting for the protection of property and the question is whether they exceeded the right of their private defence. Even where a right of private defence is not pleaded, the court on finding on the evidence before it, that the accused acted in the exercise of his right of private defence, is bound to take cognizance of this fact; *vide Yusuf Husain* v. *Emperor* (1). There is no right of private defence against an act of a public servant acting in good faith and under colour of his office, although that act may not be strictly justifiable in law. In this case the Police Officers did nothing as to which it can be said that it was not strictly justifiable in law. The fact that they had not uniforms on will not make their act illegal. But there still exists a right of private defence under Explanation I of Section 99 of the Indian Penal Code in a case where the alleged offender does not know and has no reason to believe that the person doing the act was a public servant.

(1) (1918) 40 All. 284=16 A. L. J. 169=44 I. C. 675=19 Cr. L. J. 371.

This explanation therefore covers the present case.

The only act which is involved in the charge under Section 148 is the commission of the offence of rioting being armed with a deadly weapon. No charge of illegal confinement was laid against the accused persons. The right of private defence against property continues where robbery is attempted, only so long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or instant hurt or of instant personal restraint continues. After the police officers were ejected from the premises of Debi it would appear that the right of private defence of property ceased. In the course of the ejectment came the fight and a revolver was used. Thus the right of private defence of person came into existence and continued so long as the danger to the persons continued.

Now the question is whether the accused persons had any right to confine the Police Officers after the right of private defence of person and property ended.

This brings me to the consideration of the provisions to be found in the Criminal Procedure Code as to the right of arrest by private persons. According to Section 159 of the Code of Criminal Procedure (before it was amended), a private person could arrest any man who in his view committed a non-bailable and cognizable offence and who had been proclaimed as an offender. In this case the villagers believed that the police officers were dacoits—armed robbers, who had in the attempt to escape arrest used a revolver. The supposed offence was, therefore, nonbailable and cognizable, being an offence under Section 392 of the Indian Penal Code. They were, therefore, entitled to arrest the men and keep them in confinement so long as that was necessary for making them over to the custody of Police Officers. I have already stated that Shera and Mangal were despatched to move the authorities. The villagers therefore made every attempt to bring the matter to the notice of the proper authorities. Tkey did not know and could not know whether Shera and Mangal went to the Police Station or direct to the District Magistrate but this is really immaterial. The confinement of the Police Officers was not under the circumstances unnecessary. It would have been considered dangerous to carry them bodily to the Police Station of Bhopa. The confinement, therefore, was justified. It follows that no offence under the law was committed by the nine persons whose presence has been established in the the riot, by reasonably good evidence.

In this connection the provisions of Section 79 I. P. C. are also very relevant. It lays down that nothing is an offence which is done by any person.....who by reason of a mistake of fact, ... in good faith, believes himself justified by law in doing it. This rule protects the 9 men, who would be otherwise convicted, from conviction of any offence under the Indian Penal Code.

My finding being that no offence has been committed by Shera, Mangal, Shadi, Bhagwana, Sukkha, Debi, Mehar Singh, Hardewa and Siria, they cannot be punished although they took part in the riot and the confinement of the Police Officers. Under the circumstances it is not necessary to consider what would have been the suitable punishment in the case of conviction.

The result is that the appeals of all the appellants succeed. I set aside the convictions and sentences, and order the appellants' release.

It is but fair to the 6 Police Officers concerned in the tragedy to mention that the trouble that came to them was unprovoked, by any unlawful act.

Accused acquitted.

---

* 1924 ALLAHABAD 652.

MEARS, C. J. AND PIGGOTT, J.

Raja Udairaj Singh.....Plaintiff—Appellant.

v.

The Secretary of State for India in Council...Defdt.—Respondent.

F. A. No. 78 of 1922 decided on 12th March, 1924, from the decision of the Subordinate Judge of Moradabad, dated the 16th December, 1921.

(a) *Jurisdiction—Civil Court.*

A Civil Court can't grant the plaintiff a declaration to the effect "that the plaintiff is entitled to hold a certain estate for all time as a revenue free and untaxable domain in perpetual succession." [P. 654, Col. 2 & P. 655, Col. 1.]

(b) *U. P. Local Rates Act, (1 of 1914) S. 14—Scope.*

Where the relief claimed was a declaration "that the imposition of 1874 is illegal and invalid as against himself." *Held* the suit is a suit to set aside the assessment of a rate imposed under the Local Rates Act. [P. 654, Col. 1.]

(c) *Jurisdiction—Civil Court—Question of validity of tax can be decided by competent Civil Court.*

It is undoubtedly a principle of English Law that a subject from whom any tax or impost is sought to be levied is entitled to raise before a court of competent jurisdiction the question whether the authorities levying such tax or import are or are not acting within their statutory powers. [P. 653, Col. 2.]

(d) *Jurisdiction—Civil or Revenue Court—Substance and not form of plaint determines jurisdiction.*

In determining questions which from time to time arise with regard to cases apparently lying somewhere near the borderland of the jurisdiction of the two sets of courts, one principle has been consistently laid down and maintained by Allahabad High Court: it is the substance of the relief sought, and not the mere form in which the case is preferred in the plaint, that must be looked to in order to determine the proper forum for the trial of the action. [P. 654, Col. 1.]

(e) *Specific Relief Act, S. 42—Further relief of refund or perpetual injunction not being claimed, suit is not tenable.*

Where the relief claimed was a declaration that the imposition of tax under Act No. 18 of 1871 is illegal and invalid against plff. *Held* the plaintiff could have claimed further relief both by way of a refund of money paid by him under protest in the past in satisfaction of the demand which he alleges to be illegal, and also by way of a perpetual injunction for the future and hence mere suit for declaration is not tenable. [P. 654, Col. 2.]

(f) *Suit—Valuation.*

It is necessary in the interests of the litigant public that a fair valuation should be put upon every suit. The defendant, when first this excessive valuation came to his notice, should at once, before drafting any written statement apply to the court for an order on the plaintiff to deliver particulars in writing of the valuation. [P. 656, Col. 2.]

(g) *Allahabad High Court—Fees of counsel—Higher scale fees are usually awarded—Fanciful valuation is therefore to be avoided.*

Fees on the higher scale are usually given in the High Court and in the absence of taxing masters they are graduated according to the valuation fixed by the plaintiff. Obviously if a plaintiff is permitted to place any fanciful figure as the value of the suit he subjects the defendant to an unfair burden as regards the costs which he is *prima facie* liable to pay his counsel and also subjects him to a continuing possible liability to pay the plaintiff an amount by way of costs far in excess of the real value of the case. A minor and less important matter is that the plaintiff may embarrass himself. [P. 656, Col. 2.]

(h) *Legal Practitioner—Duty to client.*

It is as much the duty of a counsel to protest his client from the liability to pay excessive fees as to protect him from an adverse decree. [P. 657, Col. 1.]

Howard, F. Owen O'Neil, S. K. Dar and U. S. Bajpai for the Appellant.

L. M. Banerji for the Respondent.

Judgment:—This was a suit brought by Raja Udairaj Singh of Kashipur against the Secretary of State for India in Council, in which certain reliefs were sought by way of declaration. Those reliefs may be set forth at once in the precise language of the plaint. They are as follows:—

(*a*) A declaration "to the effect that the plaintiff is entitled to hold the domain of Barhapura for all time as a revenue free and untaxable domain in perpetual succession."

(*b*) A declaration "that the imposition of 1874 is illegal and invalid as against himself".

We do not quite understand why the second relief has been worded in this particular form. What the plaintiff desires to challenge is the levy of a cess on the property described as "the domain of Barhapura" under the provisions of the N. W. P. Local Rates Act (Act No. 18 of 1871), which came into force on the 6th of April of that year. The record before us shows that a cess was levied upon this property immediately on the passing of the said Act.

One of the pleas raised by the defendant was that the cognisance of the suit by the court in which it was instituted, that of the Subordinate Judge of Bijnor, was barred by the provisions of Section 14 of the U. P. Local Rates Act (Local Act No. 1 of 1914), which now takes the place of the older statute under which the cess was first imposed. The words of this section are as follows:—

"A suit shall not lie in any civil court to set aside or modify any assessment of a rate imposed under this Act."

The trial court framed an issue on this plea, but has not decided it: it tried out the suit and has dismissed it on the merits. The question of jurisdiction has, however, been argued out before us and we think we ought to determine it. We note that the words of the prohibition are:—

"To set aside or modify."

It might perhaps be argued that any question as to the amount of an assessment imposed under this Act might well be left to the exclusive jurisdiction of the revenue courts; but that it must be competent for a civil court to adjudicate upon the larger question whether certain property was liable to assessment at all. It is undoubtedly a principle of English Law that a subject, from whom any tax or impost is sought to be levied, is entitled to raise before a court of competent jurisdiction the question whether the authorities levying such tax or impost

are or are not acting within their statutory powers. The question in this case however is as to the proper Tribunal competent by law to give the plaintiff the relief which he seeks. In this province we have, side by side with the ordinary civil courts, other courts constituted under the Local Land Revenue and Tenancy Acts, and certain matters are reserved by law to the exclusive jurisdiction of these latter courts. The Collector of a district, the Commissioner of a division and the Board of Revenue in these provinces are not merely executive authorities but they are also courts of justice with special jurisdiction of their own which is guarded by statute from interference on the part of the ordinary civil courts. In determining questions which from time to time arise with regard to cases apparently lying somewhere near the borderland of the jurisdiction of the two sets of courts, one principle has been consistently laid down and maintained by this court: it is the substance of the relief sought, and not the mere form in which the case is preferred in the plaint, that must be looked to in order to determine the proper forum for the trial of the action. Looking at the question thus broadly, it seems to us almost beyond argument that the present suit is as regards the second of the two reliefs claimed, a suit to set aside the assessment of a rate imposed under the Local Rates Act. If it be suggested that the revenue courts to which we have referred, being presided over by officers directly concerned in the assessment and collection of taxation levied upon agricultural land, are not suitable authorities to adjudicate upon a question of liability such as that raised by the plaintiff in this case, the answer appears to be that, the legislature having seen fit to trust these courts to make a just and impartial use of the special knowledge which their presiding officers do undoubtedly possess in such matters, it is not for us to question the policy of the legislature. Moreover, it may be pointed out that an appeal lies to His Majesty in Council from a decision pronounced by the Board of Revenue in its judicial capacity.

Mr. O'Neil, in his argument on behalf of the appellant, laid great stress on the provisions of Section 42 of the Specific Relief Act (Act No. I of 1877.) We do not deny for a moment that the plaintiff, on the facts alleged by him, would have a cause of action for relief under the provisions of this section, provided always that the jurisdiction of the ordinary civil courts in this matter is not expressly taken away by statute. A mere reference to the general provisions of Section 42 of the Specific Relief Act cannot, by itself assist us in determining the further question, whether the relief sought in this particular suit does or does not fall under the prohibition contained in Section 14 of the U. P Local Rates Act (Act No. I of 1914.) Indeed, if the point is to be argued on technical grounds rather than on the broad principle which we have already suggested, this reference to Section 42 of the Specific Relief Act only suggests a further difficulty in the plaintiff's way. Under that section itself the civil courts are prohibited from granting relief by way of a mere declaration when the plaintiff, being entitled to further or consequential relief, has omitted to claim it. In the present case it seems obvious that the plaintiff could have claimed further relief both by way of a refund of money paid by him under protest in the past in satisfaction of the demand which he alleges to be illegal, and also by way of perpetual injunction for the future. The plaintiff has omitted to claim these further reliefs, because by doing so he would have made it too flagrantly obvious that his suit was essentially one to set aside the asesssment of a rate imposed under the U.P. Local Rates Act of 1914. The civil court, however, is not concerned with the reasons which may have influenced a plaintiff in omitting to claim a particular relief. It would be a curious and anomalous result if we were compelled to hold that the cognisance of the civil court was barred in respect of the subsidiary reliefs obviously claimable by the plaintiff, and necessary in order to give him complete relief on the cause of action preferred by him, but that this bar could be evaded by the plaintiff's abandoning such consequential reliefs and limiting himself to a suit for a mere declaration.

The conclusion we arrive at is that the cognizance of this suit by the learned Subordinate Judge of Bijnore was barred, at any rate in respect of the 2nd of the two reliefs claimed, by the prohibition enacted in Section 14 of the U. P. Local Rates Act of 1914. It is contended, however, that these considerations do not apply to the first of the two reliefs claimed. Our own opinion with regard to this relief is that, in so far as the defendant to the action is concerned, the declaration sought is one which it is simply

incompetent for any court of civil jurisdiction to grant. The question sought to be raised by the words "in perpetual succession" in the said relief is not one which concerns the defendant. He does not desire to prevent the "Domain of Barhapura" from descending as an inalienable estate, in accordance with the line of succession laid down in a certain sanad of the year 1828 which is the original document of title set up by the plaintiff: nor is there anything in the imposition of a local rate or cess upon this land to interfere with the plaintiff's tenure of the property, or its devolution after the death of the plaintiff. So far as the defendant is concerned. the claim preferred in connection with this first relief is one for a declaration that the land described as "the domain of Barhapura" is for all time untaxable by any Act either of the Local, or of the Imperial, Legislature. If the land in suit forms part of "The territories for the time-being administrered by the Governor of the United Provinces," then it is subject to the jurisdiction of the legislature of the province and a civil court exercising jurisdiction within those territories has no right to declare it for ever untaxable. This is a perfectly distinct question from the question whether the rate or cess which is being levied upon the plaintiff now has actually been imposed, or is being levied, within the statutory authority of the Local Rates Act of 1914.

We doubt, however, whether this point can be made perfectly clear without a more detailed examination of the pleadings and evidence in the case. Moreover, we are bound to take note of the fact that the trial court has elected to pass over the preliminary objection to its own jurisidiction and to try out the suit on the merits. In spite, therefore, of the doubt which we felt at an early stage of the argument on the question of jurisdiction, we thought it our duty to hear the appeal on the merits and it seems only fair to both parties that we should pronounce a decision on the same.

The easiest way of arriving at such a decision will be to enter at once upon the historical survey on which the plaintiff's claim is based. That survey we propose to continue by an examination of the circumstances under which the cess now complained of was first imposed and of the controversies which arose between the plaintiff's grandfather and the revenue authorities, up to the time when the former finally acquiesced, as he undoubtedly did, in the imposition of the cess. [The judgment after the historical survey proceeded as follows :—]

In this review we have practically exhausted the whole of the plaintiff's case. To do justice to Mr. O'Neil's argument we ought perhaps to refer to the fact strongly insisted upon by him that in various official documents or semi-official publications, such as the Gazetteer and the Manual of Titles, this estate of Barhapura is referred to as a "domain", or a family "domain," and in one place as an "untaxable fief". We are not of opinion that the use of these expressions constitutes any substantial evidence in support of the plaintiff's case. The strongest point that can be taken is perhaps the use of the words "untaxable fief", in the description of the Barhapura estate given in Atkinson's Gazetteer. The context shows clearly that the author of the Gazetteer used this expression simply as a translation of the word "Jagir." The expression occurs in a passage in which the writer is explaining why the area of pargana Barhapura assessed to payment of land revenue falls far short of the survey area of the said pargana. The balance, he explains, consists of the estate in the hands of the Raja of Kashipur for the time-being, which is not assessable to land revenue. The use of the picturesque expression "untaxable fief" does not in our opinion mean anything more in this context; still less does its use in such a document and in such a connection bind the Local Government or the Local Legislature never to impose any cess, or rate, or other form of taxation upon this property.

The real point which we have to determine is whether this revenue-free grant of Barhapura, in the hands of the plaintiff, Raja Udairaj Singh, does or does not constitute an "estate", within the meaning of the definition given to that word in the U. P. Local Rates Act of 1914. That definition does not differ substantially from the one contained in the original Act No. 18 of 1871, but it is a little clearer and more specially against the plaintiff. It must be remembered that under the present Act now in force the Local Government is empowered by notification in the *Gazette* to impose in any local area within that part of the province of Agra to which pargana Barhapura in the revenue district of Bijnor does undoubtedly appertain, a rate to be levied in respect of any "estate" in such local area. If what the

plaintiff calls the "domain of Barhapura" is not such an "estate", then the Local Government has exceeded its statuory powers in imposing the rate which the plainttff seeks to contest, If on the other hand this property does constitue an "estate", within the meaning of definition, it is not open to any court of law to contest the Local Government's exercise of its statutory powers. The definition is as follows:—

"An estate means any local area separately assessed to land revenue or separately exempted from payment thereof".

The applicability of this definition to the revenue-free grant of Barhapura seems on the face of it almost beyond question. It is a local area; it had at one time been assessed to land revenue in the hands of the Taluqdar Bhup Singh, and it was separately exempted from payment thereof when it was granted to Raja Sheoraj Singh in exchange for his Jagir of Chachait. In reply to this the appellant's contention is that, inasmuch as the Barhapura grant was taken-in-exchange for the Jagir of Chachait, all the incidents attaching to this latter estate under the sanad of 1828 must attach also to the Barhapura grant. We are not particularly concerned to repel this contention, though we may point out that the question of the nature of the property in the hands of its present owner, and the rule of descent applicable to its succession after his death, are questions wholly distinct from the question whether it does or does not constitute an "estate" upon which the Local Government is empowered to levy a cess. It is at least conceivable that a liability to the imposition of such a levy was incurred when Raja Sheoraj Singh accepted the revenue-free grant of what was previously the revenue-paying taluqa of Barhapura, in exchange for his Jagir of Chachait. We do not, however, wish to determine the suit upon this ground. In our opinion there is nothing in the sanad of 1828, assuming that document to be applicable in accordance with its terms, and to the fullest possible extent, to the property in suit in the present case, which would prevent what the plaintiff calls himself "domain" of Barhapura from being a "local area separately exempted from the payment of land revenre", and therefore an "estate" subject to the imposition of a cess for local purposes at the dlscretion of the Local Government of this province. We now pass to a matter of more general interest. The plaintiff valued this suit for purposes of jurisdiction and court fees at no less a sum than fifty lakhs.

Whilst appreciating though not wholly accepting the view of the Raja that the claim of the Local Government touches the dignity and honour of his house and family we express our regret that he should have acquiesced in or directed such a figure to be inserted.

Allowing the widest margin for contingencies the interest on a capital sum of Rs. 50,000 would more than provide the anuually recurring payment and it would, in our opinion, have been better had the plaintiff set out the considerations of status and dignity in the petition and whilst emphasising tbe importance which he attached to them had stated that he refrained from appraising them in terms of money.

It is necessary in the interests of the litigant public that a fair valuation should be put upon every suit. In this court, fees on the higher scale are usually given and in the absence of taxing masters they are graduated according to the valuation fixed by the plaintiff. Obviously if a plaintiff is permitted to place any fanciful figure as the value of the suit he subjects the defendant to an unfair burden as regards the costs which he is *prima facie* liable to pay his counsel and also subjects him to a continuing possible liability to pay the plaintiff an amount by way of costs far in excess of the real value of the case. A minor and less important matter is that the plaintiff may embarrass himself.

The latter, indeed is, exactly what happened. The effect of this unwise valuation pressed so heavily upon the Raja in this court that he applied on the 15th of May, 1923, for a nine months adjournment on the ground that he was prevented at present from "undertaking heavy expenditure in counsel's fees". On the 3rd of December, 1923, he applied again stating that until the Kharif collections in January 1924 he would not be in a position to find the fees necessary to engage counsel. At the time of granting these concessions the court was not in possession of information to enable the extravagance of the valuation to be estimated.

We think that counsel for the defendant when first this excessive valuation came to their notice should at once, before drafting any written statement, have applied to the court for an order on the plaintiff to

deliver particulars in writing "of the valuation of fifty lakhs stating how much thereof is referable to the cess and how much to other and what considerations". It is as much the duty of a counsel to protect his client from the liability to pay excessive fees as to protect him from an adverse decree. It was not in our opinion sufficient for the written statement to allege that the valuation was excessive and to leave it at that.

It would have been the manifest duty of the Judge to make such an order and in all probability the plaintiff would have amended his valuation to an amount more within the limits of reality.

If he failed to do so then the judge should himself have decided the matter and been watchful not to allow the plaintiff, if he succeeded, more than a reasonable amount of costs. As regards the costs incurred by the defendant there would be no ground for withholding any sum certified as having been paid, even if such amount happened to be more than in the opinion of the Judge would have been disbursed on a fair valuation.

In this particular case we have been told that the Local Government has paid the usual higher scale fee on the recognised computation and whilst the recoupment of this to the Local Government will impose a heavy burden upon the plaintiff we can see no ground for relieving him of any part of the liability. The amount of the valuation was fixed by him and he must bear the consequences.

We therefore dismiss the appeal with costs and fees on the higher scale.

Appeal dismissed.

---

*1924 ALLAHABAD 657.

LINDSAY AND SULAIMAN, JJ.

Mirza Mahomed Jan and another..... Defts.—Appellants.

v.

Shaikh Fazl Uddin.....Plff—Respondent.

F. A. No. 131 of 1923 decided on 19th February, 1924 from order of the Small Cause Court Judge of Allahabad dated 17th May, 1923.

(a) *Pre-emption — Right by contract continues against representatives and assigns with notice— T. P. Act, S. 40.*

A contract for pre-emption can be enforced against the representatives of the parties to the contract, and also against a person who has taken the property affected by the contract with notice of the contract or who has taken that property gratuitously. *Per Sulaiman J.*—A contract of pre-emption or one for reconveyance does not come under the rule against perpetuities, because such covenants do not create equitable interest in land. The essence of a contract is that the liabilities which it imposes must be imposed on definite persons, within a definite time, and the rights created by it must of themselves be definite. By a definite time is not meant a period which is to expire on a fixed date but merely a period not unlimited in its duration. If a contract is supposed to bind an indefinite class of persons, generation after generation and to bind them for an indefinite length of time it completely loses its character of an obligation in *personam*. If no period of time is fixed by the parties themselves the court would not be justified under Section 46 of the Contract Act in filling up the gap and fixing a time which it considers reasonable; such a contract is too vague, indefinite and uncertain to be enforced against the heir of the deceased party. Although under the provisions of section 37 of the Indian Contract Act a contract of pre-emption can be enforced against the personal representatives of the promissor in case of his death before performance unless a contrary intention appears from the contract, nevertheless where a contract does not specify any period of time within which it has to remain in force it is too vague indefinite and uncertain to be capable of being enforced except as against the actual parties to the contract in their lifetime. 21 A. L. J. R. 413 & 430 Foll. [P. 658, Col. 1 & 2, P. 661, Col. 2, P. 662 Col. 1 & 2.]

(b) *Contract Act, S. 29—Indefiniteness of period.*

No contract is void merely because no time for performance is specified. There are many kinds of contracts in which no time for performance is fixed. 21 A.L.J.R. 413 & 430 Diss. [P. 658, Col. 2.]

Zamir-ul-Haq for the Appellants.

K. N. Katju for the Respondent.

Lindsay, J.:—The points which arise for decision in this appeal have practically been settled by my judgment in F. A. F. O. No. 108 of 1923 decided on 28th of January, 1924. The facts with which we are concerned here are briefly as follows:—

There was litigation in the year 1915 between Shaikh Fazal Uddin, the plaintiff in the present case and two defendants, Nawab Ali and Musammat Bilauri Bibi, who were husband and wife.

It appears that Fazal Uddin is the son of Nawab Ali's sister.

It further appears that Nawab Ali's daughter is married to Shaikh Fazal Uddin.

The dispute in the court of the Munsiff was with regard to a family house and the suit terminated in a compromise by which a half share of this house was awarded to the the plaintiff and the remaining half share to the defendants. It was agreed under the terms of the compromise that if either party wanted to transfer his share in the property, an offer was to be made to the other

party in the first instance in order that he might secure the share by right of pre-emption. A decree was passed in terms of this compromise. The present suit was brought by Fazal Uddin in order to enforce the contract of pre-emption which arose out of this compromise and decree.

The first defendant in the suit was Mirza Muhammad Jan. This man is the brother of Mt. Bilauri Bibi now deceased. When she died she left as heirs her four daughters and this brother Muhammad Jan who got a one-third share of her property.

It appears that on the 11th July, 1921, Muhammad Jan transferred his one-third share of his interest in this house to the second defendant Fazal Husain by a deed which purports to be a deed of gift. This man Fazal Husain is the daughther's son of Mt. Bilauri Bibi.

It was the case for the plaintiff that the document, although drawn in the form of a document of gift, was in fact a deed of sale, and it has been found by the courts below that the transaction was a sale and not a gift. There can be no doubt that on the evidence afforded by the document itself this is a correct conclusion.

Fazal Uddin therefore claimed to pre-empt this transfer on the basis of the contract for pre-emption which had been entered into at the time of the compromise and decree above referred to.

The suit was resisted on various grounds. The first court dismissed the suit but the lower appellate court has reversed the decree of the court of first instance and remanded the case to the court of first instance for disposal on the issues which were left undecided.

It is contended here in the first ground of appeal that the lower appellate court has put a wrong construction on the deed of transfer in this case. That question is really not open. The finding is a finding of fact and, as has already been said, the transaction was clearly a transaction of sale and not of gift.

The second ground taken is that the contract for pre-emption was bad inasmuch as it could not for all time to come bind the representatives of the covenantor.

I have dealt with a similar question in the case abovementioned which has only been recently decided and I have held and still hold that a contract for pre-emption can be enforced against the representatives of the parties to the contract. The previous case arose out of a contract embodied in a wajibularz which was drawn up at the time of settlement. This contract was described as being a binding contract for the period of the settlement.

In the present case, however, it is pointed out that there is no limit of time and it has therefore been sought to be argued that because no time was limited for the performance of the contract entered into under this compromise and decree the contract is unenforceable.

In the judgment in the earlier case I expressed the opinion that a contract for pre-emption is enforceable between the representatives to the parties if the parties have died before performance. I further held that having regard to the provisions of Section 40 of the Transfer of Property Act a contract for pre-emption is enforceable against a person who has taken the property affected by the contract with notice of the contract or who has taken that property gratuitously.

It has, however been argued in the present case that the contract with which we are here concerned differs from the contract in the earlier case just mentioned by reason of the fact that here no time for performance has been limited whereas in the earlier case the contract was expressly declared to be binding only for the period of the settlement, that is to say, a period of about thirty years.

The argument is that because no time is limited for the performance of this contract of preemption the contract is not enforceable because it is uncertain. I am unble to accept this argument. The only section of the Contract Act which deals with agreements which are void for uncertainty is section 29 which lays down that agreements, the meaning of which is not certain or capable of being made certain, are void.

There can be no question whatever as to any ambiguity or uncertainty about the meaning of the contract with which we are dealing in this case. There is absolutely no uncertainty as to the meaning and thereforeSection 29 cannot be appealed to for the purpose of arguing that the contract is entirely void. FurtherI am of opinion that no contract is void merely because no time for performance is specified. There are many kinds of contracts in which no time for performance is fixed and

with respect to which no argument could possibly be entertained that they are void. Take for example, the case of a promissory note by which the executant undertakes to pay money on demand. Here is no time fixed for performance and yet it has never to my knowledge been argued that a contract of this kind is void because of uncertainty. Or take again the class of contracts referred to in Chapter 3 of the Indian Contract Act, namely, contingent contracts. Section 31 defines a contingent contract as being a contract to do or not to do something if some event collateral to such contract does or does not happen. Section 32 declares that contracts to do or not to do anything if an uncertain event happens cannot be enforced by law unless and until that event has happened. In a contract of this latter description it is clear that no time for performance can possibly be fixed and yet such a contract is recognized as being a perfectly good contract under the law.

It is true that the law of limitation may intervene and declare that, for example in the case of a contract under a promissory note to pay on demand, the contract must be enforced within a particular time but the fact that the law of limitation insists upon a suit for performance being brought within a specified time, cannot mean that the contract is void. On the contrary the validity of the contract is clearly recognised and all that is insisted upon is that performance of it must be sought within the time limited by the law.

I do not see how it is possible to argue that any contract unlimited in point of time is a void contract. This question was raised in a well-known English case which has been cited before us and which was cited before us at the hearing of the earlier case, namely, *London and South-Western Railway Company* v. *Gomm* (1). The learned Judge who presided over the court of first instance in that case pointed out that a covenant to pay £ 1,000 when demanded with interest meanwhile, if not barred by the statute of limitation might be enforced by an action of covenant at any time. Similarly in the court of appeal it was pointed out by Jessel, M. R. that the contract with which the court was there concerned was a contract unlimited in point of time. The learned Judge observed at page 580 of the report as follows :—

"Now that is unlimited in point of time, and it does not appear to me to be possible to insert a limit of time, because to put in the words "within a reasonable time" or any other words limiting the time, would be exactly contrary to the intention of the parties. It is not only unlimited in point of time but it is obviously intended so to be. The Railway Company do not want the land now and they do not know that they ever will want it, but their bargain is that whenever it may be required for the works of the company the owners or owner for the time-being of the land are or is to convey to the company. The very essence of the contract is that it shall be indefinite in point of time."

There is no suggestion in these remarks that a contract can in any way be deemed to be void because it is indefinite in point of time and it was not because of any uncertainty in the contract that performance of it was refused by the court. The ground upon which that case was decided was that the contract for pre-emption gave rise to an interest in land and was therefore obnoxious to the rule against perpetuities.

The obligation which arises under a contract subsists until the contract is performed or until non-performance of it is excused or justified under operation of law.

I have already pointed out that in the case of a promise to pay money on demand, although the law of limitation lays down certain limits within which preformance must be sought, the contract is not treated as void. I need only further refer to article 10 of the schedule to the Indian Limitation Act, Act. IX of 1908, which in the case of a suit to enforce a right of pre-emption, where the right is founded on law, general usage or special contract, lays down that the suit must be brought within one year from the time when the purchaser takes under the sale sought to be impeached, physical possession of the property sold, or in cases where the subject of the sale does not admit of physical possession, one year from the date when the instrument of sale is registered.

In my opinion, therefore, it is impossible to contend that a contract for pre-emption in which no time is limited for preformance is void and unenforceable.

I am aware that in coming to this decision I am dissenting from the view which was taken by a Bench of this Court in two cases which are reported in 21 A. L. J. at pages

(1) 20 Ch. D. 562=51 L.J. Ch. 530=46 L.T. 449=30 W. R. 620.

413 and 430 respectively. I must, however, assume whatever responsibility attaches to the course I am taking. It seems to me that if I were to follow the principles laid down in the rulings referred to I should have to hold that every contract for payment of money on demand or every contingent contract was void *ab initio*.

The only point which remains for consideration in this case is that I have already mentioned that in the earlier case to which I was a party I held that a contract for pre-emption was enforceable against a transferee with notice or gratuitous transferee.

In the case before us no plea of notice was taken, and indeed no plea of notice could have been properly taken by the second defendant, Fazal Husain, who put forward the case that the transfer to him was a gratuitous transfer, namely, a transfer by way of gift. It has, however, been held by the courts below, and the finding is accepted, that the transfer was a transfer for consideration and amounted to a sale. In my opinion the contract cannot be enforced against the second defendant, Fazal Husasin, unless he is shown to be affected with notice of it. This is a question which has not been gone into and I think, therefore, that in dismissing this appeal it ought to be laid down for the guidance of the first court that the contract should not be enforced against the second defendant unless it is shown to the satisfaction of the court that he had notice of it.

It is the fact as has been pointed out that the second defendant is the daughter's son of one of the parties to the contract. It would not, however, be proper to infer from this circumstance alone that he was affected with knowledge of the contract. I think the court of first instance to which the suit has been referred for disposal ought to raise an issue regarding this question of notice and the parties ought to be allowed to call evidence. If the court of first instance finds that the second defendant had notice of the contract the contract should be enforced against bim. If it finds that he had not such notice the suit should be dismissed.

Sulaiman, J.:—This is a defendants' appeal arising out of a suit for pre-emption on the basis of an alleged contract. The plaintiff alleged that under a compromise decree passed in suit No. 551 of 1915 between himself and Nawab Ali and Musammat Bilauri, a covenant for pre-emption was specifically entered into so as to bind the parties and their representatives in regard to transfer of the house in question, that Muhammad Jan, defendant No. 1, as heir of Musammat Bilauri Bibi, since deceased, in breach of the said contract, sold the property to defendant No. 2 for Rs. 50 under a deed dated the 11th of July, 1921, which was wrongly described as a deed of gift; hence the suit for pre-emption.

Both the defendants contested the claim. The main defence was that the deed in question was not a deed of sale but a deed of gift without consideration and that the alleged contract of pre-emption was invalid and could not be enforced as against the defendants. It is also to be noted that after the suit had been filed the defendant No. 2 executed a deed of relinquishment in favour of defendant No. 1 and on the strength of it a plea was raised that the *status quo ante* was restored and the plaintiff was not entitled to a decree.

The court of first instance found that the deed in question was not a sale deed; that the *status quo ante* was restored by the deed of relinquishment and so the plaintiff could not pre-empt the property; and it also found that the contract embodied in the compromise decree had not the effect of binding for all time to come the representatives of the parties to that decree. It did not determine the remaining issues, but dismissed the suit.

On appeal the lower appellate court has decreed the claim and remanded the case for the remaining issues to be determined. The lower appellate court found that the transaction in question was a sale transaction for consideration, that the deed of relinquishment *pendente lite* did not affect the plaintiff's right of pre-emption and that on the authority of the case of *Bimal Jati v. Biranja Kuar* (2) the contract embodied in the decree was enforceable.

The defendants have come up in appeal and challenge all the three findings.

The finding that the transaction in question was a sale transaction and not a gift cannot now be seriously disputed. The lower appellate court has found that the transaction was really for consideration. It appears that there was a decree against Musammat Bilauri and the defendant No. 2 Fazal Husain for about Rs. 1500. Fazal Husain,

(2) (1900) 22 All. 238 = 1900 A. W. N. 99.

however, had been impleaded merely as a surety. Musammat Bilauri was, therefore, the principal debtor. On Musammat Bilauri's death one-third share in her estate was inherited by Muhammad Jan, defendant No. 1, Muhammad Jan, therefore, was liable to pay at least one-third of the decretal amount to the extent of the assets in his hands. It was Fazal Husain who paid off the decree and in lieu of a 1/3 share in the decretal amount so paid off, Muhammad Jan executed this deed of transfer in favour of Fazal Husain. Although, therefore, the deed was styled ostensibly as a deed of gift, there can, on the facts found, be no doubt that it was a sale transaction. It is noteworthy that the value of the property described in the deed of transfer is also stated to be Rs. 50.

The other finding of the lower appellate court also cannot be seriously challenged. A deed of relinquishment by itself did not amount to a reconveyance. A mere disclaimer cannot be deemed to be a transfer. Furthermore, it is manifest that a transfer of the property in dispute after the suit had been brought was subject to the doctrine of *lis pendens*. The defendant could not by transferring the property, sought to be pre-empted, in any way affect the right of the plaintiff pre-emptor.

I am, however, unable to agree with the view expressed by the lower appellate court on the third point. In fact the learned Judge of the court below did not quite appreciate what the court of first instance had held. That court had not said that the transaction was altogether void. What it had held was that it could not be enforced against the personal representatives of the original parties. This point is not at all considered by the lower appellate court and the case of *Bimal Jati* v. *Biranja Kuar* (2) relied on by it, so far as appears from the judgment, was one against the original parties to the contract and their own vendees.

I may here correct one mistake in the judgment of the first court. The plaintiff does not claim to pre-empt the sale as a representative of the plaintiff in the former suit, but as one who himself was a party to that suit. He, however, claims against the heir of Musammát Bilauri (who has died since) and his transferee.

This last question raises a point which is somewhat similar to one raised in F. A. F. O No. 108 of 1923 decided by us on the 28th of January, 1924. In the course of my judgment in that case I tried to review all the leading cases on the question how far a convenant of pre-emption was enforceable against the representatives of the original parties. In view of the provision contained in Section 54 of the Transfer of Property Act that a contract of sale creates no interest in land and in view of the provisions of Section 40 of the Transfer of Property Act laying down how the benefit of an obligation arising out of a contract annexed to the ownership of property but not amounting to an interest therein or easement thereon, could be enforced against gratuitous transferees or transferees with notice, I there expressed the view that it was impossible to hold that a contract of pre-emption or one for reconveyance came under the rule against perpetuities. I pointed out that the English cases were distinguishable inasmuch as in England such convenants created an equitable interest in land. When under the Indian Law no interest in land was created by a mere contract it was impossible to bring in the rule against perpetuities. I still adhere to the same view. I did however also indicate in my judgment in that case that "if the contract had been for an unlimited period of time it might well have been contended that it was unenforceable against the heirs and the representatives as being too vague and uncertain." I took pains to distinguish most of the cases referred to by me on the ground amongst others that there the contract was *unlimited in point of time*. The present case, however, cannot be distinguished on this latter ground as the contract for pre-emption here happens to be for an unspecified and indefinite time.

The question then is whether such a contract can be enforced after the death of one of the parties and will remain in force for all time to come generation after generation. As no period at all is fixed for the performance of the contract it cannot be quite clear for how long the parties intended that it should remain operative. The words 'in perpetuity' are not to be found in the clause in question and in case of such a trivial property I am not convinced that the intention must necessarily have been to keep such a convenant alive for all time to come and against all the successive heirs and representatives. For aught one knows, the contract might have been intended to remain in force for a period shorter than the one that has already expired. Under circumstances of

such vagueness and uncertainty I am unable to hold that it is still enforceable against the heir of the deceased party and his transferee.

I understand it to be of the essence of a contract that the liabilities which it imposes must be imposed on definite persons, within a definite time, and the rights created by it must of themselves be definite. By a definite time, I do not mean a period which is to expire on a fixed date, but merely a period not unlimited in its duration.

If a contract is supposed to bind an indefinite class of persons, generation after generation, and to bind them for an indefinite length of time, it completely loses its character of an obligation in *personum*. If no period of time is fixed by the parties themselves the court would not be justified in filling up the gap and fixing a time which it considers reasonable, From the very nature of the contract it is apparent that no action for a performance could arise unless there was an intention to sell the property. In such a case the court cannot under Section 46 of the Contract Act fix any time as being a reasonable one. Even if the contract were to be treated as a contingent contract within the meaning of Section 31 of the Act, it cannot in my opinion remain in force for an indefinite length of time. I am, therefore, of opinion that the contract in question according to the terms in which it is worded is too vague, indefinite and uncertain to be now enforced against the heir of the deceased party.

I should like to point out the distinction between the case of a personal representative of the original party to the contract, who is made liable under Section 37 of the Indian Contract Act, and the case of a transferee against whom the contract may be enforced under Section 40 of the Transfer of Property Act. In the case of transferees it is apparent that for all practical purposes a limit of time is indirectly imposed by the condition that he must have notice. After each succession the possibility of proving actual notice continually diminishes and transferees at a distant date may well be safe. Whereas in the case of personal representatives no question of any consideration of notice arises. If therefore a contract for an indefinite time is to be enforced against them it must always remain in force in perpetuity until it is either performed when the occasion arises or has been rescinded by consent of the representatives of the other parties thereto.

Although therefore I am of opinion that under the provisions of Section 37 of the Indian Contract Act a contract of pre-emption can be enforced against the personal representatives of the promissor in case of his death before performance, unless a contrary intention appears from the contract, nevertheless I hold that where a contract does not specify any period of time within which it has to remain in force it is too vague, indefinite and uncertain to be capable of being enforced except as against the actual parties to the contract in their lifetime.

I may here note that the two recent cases of this Court reported in 21 A. L. J. at page 413 and page 430 are cases which I am unable to distinguish from the facts of the present case, as in both of these cases the time for performance was unlimited. Even if I had entertained a different opinion on the enforcibility of the contract in this case, I would not have merely dissented from the previous decisions but would have suggested a reference to a higher Bench.

There is another point which requires mention. In the plaint there was no suggestion that the transferee (defendant No. 2) had any notice of this contract, nor was there apparently any evidence led on the point. The defendant too did not specifically set up want of notice as he claimed to be a donee. The claim cannot be enforced against the transferee if he had had no notice of the contract. As against defendant No. 1 there is no claim for any damages.

I would, therefore, allow this appeal, set aside the order of the court below and restore the decree of the court of first instance with costs.

Appeal set aside.

** 1924 ALLAHABAD 662.

STUART AND SULAIMAN, JJ.

Bandhu and another.....Appellants.

v.

King-Emperor.....*Respondent.*

Cr. A. No. 1 of 1924 decided on 30-1-1924 against the Order of Sessions Judge of Gorakhpur.

Penal Code S. 302—Prosecution must prove actual death of the murdered person.

Where a person was beaten into unconsciousness by being brutally attacked with lathis and was dragged up to the bank of rivulet leaving traces of blood along the way and was never heard of again, *held*, that there was a reasonable

possibility of the person being alive, and therefore the accused can only be convicted of an attempt to murder. Prosecution must prove the actual death of the alleged murdered person.

G. W. Dillon for Appellants.

Government Advocate for the Crown.

Judgment:—The appellants Bandhu and Bachcha have been found guilty by the Sessions Judge of Gorakhpur of the offence of having murdered a man called Dina on the night of the 19-20th April, 1923, in the village of Paikol in Deoria Tahsil of the Gorakhpur district. They have been sentenced to death subject to confirmation by this Court. The reference in confirmation is also before us.

The story is that Dina, who had formerly been a resident of Paikol but who some years ago had shifted his residence to a village called Bari in Bihar which is some 14 miles from Paikol, his brother-in-law Rajinandan of Bari, and another man called Ram Prasad of Bari were on the night in question returning from Sohnag in the Gorakhpur district, where they had been to a fair, towards Bari, and that they were spending the night in Paikol sleeping on banklets near a well just outside the inhabited area. The story continues that about midnight or a little before a number of men came out of the night. Some of them committed an aggravated attack on Dina by beating him with lathis. Others held down Rajinandan and Ram Prasad, closing their mouths so that they should not shout. After Dina had been severely attacked he was dragged by his feet across the railway line which is 150 to 200 yards from the scene of the attack. Rajinandan and Ram Prasad, being loosed by the men who were holding them, raised an alarm. Other villagers came up. The men who were dragging Dina away were pursued but they turned upon their pursuers so that the villagers fell back. On the other side of the railway line at a distance of 70 or 80 yards is the Koilar river, a tributary stream, which falls into the Little Gandhak. According to the *Gorakhpur Gazetteer*, page 9, the Koilar usually carries water only during the rains. Dina has never been seen again.

We have heard the learned counsel who has appeared for the appellants. He has put the case for them in a very able manner, but he has been unable to satisfy us that the evidence as to the attack on Dina is unreliable. From this evidence we are satisfied that a large number of men, of whom Bandhu was the ringleader, made the attack, to which we have already referred, upon Dina and we are satisfied that both Bandhu and Bachcha took part in the attack. There is some evidence of motive but that point is comparatively immaterial, as we are satisfied as to the salient facts.

It remains, however, to be considered whether on this evidence a conviction of murder can be based. Before a conviction of murder can be obtained, the court must be satisfied that the person alleged to have been murdered is actually dead. This is elementary. Can it be said here that it is established beyond the possibility of reasonable doubt that Dina is dead? This much we know. He was brutally attacked with lathis. He was beaten apparently into unconsciousness. He was dragged away along the ground leaving traces of blood both on the fields and on the railway line. His assailants dragged him until they reached the Koilar river. Dina has never been seen since. Certainly the probabilities are in favour of the man being dead, but can it be said that there is no possibility of reasonable doubt upon the point? We are unable to arrive at the conclusion that Dina is dead, though we think it exceedingly unlikely that he is alive, and in the circumstances we cannot uphold the conviction of murder. But on the facts it is established abundantly that the crime of an attempt to murder punishable under Section 307 of the Indian Penal Code was committed and that both the appellants are guilty of that offence. Under the provisions of Section 237 (2) of the Code of Criminal Procedure it is open to us while upsetting the conviction under Section 302 of the Indian Penal Code to convict under Section 307 of the Indian Penal Code and this is the course which we propose to take. The appellants are in no way prejudiced by our action as their defence on the major charge includes the defence on the minor.

We therefore set aside the convictions under Section 302 of the Indian Penal Code but convict both the appellants under Section 307 of the Indian Penal Code and sentence each to transportation for life.

Sentence modified.

* 1924 ALLAHABAD 664 (1).

DALAL, J.

Rekha Chamar.....Applicant.

v.

King-Emperor.....Opposite Party.

Criminal Revision No. 7 of 1924 decided on 19th March, 1924, against the order of the Sessions Judge of Azamgarh, dated the 19th December, 1924.

Criminal P. C., Sec. 200—Contravention order directing inquiry before examining complainant and directing his prosecution on report of police is illegal.

Direction for an enquiry before the complainant has been examined on oath is illegal. The law very properly enjoins that the court having jurisdiction must examine the complainant so as to think out for itself whether the complaint is true or false. Such a decision cannot be left by the court to some other court or police authority. [P. 664, Col. 2.]

J. M. Banerji for the Applicant.

The Assistant Government Advocate for the Crown.

Judgment:—On the 27th September the District Magistrate of Azamgarh ordered the prosecution of one Rekha Chamar under Section 182 of the Indian Penal Code and of Rambali for abetment of that offence. A complaint was lodged in his court by Rekha Chamar against the Tahsildar of Mohamadabad and three other persons for committing an offence of simple hurt under Section 323 of the Indian Penal Code. The District Magistrate did not record the complainant's statement as he was bound to do under Section 200 of the Code of Criminal Procedure but immediately directed the Deputy Superintendent of Police to make an enquiry in the matter. This order was illegal. The proviso to Section 202 of the Code of Criminal Procedure specifically lays down that no such direction for an enquiry shall be made unless the complainant has been examined on oath under the provisions of Section 200. On receiving the report of the Deputy Superintendent the District Magistrate passed the order already referred to. The prosecution of Rambali appears to have been ordered on account of some reference in the report of the Deputy Superintendent. There is no mention of Rambali in the petition of Rekha Chamar.

The learned Sessions Judge refused to cancel the order for prosecution and so Rekha and Rambali have applied here in revision. The proceedings of the District Magistrate were taken to such a great extent in disobedience of statute law that it will not be equitable to confirm his order for prosecution. At no stage has he brought his mind to bear upon the matter in issue. He has given no reason why he has accepted the report of the Deputy Superintendent of Police. The law very properly enjoins that the court having jurisdiction must examine the complainant so as to think out for itself whether the complaint is true or false. Such a decision cannot be left by the court to some other court or police authority. So far Rekha has had no hearing in a court of law. The District Magistrate does not appear to have understood that the application before him was a regular complaint and not an application for sanction to prosecute the Tahsildar.

In the result I set aside the order of the District Magistrate of Azamgarh dated 27th September and direct that any proceedings if already taken against Rekha and Rambali shall be cancelled.

Order set aside.

1924 ALLAHABAD 664 (2).

DANIELS, J.

Ganpat Lal.....Applicant.

v.

King-Emperor.....Opposite Party.

Cr. Rev. No, 14 of 1924 decided on 27th February, 1924, against the order of the Sessions Judge of Ghazipur, dated the 1st December, 1923.

Crl. P. C., S. 209—Magistrate must discharge if there are no sufficient grounds for committing.

It is not correct to say if the prosecution makes statements which if accepted at their face value might make out a case against the accused he is bound to commit him to Sessions even though he is satisfied that no grounds for so doing exist and that the charge is a baseless one. [P. 665, Col. 1.]

It is now settled law that if a Magistrate is satisfied that the charge is without foundation and that there are no sufficient grounds for committing the accused person for trial he is entitled and indeed it is his duty to discharge him. (1904) A. W. N. 5; Diss. 26 All. 564; 12 A. L. J. 150; 37 All. 355; 19 A. L. J. 831 Foll. [P. 665, Col. 2.]

J. M. Banerji and Janaki Prasad for the Applicant.

A. P. Pandey for the Opposite Party.

Judgment:—This is an application in revision in a case in which the learned Sessions Judge acting under the provisions of Section 437 Cr. P. C. has set aside an order of discharge passed under Section 209 and directed the commitment of the accused to the court of Sessions. The case was one

under Section 218 of the Indian Penal Code, triable exclusively by the Court of Sessions, in which a patwari was accused of intentionally framing an incorrect record with a view to cause injury to the complainant. The Magistrate who heard the case came to the conclusion that on the evidence before him there was absolutely no material on which he could hold that the patwari intentionally prepared a wrong record or that he did so with the intention of injuring the complainant. He was indeed so strongly satisfied that the prosecution was without foundation that he directed proceedings to be taken against the complainant under Section 476 of the Code of Criminal Procedure. Holding this view he discharged the accused as he was bound to do under the provisions of Section 209. That section lays down that if the Magistrate finds that there are not sufficient grounds for committing the accused person for trial he shall record his reasons and discharge him. The learned Sessions Judge has set aside this order on the ground, to quote his own words, that :—

"There have been several rulings to the effect that such cases if made out *prima facie* should be committed to the Sessions Court and not discharged by a Magistrate."

As the learned Sessions Judge has nowhere said that the reasons given by the Magistrate for discharging the accused are insufficient I understand his view to be that if the prosecution makes statements which if accepted at their face value might make out a case against the accused he is bound to commit him to sessions even though he is satisfied that no grounds for so doing exist and that the charge is a baseless one. If this is the learned Sessions Judge's view it is entirely erroneous. It is true that there are one or two old cases *e.g.*, *Chiranji Lal v. Ram Lal.* (1) in which this proposition has been laid down, but it has been dissented from in a long series of cases of which I may instance *Fattu v. Fattu* (2), *Shahzad v. King-Emperor* (3), *Dharam Singh v. Joti Prasad* (4), *Muhammad Abdul Hadi v. Baldeo Sahai* (5).

It is now settled law that if a Magistrate is satisfied that the charge is without foundation and that there are no sufficient grounds for committing the accused person for trial he is entitled, and indeed it is his duty, to discharge him.

For the above reasons I accept this application and set aside the order of the court below.

Order set aside.

---

(1) 1904 A. W. N. 5.
(2) (1904) 26 All. 564=1904 A. W. N. 125=1 A. L. J. 292.
(3) (1914) 12 A. L. J. 150=20 I. C. 747=14 Cr. L. J. 491.
(4) (1915) 37 All. 355=13 A. L. J. 497=28 I. C. 1005=16 Cr. L. J. 429.
(5) (1921) 19 A. L. J. 831=63 I. C. 831=22 Cr. L. J. 703.

* 1924 ALLAHABAD 665.

KANHAIYA LAL, J.

Mohan Lal.....Appellant.

v.

King-Emperor.....Opposite Party.

Crl. Rev. No. 15 of 1924 decided on 23rd January, 1924 from an order of First Class Magistrate, Agra.

Crl. P. C., S. 231—Alteration of charge after defence without further opportunity is illegal.

Originally the accused was tried under S. 324 I. P. C. and the charge was framed after the evidence of the prosecution was recorded. The Magistrate after the defence was concluded altered the charge into one under S. 307 I. P. C. and did not give an opportunity to the accused to re-examine the witnesses for the prosecution with reference to the altered charge or to produce further defence evidence but committed him to the Court of Sessions on the altered charge. *Held*, that the procedure was entirely illegal and was likely to prejudice the accused. The order of commitment is therefore set aside. [P. 665, Col. 2 & P. 666, Col. 1.]

J. M. Bannerji for Applicant.

Mushtaq Ahmad, Advocate, for the Crown.

Judgment :—This is an application under Section 215 of the Code of Criminal Procedure for quashing the commitment of the accused on a charge of attempting to commit murder. The accused was originally tried under Section 324 Indian Penal Code. After the evidence for the prosecution was closed the accused was charged under Section 324 Indian Penal Code and the trying Magistrate recorded his plea and proceeded to hear the evidence for the defence. The charge aforesaid was framed on the 16th of November, 1923. The evidence for the defence was concluded on the 12th of December, 1923. On the 15th of December, 1923, the trying Magistrate altered the charge into one under Section 307 Indian Penal Code and without giving the accused an opportunity to re-examine the witnesses for the prosecution in regard to the altered charge or to produce such further defence evidence as he may have in his defence on that charge, committed him to the Court of Sessions for

trial on the charge so altered. Section 231 Criminal Procedure Code, however, requires that when a charge is altered by the court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall, or re-summon and examine with reference to such alteration or addition any witness who may have been examined and also to call any such further witness whom the court may think to be material. The alteration was made at a very late stage of the case and no commitment ought to have been made on the altered charge without giving the accused an opportunity of re-examining the witnesses for the prosecution and producing his defence in regard thereto.

The procedure of the magistrate is entirely illegal and is likely to prejudice the accused in his trial before the Court of Sessions. It is unnecessary to say whether the evidence adduced was *prima facie* sufficient to bear out the altered charge at this stage of the case. The committing of the accused under Section 307 Indian Penal Code is set aside and the committing magistrate directed either to proceed with the charge under Section 324 Indian Penal Code as it stood originally or if he alters the charge to give the accused an opportunity to which he is entitled under the law of recalling and re-examining the witnesses for the prosecution and producing such evidence in defence as he may like to produce in relation thereto. The accused will, meanwhile, be released on bail on a personal cognizance of Rs. 1,000 and one surety for Rs. 1000.

Commitment set aside

---

* 1924 ALLAHABAD 666 (1).

DANIELS, J.

Govind Prasad Singh and others...Applicants.

v.

Ram Das Dusadh.....Opposite Party.

Criminal Revision No. 17 of 1924 decided on 27th February, 1924 from an order of the Sessions Judge, Ghazipur, dated the 1st December, 1923.

Criminal P. C., S, 200—District Magistrate to whom case is sent for being transferred can legally dismiss it.

The complaint was originally before a Deputy Magistrate. The Deputy Magistrate sent the case to the District Magistrate with a view to the District Magistrate transferring it to another court. Instead of transferring it to another court the District Magistrate after examining the record came to the conclusion that the complaint was wholly without foundation and dismissed it, *Held* the order passed by him was not passed without jurisdiction. [P. 666, Col. 2.]

M. L. Agarwala for the Applicants.

Kumuda Prasad for the Opposite Party.

Judgment:—This is an application in revision against an order of the learned Sessions Judge of Ghazipur setting aside the dismissal of a complaint under Section 203 Criminal Procedure Code. It is not alleged that the reasons given for dismissing the complaint were insufficient but the learned Sessions Judge is of opinion that the District Magistrate who passed the order had no jurisdiction. The complaint was originally before a Deputy Magistrate. The Deputy Magistrate considered that there were reasons why he should not try it and sent the case to the District Magistrate with a view to the District Magistrate transferring it to another Court. Instead of transferring it to another Court the District Magistrate after examining the record came to the conclusion that the complaint was wholly without foundation and dismissed it. In my opinion the District Magistrate was sufficiently seized of the case and the order passed by him was not passed without jurisdiction.

I accordingly accept the revision and set aside the order of the Court below.

Order set aside.

---

* 1924 ALLAHABAD 666 (2).

DALAL, J.

Musa.....Applicant.

v.

King-Emperor.....Opposite Party.

Criminal Rev. No. 18 of 1924, decided on 19th March, 1924 from an order of the District Magistrate of Garhwal dated the 7th November, 1923.

Criminal Trial—Death.

A criminal prosecution under Section 323 of the Indian Penal Code does not abate by reason of the death of the person injured. 44 Mad. 417 Foll. [P. 667, Col. 1.]

S. D. Sinha for the Applicant.

The Assistant Government Advocate for the Crown.

Judgment:—After a trial had commenced on a complaint under Section 323 the complainant died. It is argued here that the prosecution ought to have abated in consequence. The learned District Magistrate has quoted a ruling of the Madras High Court (44 Mad. 417) in which this point has been fully considered, and the Punjab rulings quoted by the learned counsel for

the applicant here dissented from. I agree with the reasoning of the Madras High Court and hold that a criminal prosecution under Section 323 of the Indian Penal Code does not abate by reason of the death of the person injured. One of the learned Judges of the Madras High Court has exposed the absurdity of applying to criminal proceedings the provisions of Section 89 of the Probate and Administration Act. This application is dismissed.

Application dismissed.

---

* 1924 ALLAHABAD 667.

RYVES, J.

Gokul and another.....Petitioner.

v.

King-Emperor.....Opposite Party.

Criminal Rev. No. 27 of 1924 decided on 6th March, 1924, against an order of the Sessions Judge of Cawnpore.

(a) *Criminal P. C., S. 133—15½ feet high branch is not obstruction in a village road.*

An obstruction at 15½ feet over country road, having regard to the normal traffic was held to be not an unlawful obstruction within the meaning of the section. [P. 667 Col. 2.]

(b) *Criminal P. C.—Danger must be at the time of injury and not at future indefinite time.*

The section deals with the condition of things at the time when the enquiry is held. If at such a time a house or branch of a tree is likely to fall and thereby endanger the life of passers-by action under the section is justified; the section is not meant to apply to what may happen at some indefinite time in the future or under quite abnormal circumstances. [P. 668 Col. 1.]

U. S. Bajpai for the Petitioner.

The Assistant Government Advocate for the Opposite Party.

Judgment:—This in an application in revision against an order of a Magistrate of the first class of Cawnpore made under Section 133 of the Criminal Procedure Code, which was upheld by the learned Sessions Judge.

A *katcha* public road takes off from the Grand Trunk Road near the village of Sachendi and passes through it. At this part there are houses on both sides of the road.

Outside the house of Ajudhia Prasad and Gokul there is an ancient tamarind tree, one branch of which overhangs the road and forms an arch over it, and the end of the branch almost rests on some houses on the other side, which however are described as in ruins and unoccupied. It is an old tree and has stood firm for very many years and has not caused any inconvenience or apprehension of danger to anybody.

During the Muharram of 1923 for the first time, some Muhammadans had occasion to complain of this branch. They had built a *Tazia* unusually high and carried it aloft in the usual fashion, and found it could not pass under this branch. They refused to lower it or to tilt it on to one side and demanded the removal of the branch. A breach of the peace seemed imminent but the Sub-Inspector of Sachendi fortunately was able to find a way out of the difficulty. But as he feared that there might be a recurrence of trouble on some future occasion when *Tazias* were taken that way, he took action under Section 133 of the Code of Criminal Procedure. It may be noted that in the past on no occasion had the carrying of the *Tazias* been interfered with by this tree.

The learned Magistrate has found that "taking into consideration all the circumstances I am of opinion that the branch in question is a sufficient obstruction to the free use of the public road and there is likelihood of its falling down and causing injury to the public".

The facts are quite clear. The branch of the tree is 15½ feet above the level of the road. It seems to me that an obstruction at that height over this country road, having regard to the normal traffic, cannot be called an unlawful obstruction within the meaning of the section.

There remains the other consideration, *i. e.* whether the branch is a danger to the public.

The Magistrate says that the overhanging branch is very thick and that the weight of twigs at the end have to be taken into consideration for determining whether there is any likelihood of its breaking. Evidence was given by a Forest Ranger who was of opinion that there was no likelihood of the branch falling. He said it was vigorous, firm and solid. The Magistrate has accepted that evidence but goes on to say "it is very likely that on account of these factors (*i. e.* the age of the tree and the weight of its foliage) it may not withstand a heavy storm or gale. If it falls it is bound to endanger human life."

I take this finding to mean that at the present time and at normal times, there is no

likelihood of this branch falling, but that it is possible that at some time or other in the future there may be a gale of sufficient violence to cause it to fall. This argument would apply to every tree.

I think that the section deals with the condition of things at the time when the inquiry was held. If at such a time a house or branch of a tree is likely to fall and thereby endanger the life of passers-by, no doubt action under the section is justified, but I do not think it is meant to apply to what may happen at some indefinite time in the future or under quite abnormal circumstances. It might just as logically be said that half the houses in Allahabad city should be pulled down now because at some time in future there may be an earthquake of the intensity which unfortunately recently desolated Japan.

But even if the Magistrate was justified in holding that this branch was likely at some time or other to fall and endanger life, it seems to me that it was not necessary for him to go to the extreme length of ordering it to be cut down. A tamarind tree is an object of veneration to many Hindus, and the safety of the public, which after all is what is contemplated by the section, would have been adequately secured if the Magistrate had ordered proper support to be given so as to prevent the branch from falling. It is open to him to pass such orders if he still thinks there is any necessity for it. In my opinion the order as it stands must be discharged and it is discharged accordingly.

Order discharged.

1924 ALLAHABAD 668 (1).

DANIELS, J.

Daya Ram.....Plaintiff—Applicant.

v.

Thakuri.....Defendant—Opposite Party.

Civ. Rev. No. 30 of 1924 decided on 31st March, 1924 from an order of the Judge of the Court of Small Causes at Allahabad dated the 20th November, 1923.

(a) *Contract Act, S. 23—Public Policy.*

Mortgage of occupancy holding will not be recognized even collaterally under T. P. Act S. 68 if it is illegal. 1922 All. 134 Foll. [P. 668, Col. 2.]

(b) *Fraud—Party to fraud.*

Once it is established that the parties are *pari delicto* the courts will not assist an illegal transaction in any respect, that is, the person who asks the court to do something will fail. 1923 All. 504 Foll.; 1924 All. 80 Dist. [P. 668, Col. 2.]

S. S. Sastry for the Applicant.

Janaki Prasad for the Opposite Party.

Judgment:—This is an application for revision of a Small Cause Court decree. The facts are that the plaintiff is the usufructuary mortgagee of an occupancy holding under a mortgage executed in the year 1919. His case is that he has been dispossessed by a third party and therefore under a covenant contained in the mortgage deed he claims to recover the mortgage money from the mortgagor. It has been repeatedly held that a mortgage of an occupancy holding under the present Tenancy Act is illegal. The court below refers to two such rulings, the latest being that in *Har Prasad Tewari v. Sheo Gobind Tiwari* (1). That ruling entirely covers the present case. The court refused to recognise the transaction in any way, even by allowing a suit for the mortgage money on the basis of a personal covenant contained in the mortgage. The same principle has been laid down with reference to another class of suit in *Vilayat Husain v. Misran* (2). "Once it is established that the parties are *pari delicto* the courts will not assist an illegal transaction in any respect, that is, the person who asks the court to do something will fail".

The applicant relies on the case of *Jarbandhen v. Badri Narain* (3) but that case proceeds on special facts and is clearly distinguishable.

The application for revision fails and it is accordingly dismissed with costs.

Application dismissed.

---

(1) 1922 All. 134=44 All. 486=67 I. C. 793=20 A. L. J. 318.

(2) 1923 All. 504=45 All. 396=72 I. C. 92=4 L. R. A. Civ. 418=21 A. L. J. 303.

(3) 1924 All. 80=45 All. 621=4 L.R.A. Civ.581=21 A. L. J. 480.

---

* 1924 ALLAHABAD 668 (2).

DANIELS, J.

Tota Ram.....Petitioner.

v.

Panna Lal.....Opposite Party.

Civ. Rev. No. 43 of 1924 decided on 9th April, 1924 from the order of the Munsiff of Haveli, Aligarh, dated the 26th January, 1924.

Civil P. C., S. 151—No inherent power against express provisions of law.

Section 151 is not intended to override the express provisions of law. In other words where the law provides a period of limitation for a

particular class of applications the court cannot ignore the provisions of the law of limitation by appealing to Section 151 of the Code. That section is intended for cases for which the strict letter of the law provides no remedy. 1924 All. 446 Foll.

P. L. Banerji and S. N. Gupta for the Applicant.

The Opposite Party was not represented.

Judgment :—This is an application for revision of an order passed by the court below restoring an application for cancellation of a sale. The application was originally dismissed for default. The application to restore was not made within the time allowed by law. The court below has, however, allowed it in the exercise of its inherent powers under Section 151 of the Code. It is established by ample authority that Section 151 is not intended to override the express provisions of law. In other words where the law provides a period of limitation for a particular class of application the court cannot ignore the provisions of the law of limitation by appealing to Section 151 of the Code. That section is intended for cases for which the strict letter of the law provides no remedy. This was the view taken by this Court in a very recent case, *Joshi Shib Prakash* v. *Jhinguria* (1). There are also decisions of the Patna (1 Pat. 277) Lahore (1 Lah. 363) Bombay (42 Bom. 363 and 45 Bom. 503 at p. 507) and Madras (47 Mad. 171) High Courts to the same effect. There are observations to the same effect in the judgment of their Lordships of the Privy Council in *Sabitri Thakurain* v. *Savik* (2).

I accordingly set aside the order of the court below. The application for cancellation will stand dismissed with costs in both courts.

Order set aside.

---

(1) 1924 All. 446 = 46 All. 144.

(2) (1921) 48 Cal. 481 = 48 I.A. 76 = 40 M.L.J. 308 = 1921 M. W. N. 159 = 19 A. L. J. 281 = 60 I .C. 274 = 23 Bom. L.R., 681 = 25 C.W.N. 557 = 33 C.L.J. 307 = 14 L.W. 362 (P. C.)

---

* 1924 ALLAHABAD 669.

MEARS AND PIGGOTT, JJ.

The Municipal Board of Bareilly.....
Applicant.

v.

Hafiz Ala Baksh.....Opposite Party.

Mis. Case No. 44 of 1924 decided on 14th March, 1924 from the District Magistrate of Bareilly.

C. P. C., S. 20—Words and Phrases—Residence of a trader means a place where he carries on business and earns a living and does his daily work.

In every case residence is a question of fact, and it must depend upon the particular circumstances. The general practice is to accept as the person's residence the place where throughout the year you would ordinarily expect him to be found. The term residence is naturally a flexible one, but in the case of traders carrying on business it is manifestly their place where they earn a living and do their daily work nor does that place cease to be their residence merely because for purposes of rest or recreation or family ties, they occasionally return to the family home where they and their families have been brought up. [P.670 Col. 1.]

The parties were not represented.

Judgment :—This is a reference under S. 162 (1) of the Municipalities Act from the District Magistrate of Bareilly, who seeks guidance as to the principle upon which certain named gentlemen should be taxed in the notified area of Aonla. In that area there is the following rule governing it: "A tax on all persons residing or carrying on any trade, calling or vocation, or owning property within the notified area of Aonla will be levied according to their circumstances and property, provided that in case of non-residents the tax will be levied with regard only to the value of their property and trade within the notified area." The question upon which decision is sought has arisen in this way. There are certain gentlemen whose native town is Aonla. They have gone out into the world, principally Calcutta, where they have established business and where they have established house-holds; but they return to their native district and to their ancestral family houses either for rest or on occasions of family ceremonies, and it may be taken generally that two months is the outside period during which any one of these would be expected to be found in the town of Aonla. The taxation as will be seen from the rule falls under two heads; that is to say, there is a tax upon all persons who reside or carry on any trade or calling or vocation or owning property within the notified area; and that tax is levied upon these resident persons or those persons carrying on trade according to their circumstances and their property. But with regard to the class of cases of people who are non-residents they pay a tax which is calculated upon the value of their property and trade within the notified area. If these gentlemen are held to be persons residing within the area they will be subject to very much greater tax than if they are held to be non-residents. They do not object to taxa-

tion as non-residents upon the value of their property within the notified area. In passing one may remark that there is no evidence that they carry on any trade within the notified area. We are of opinion tnat on the facts as laid before us wlth regard to (1) Hafiz Ala Baksh, (2) Tanbir Ahmad and Khairunnissa, (3) Zainuddin, (4) Muhammad Ibrahim, (5) Abdul Shakur, (6) Abdul Qayum, and (7) Ahmad Murtaza and Muhommad Murtaza, with regard to all of these, the facts as stated do not bring them within the description of persons residing within the notified area of Aonla. In every case residence is a question of fact, and it must depend upon the particular circumstances. The general practice is to accept as the person's residence the place where throughout the year you would ordinarily expect him to be found. The term residence is naturally a flexible one, but in the case of gentlemen such as these who are traders carrying on business either at Calcutta or elsewhere, their place of residence is manifestly their place where they earn a living and do their daily work nor does that place cease to be their residence because for purposes of rest or recreation or family ties, they occasionally return to the family home where they and their families have been brought up. We are, therefore, of opinion that these gentlemen should not be taxed as residents but merely in respect of property owned by them within the notified area.

1924 ALLAHABAD 670.

DANIELS AND BOYS, JJ.

Behari and others.....Appellants.

v.

King-Emperor.....Respondent.

Criminal appeal No. 70 of 1924 decided on 15th May, 1924 from an order of the Sessions Judge of Bareilly dated the 20th December, 1923.

Penal Code, S. 149—Section covers two classes of cases—One is act done for the common object and the other is act known by accused as likely to be caused in prosecuting their common object.

Per Daniels, J.—Section 149 covers two classes of acts. The two parts of the section are quite distinct though the same act may and frequently does fall under both. The first class of acts are those committed in prosecution of the common object of the assembly. The act may be that of one individual accused, but if it is committed in furtherance of the end which they all have in view, all the accused are liable for it. The second class of acts are those which the accused knew to be likely to be committed in connection with the carrying out of their common purpose. [P. 671 Col. 2.]

Per Boys, J.—Ordinarily if accused persons go armed with spears in superior force intending to carry out by force a purpose (in this case capturing a woman) which they know others will resist, each of the accused must be taken to have known at least, that a death caused by one of his party was likely to be caused. [P. 672 Col. 2.]

A. P. Pandeya for the Appellants.

The Assistant Government Advocate for the Crown.

Daniels, J.:—In this case eight accused, Bihari, Noni, Hulli, Birbal, Narain, Ganga, Ghasi and Umedi have been convicted by the learned Sessions Judge of Bareilly. The first five have appealed. The case of the remaining three has been taken up in revision. Noni has been convicted under Section 302 of the Indian Penal Code and sentenced to transportation for life. The learned Judge refrained from passing sentence of death because of the accused's youth, because he found there was no direct intention to kill and because the wound was inflicted in the course of a scuffle and without premeditation. All the accused other than Noni have been convicted under Sections 147 and 324 read with 149, and 342 read with 149 of the Indian Penal Code, and sentenced to terms of imprisonment varying from three years to one year, the sentences to be concurrent with those passed under Section 342 and section 147. Notice has been issued to these accused to show cause why they should not be convicted under Section 302 read with Section 149 and why their sentences should not be enhanced. It was intended that the notices should be issued to the seven accused other than Noni but owing to a clerical omission in the order passed notice has been issued to Noni as well Counsel has appeared to argue the case on their behalf.

The facts are clearly stated in the full and careful judgment of the learned Sessions Judge. The accused formed an unlawful assembly whose common object was to carry off by force Mt. Bibbo Mt. Bibbo was the widow of a brother of the first accused Bihari. She had, as the learned Judge says "formed a friendship either legitimate or illegitimate with Jhamman Murao and Daya Ram Brahman." Bihari claimed to have married her after her husband's death and on 23rd May, 1922, filed a complaint under Section 498 of Indian Penal Code against Daya Ram and Jhamman. These proceedings were pending at the time of the present occurrence. The complaint was ultimately dismissed on the ground that Bihari's marriage to Mt. Bibbo

was not proved. On 12th June the complaint was before the court and on 13th June a warrant was issued for the arrest of Mst. Bibbo. On the 16th June Bihari and the remaining accused went in a body at night to the house of Jhamman in order forcibly to carry away Mt. Bibbo. Two of the party carried spears and the remainder were armed with lathis. About midnight they broke into the house and found Daya Ram, Jhamman, Mt. Bibbo and Jhamman's mother sleeping in the courtyard. They attacked the inmates of the house with lathis and Noni struck Mt. Bibbo in the abdomen with a spear. The spear penetrated the liver and intestines and Mt. Bibbo died as the result of the injury. Jhamman and Daya Ram received minor injuries. The accused's party took Mt. Bibbo, wounded as she was, to the thana on a cart and tied up Daya Ram and took him there also. Bihari proceeded to make a report in which he said that they were on their way to the house to recover the woman who was about to be carried off when on the way they met Jhamman and Daya Ram in the act of removing the woman and Jhamman Murao turned on them and attacked them with lathis. The Sub-Inspector finding that Mt. Bibbo had a wound in the abdomen from which her entrails were protruding took Bihari into custody, recorded Mt. Bibbo's statement as a first report, and sent her and Daya Ram to the dispensary for treatment.

That the facts as found by the learned Sessions Judge do not admit of any doubt and the learned Counsel who represented the accused conceded that so far as the appeal was concerned there was very little which he could urge. The learned Judge has dealt with the case of each accused separately and has shown that the evidence against all the appellants is overwhelming. We have no hesitation in dismissing the appeals of all the accused.

The real question in the case is whether the learned Judge was right in convicting the accused other than Noni only on a minor charge and inflicting upon them comparatively light sentence. The view which the learned Judge has taken is this, He finds that the common object of the accused was to get possession of Mt. Bibbo, using force if necessary. He finds that even if they considered that they had a right to arrest her they could not possibly think that they had a right to enter another person's house at dead of night for this purpose armed with lathis and spears and to use these weapons to overpower any resistance they might meet with. He also finds that as two of the accused carried spears they must all have known that it was likely that these spears might have to be used to effect their purpose. He considers, however, that as the common object was to carry off Mt. Bibbo alive it is improbable that any of the accused knew it to be likely that either Mt. Bibbo or Jhamman or Daya Ram would be killed in the course of the proceedings. He therefore considers that he is justified in applying Section 149 to charges under Sections 324 and 342 but not to the charge under Section 302.

The law applicable does not admit of any doubt, but as it is sometimes misunderstood it may be well to state it. Section 149 covers two classes of acts. The two parts of the section are quite distinct though the same act may, and frequently does fall under both. The first class of acts are those committed in prosecution of the common object of the assembly. The act may be that of one individual accused, but if it is committed in furtherance of the end which they all have in view, all the accused are liable for it. The second class of acts are those which the accused knew to be likely to be committed in connection with the carrying out of their common purpose. In the present case the common object was to carry off Musammat Bibbo alive, and her death cannot be said to have been caused in prosecution of the common object. It may indeed be that the party were determined to get her and were prepared to commit murder rather than be baulked of their object, but it is not safe to assume that they meant to go so far.

It does seem to me, however, that when they went armed with spears they must have known that if they encountered opposition some one was likely to be killed. The spears were meant to be used if occasion arose and a spear is one of the most deadly weapons there is. My learned brother is not prepared to draw this inference and would prefer to convict under Section 326. I am content to adopt this course for two reasons. First the difference between us is not one of general principle but merely of what inference can be drawn, on the somewhat peculiar facts of this particular case. Secondly, an adequate sentence can be passed under Section 326. The learned

Judge appears to have overlooked that section. It is unquestionable that the accused must have at least contemplated grievous hurt as a probable result of their attempt to carry off the deceased. Concurring with my learned brother I would therefore alter the conviction of all the accused other than Noni to one under Section 326 read with Section 149 of the Indian Penal Code and sentence them to seven years' rigorous imprisonment under that Section, the sentences to run concurrently with those passed under Sections 147 and 324.

Boys, J.:—Eight men have been convicted, one of them Noni, under Section 302 read with Section 149 and the others under Section 147, 324 read with Section 149, and 342 read with Section 149 of the Indian Penal Code. Noni has been sentenced to transportation for life and the others to varying terms of imprisonment from three years to one year.

The circumstances are briefly that Behari and others of his relations believed that Musammat Bibbo, a widow of Behari's brother, was living with two persons Daya Ram and Jhamman. Behari alleged that he himself had married Musammat Bibbo after his brother's death. Prior to the incident in this case, Behari had instituted proceedings under Section 498 of the Indian Penal Code, in the course of which a warrant was issued but not executed for the arrest of Musammat Bibbo. The Section 498 of the Indian Penal Code, proceedings were eventually dismissed. Subsequently, as is found and as is hardly disputed, and we accept the account, Behari went with the other accused to the house of Jhamman and Daya Ram where he had heard that Musammat Bibbo actually was at the moment. They went armed with two spears and lathis. The spears were in the hands of Noni and Narain. The party of the accused entered the house of Daya Ram and Jhamman, and inflicted certain injuries on Daya Ram, Jhamman and the woman Musammat Bibbo. Jhamman escaped but the accused captured Daya Ram and the woman and took them off to the thana, taking them *en route* to the Chaukidar and the Mukhia. Daya Ram they took along with his hands tied. In the course of effecting this capture, they inflicted some slight injuries on Jhamman, some slight injuries and a fleshwound on the head of Daya Ram, the latter wound said to have been inflicted by Narain with a spear, and a very bad spear wound in the stomach of Musammat Bibbo inflicted by Noni and some slight injuries. From this wound in the stomach Musammat Bibbo eventually died.

The only question that has been argued before us is as to whether in pursuance of the notice for enhancement that was issued by this Court the convictions of the seven appellants other than Noni should be altered to convictions under Section 302 read with Section 149 of the Indian Penal Code, and sentences passed accordingly.

The whole question really turns on whether the words in Section 149 "In pursuance of the common object or knowing it to be likely" are applicable to this case or not, in connection with the offence described by Section 302 of the Indian Penal Code. There can be no question but that ordinarily if accused persons go armed with spears in superior force intending to carry out by force a purpose which they know others will resist, each of the accused must be taken to have known at least, that a death caused by one of his party was likely to be caused.

This case is not so simple.

To my mind the circumstances justify two very different inferences, the difference being dependent on whether we are regarding the fatal wound inflicted on the woman Mt. Bibbo or the spear wound inflicted on the man Daya Ram. To take the case of the woman first.

Any individual of such a party (a) may share a positive common purpose to kill, or (b) may be reckless whether there is killing or not without actually intending it, or (c) may reasonably understand that the definite intention is not to cause death. In the first two cases Section 302, read with Section 149, is applicable; in the third case if and when established, it is not.

In my opinion this is one of the rare cases in which the third proposition can fairly be said to be established.

It is admitted by the Crown that the first proposition does not apply here, but it is urged that the second proposition is applicable, that it may fairly be presumed that all the accused knew at least that the woman's death was likely to be caused. To state the case for the Crown at its strongest, the accused knew that an act such as Noni's was

likely to be committed for they knew that several members of their party were animated by very bitter feelings against Daya Ram, Jhamman and the woman; they knew that two of their party were going armed with spears and they knew that they were going in superior force.

On the other hand, from the other circumstances in the case already set forth it is a very fair and a just inference that when the conspirators started out their sole definite intention was to arrest the woman and take her to the police and nothing was further from the contemplation of any of them than that *the woman* might be killed. How then can it be said that the inference is justifiable in these circumstances that each of the party had the knowledge of likelihood that must be established before Section 149 can be invoked. It must be remembered that *we are concerned at present only with the death of the woman.* Had Daya Ram or Jhamman been killed different considerations might have arisen on the facts, but that we are not considering. So far then as regards the death of the woman I hold Section 302 read with Section 149 inapplicable in the circumstances of this case.

The case bears a totally different aspect in regard to the spear wound inflicted on Daya Ram. It is true that Daya Ram was taken to the Police Station when he was captured but there was no warrant out against him and a just inference can be drawn that the spears were intended to be used and known to be likely to be used *against the man who might resist them.* Section 149 is therefore applicable.

To conclude, I hold that the circumstances established in this case do not justify an inference that the accused knew it to be likely that the spears would be used against the woman but to justify the inference that they all knew it to be likely that the spears would be used against the men.

I agree with my learned brother that the difference of opinion between us is rather one of inference from the facts than of principle.

Holding as I do the accused guilty by the aid of Section 149 in reference to the use of a spear on the man Daya Ram I am unable to understand why the learned Sessions Judge did not apply Section 326. I concur with my learned brother in altering the conviction of the accused other than Noni from one under Section 324 read with Section 149 to one under Section 326 read with Section 149, and in view of the very grave nature of the action of the accused (altogether apart from the death of Musammat Bibbo) and the fact that it is probably only owing to Daya Ram and Jhamman not putting up a stouter resistance that one or both were not killed, I concur with my learned brother in passing a sentence of seven years rigorous imprisonment, to run concurrently with the sentences under Section 147 and 342 read with Section 149.

By the Court:—The order of the Court is that the convictions of Behari, Hulli, Birbal, Narain, Ganga, Ghasi and Umodi under Section 324 read with Section 149 be altered to convictions under Section 326 read with Section 149 and they are sentenced to seven years rigorous imprisonment each, the sentences to run concurrently with the sentences under Section 147 and Section 342 read with Section 149. For the rest, the appeals are dismissed.

Appeals dismissed.

---

* 1924 ALLAHABAD 673.

DALAL, J.

Mushtaq Husain.....Applicant.

v.

King-Emperor.....Opposite Party.

Criminal Rev. No. 78 of 1924 decided on 28th March, 1924 against the order of the Sessions Judge of Bareilly dated the 5th of November, 1923.

Criminal P. C., S. 256—Refusal to examine any defence witnesses once precludes further exercise of the right at a later stage.

Where the cross-examination took place under directions of the Sessions Judge and the accused had previously declared that he had no witnesses for the defence. *Held* the accused had no right to produce his defence. [P. 674 Col 1.]

Z. Mehdi for the Applicant.

The Assistant Government Advocate for the Crown.

Judgment:—I see no reason to interfere by way of revision. The applicant has been convicted of an offence under Section 457 I. P. C. by the trial court. On appeal to the Sessions Judge he directed the trial court to give the applicant an opportunity of cross-examining the prosecution witnesses. At that time he gave very satisfactory reasons why the applicant should not be permitted to produce evidence for his defence. When questioned by the trial court previous to the appeal to the Sessions Judge the applicant

specifically stated that he had no witnesses for the defence. In the circumstances the Sessions Judge was correct in thinking that if witnesses for the defence were produced they would be tutored witnesses. My attention was drawn to the last sentence of Section 256 of the Code of Criminal Procedure. It is laid down there that after cross-examination and re-examination of the prosecution witnesses, if any,the accused shall be called upon to enter upon his defence and produce evidence. It must be remembered, however, that in this case the cross-examination took place under directions of the Sessions Judge and the applicant had previously declared that he had no witnesses for the defence. Under the circumstances I cannot hold that after the cross-examination the accused had a right to produce his defence. Obviously a technical plea is taken in hopes of some result profitable to the applicant flowing from it. When the applicant declared that he had no evidence for the defence it cannot be believed that upon cross-examination of the prosecution witnesses some evidence may be forthcoming. I dismiss this application.

Application desmissed.

---

* 1924 ALLAHABAD 674.

DALAL, J.

Debi Prasad.....Applicant.

v.

King-Emperor. .....Opposite Party.

Criminal Rev. No. 99 of 1924 decided on 28th March, 1924 from an order of the First Additional Sessions Judge of Gorakhpur, dated the 5th October, 1923.

(a) *Criminal P. C., S. 16—One Bench Magistrate being competent to try, absence of others during trial does not vitiate trial—Bench Magistrates.*

Where transfer of accused was made under Section 192 to the Bench Magistrates one of whom alone being invested with powers of a Magistrate of third class was empowered to hear and try the case under orders issued by the District Magistrate consonant to the provisions of Section 16 of the Criminal Procedure Code, and where he had jurisdiction to try the case sitting alone and he heard all the evidence and he was the Magistrate who pronounced judgment. *Held* there was no irregularity nor one vitiating the trial. [P. 674 Col. 2.]

(b) *Criminal P. C., S. 439—Acquittal is not generally revised.*

When no prejudice is caused, High Court will be very reluctant to interfere with the acquittal of persons who have undergone a trial in a court of competent jurisdiction or with the order of such a competent court under Section 250. [P. 675 Col 1.]

J. M. Banerji for the Applicant.

The Assistant Government Advocate for the Crown.

Judgment:—The applicant Debi Prasad was complainant against certain persons whom he prosecuted for committing offences under Sections 352 and 504 of the Indian Penal Code which offences were within the cognizance of a Magistrate invested with any powers, even the lowest, those of a third class. The complaint was filed in the court of a Sub-Divisional Magistrate who transferred it to the Bench Magistrates of Gorakhpur under Section 192 of the Criminal Procedure Code. The trial started before three Magistrates of the Bench but subsequently from the next hearing only one Magistrate M. Hakim Barham heard the evidence of both parties and pronounced judgment acquitting the accused and directing the complainant Debi Prasad to pay compensation under Section 250 of the Criminal Procedure Code. Under paragraph 3 of that Section Debi Prasad appealed to the District Magistrate to have the order for compensation set aside. In that appeal he described the order as having been made by M. Hakim Barham, an Honorary Magistrate of the third class. The District Magistrate dismissed the appeal and a revision from that order was dismissed by the learned Sessions Judge. Debi Prasad has come here in revision.

It is argued that M. Hakim Barham had no jurisdiction to try the case. I however agree with the point of view placed before this Court by the learned Government Advocate. He said that transfer was made under Section 192 to the Bench Magistrates one of whom alone being invested with powers of a Magistrate of third class was empowered to hear and try the case under orders issued by the District Magistrate consonant to the provisions of Section 16 of the Criminal Procedure Code. According to him even if there was any irregularity in M. Hakim Barham hearing the case alone, that irregularity did not vitiate the proceedings under clause (e) of Section 529. The learned counsel for the applicant quoted a judgment of a learned Judge of this Court in *Mathura v. King-Emperor* (1). In that case the question was whether the applicant was prejudiced and in consequence whether the trial was illegal. In the present case no

---

(1) (1918) 41 All. 116=16 A. L. J. 884=41 I. C. 344=19 Cr. L. J. 1004.

question of prejudice can arise. Munshi Hakim Barham had jurisdiction to try the case sitting alone. He heard all the evidence and he was the Magistrate who pronounced judgment. This is not a case where the Magistrate pronouncing judgment had been absent from Court at some of the hearings and in consequence there was a likelihood of prejudice being created against the prisoner or the person called upon to pay compensation. When no prejudice is caused this Court will be very reluctant to interfere with the acquittal of persons who have undergone a trial in a court of competent jurisdiction or with the order of such a competent court under Section 250. It must also be remembered that this order has been considered by the District Magistrate and upheld. I dismiss this application.

Application dismissed.

1924 ALLAHABAD 675 (1).

RYVES, J.

King-Emperor.....Petitioner.

v.

Ram Narain and another.....Opposite Party.

Criminal Reference No. 112 of 1924 decided on 7th March, 1924. Cr. Ref. made by the Sessions Judge of Benaras.

U. P. Excise Act, S. 60-A—Offence of possessing excisable article except cocaine is not summarily triable.

Under the U. P. Excise Amendment Act (II of 1923) Section 13 the punishment for an offence under Section 6 in respect of exciseable articles other than cocaine is imprisonment for one year. The offence is therefore not triable summarily. [P. 675 Col 2.]

The parties were not represented.

The following is the Referring Order made by the Sessions Judge of Benares:—Ram Narain and Sita Ram were sent up for trial under Section 60-A of the Excise Act for being in possession of country liquor without a license.

The Magistrate tried the case summarily, and in a discussive, and in many ways extraordinary, judgment acquitted both accused.

Against this order the District Magistrate has filed this application for revision.

The grounds are (1) that the case was not triable summarily and (2) that this order is based on surmises and not on evidence.

I am not prepared to go into the second ground. If there are reasons for supposing a finding of acquittal to be perverse the proper remedy is an appeal through the Local Government and not an application for revision.

It is, however, clear that on the first ground the application must be accepted. Under the U. P. Excise Amendment Act (II of 1923) Section 13, the punishment for an offence under Section 6 in respect of exciseable articles other than cocaine is imprisonment for one year. The offence is therefore not triable summarily. Under Section 530 (g) of the Criminal Procedure Code a summary trial conducted *ultra vires* is a nullity.

I therefore submit the record under Section 438 of the Criminal Procedure Code to the Hon'ble High Court with a recommendation that the proceedings be quashed and a lawful trial ordered.

The Magistrate was served with notice and has recorded his observations thereon.

Upon the Reference being heard by the Hon'ble High Court the following judgment was delivered :—

Judgment:—For the reasons given by the Sessions Judge, I accept this reference and set aside the summary trial and order that Ram Narain and Sita Ram be retried according to law.

Order set aside.

---

* 1924 ALLAHABAD 675 (2).

DANIELS, J.

Debi Ram and another.....Applicants.

v.

King-Emperor.....Opposite Party.

Cri. Ref. No. 115 of 1924 decided on 31st March, 1924, made by the Additional Sessions Judge of Saharanpur dated the 16th February, 1924.

Criminal P. C., S. 517—Order could be cancelled in appeal or revision—Order on acquittal can't be set aside by District Magistrate.

An order under Section 517 can be set aside by a court of appeal, confirmation or revision. The District Magistrate is not a court of confirmation, reference or revision, the only court which could pass orders on a reference or revision being the High Court. 42 Bom. 664 Foll. [P. 676 Col 1.]

Nehal Chand for the Applicants.

P. L. Banerji for the Opposite Party.

Judgment:—This is a reference by the learned Additional Sessions Judge of Saharanpur under the following circumstances :—Two persons Debi Ram and Bahram were accused of the theft of a drum under Section 380 I. P. C. The trying Magistrate acquitted them and ordered the drum to be restored to them. The complainants applied in revision to the District Magistrate urging that the accused had been wrongly acquitted and

that they should be convicted and punished. The learned District Magistrate declined to entertain the revision but holding that the order under Section 517 Cr. P. C. was appealable and considering that the weight of evidence was in favour of the drum being the property of the complainants, he set aside the order of the trial court and directed the delivery of the drum to the complainants. The learned Additional Sessions Judge has referred the case to this Court holding that the District Magistrate had no jurisdiction. This is the second case in which this learned Judge has made a reference to this Court without giving the Magistrate an opportunity of submitting his explanation as required by the rules. It is, however, at this stage unnecessary to delay the case by sending it back. I agree with the learned Additional Sessions Judge. An order under Section 517 can be set aside by a court of appeal, confirmation or revision. The District Magistrate was, however, in this case not a Court of appeal because no appeal lay against the order of acquittal. This view has been taken under similar circumstances by the Bombay High Court in the case of *In re Khema* (1). It was held in that case that where the accused had been acquitted the Sessions Judge had no jurisdiction to set aside the order of the trying Magistrate restoring the cattle to the accused and to order their delivery to the complainant. The District Magistrate was also not a court of confirmation, reference or revision, the only court which could pass orders on a reference or revision being the High Court.

I therefore set aside the order of the Court below and restore that of the Cantonment Magistrate.

Order set aside.

(1) 42 Bom. 664.

1924 ALLAHABAD 676 (1).

RYVES, J.

Damri.....Appellant.

v.

King-Emperor.....Respondent.

Criminal Appeal No. 152 of 1924 decided on 31st March, 1924, from the order of the Sessions Judge of Fatehpur dated the 28th January, 1924.

Penal Code, S. 216-B—Scope.

Where a pony was lent to the dacoits merely to facilitate them in removing the loot. *Held* the offence under S. 216-B was not committed. [P. 676 Col 2.]

Appeal from jail.

The Government Pleader for the Crown.

Judgment :—There was a bad dacoity committed in the Fatehpur District, in the course of which two men were killed and several other persons were seriously injured, and property including a quantity of utensils were carried away. The fact that the dacoity was attended with unusual violence is really not relevant in this case. Damri has been charged under Section 216-A of the Indian Penal Code with having harboured the dacoits. It has been found that the dacoits took with them a pony belonging to Damri to the scene of the dacoity, and loaded it with some of the utensils which were looted. The object apparently with which this pony was taken was to help them in carrying away their booty. If this was done with the consent of Damri, he could certainly have been tried and convicted of abetment of the dacoity. He however has not been tried under that charge, but for having harboured the dacoits. Having regard to the definition of "harbour" given in Section 216-B, it seems to me that the case does not come within the section. The pony was not lent to the dacoits, with any of the objects comprised in the definition of "harbour". It was lent to them merely to facilitate them in removing the loot. The conviction therefore cannot stand. Damri has already been convicted in Appeal No. 151 for being in possession of an utensil stolen in this dacoity, and has been sentenced to five years' rigorous imprisonment in that case. Under these circumstances I merely allow this appeal, and direct that so far as the charge under Section 216-A is concerned he be released, but he has still to serve the term which he is undergoing on a charge under Section 412 of the Indian Penal Code.

Appeal allowed.

---

* 1924 ALLAHABAD 676 (2).

BOYS, J.

Behari Singh and another.....Applicants.

v.

King-Emperor.....Opposite Party.

Cr. Ref. No. 157 of 1924 decided on 22nd April, 1924 by the Sessions Judge of Meerut dated the 6th March, 1924.

Civil P. C., S. 135—Protection extends only for going and returning directly—A few yards out of the way is immaterial deviation.

The protection given by Section 135 cannot be claimed by a witness who is claiming privilege to return by any route he pleases. His return must be straight from the court to the place whence he came in obedience to the summons. It cannot

possibly be open to a witness claiming privilege to dictate as to how far out of the straight route he may or may not go. This, of course, does not mean that if a witness goes to his destination by a road a few yards out of the way he therefore necessarily loses his protection. [P. 677, Cols. 1 & 2.]

S. N. Gupta for the Applicants.

N. P. Asthana for the Opposite Party.

Judgment:—This is a reference by the Sessions Judge of Meerut recommending that the convictions and sentences passed on four men under Sections 166 and 342 of the Indian Penal Code should be set aside on the ground that the arrest in respect of which they have been convicted was not an illegal arrest but was justifiable in law.

It appears that the complainant Gopi Nath had come from Allahabad to the court of the Subordinate Judge of Meerut in order to give evidence in some proceedings before the Subordinate Judge under Section 195 of the Criminal Procedure Code. At the time when he went to the court of the Subordinate Judge to give evidence, he went, as found by the Judge, to all intents and purposes, as a witness summoned, though, in fact, no summons had been served on him. At this time there was a warrant out against him for his arrest in certain execution proceedings. On his arrival at the court of the Subordinate Judge he asked for protection from arrest *until he should be able to return to Allahabad.* He was informed that as a witness he could not be arrested and no special orders were necessary. As a matter of fact, before he reached the railway station at Meerut, he was arrested and that arrest has formed the subject of the proceedings resulting in the conviction and sentence which the Sessions Judge has referred with a recommendation that they should be set aside. It is urged on behalf of the complainant that he was, in fact, returning to Allahabad when he was arrested, though he was visiting his son's house *en route.* It is suggested that at that time he was residing temporarily at any rate, at his son's house, but there is no evidence of any sort to that effect. The protection given by Section 135 of the Civil Procedure Code is expressed as protection "while returning from such tribunal." It is clear that it cannot be claimed by a witness, who is claiming privilege, to return by any route he pleases. It is clear that his return must be straight from the court to the place whence he came in obedience to the summons. He himself has in Ex. A described that place as Allahabad. Both courts find that, as a matter of fact, he was returning by a circuitous route which he had no doubt taken in order to see his son. It cannot possibly be open to a witness claiming privilege to dictate as to how far out of the straight route he may or may not go. He himself said that he wanted protection to go to Allahabad and it was by the direct route to Allahabad that he could have protection and by no other. This, of course, does not mean that if a witness goes to his destination by a road a few yards out of the way he, therefore, necessarily loses his protection. But on the findings of fact of the lower courts, the complainant in this case did more.

Under these circumstances I accept the reference of the Sessions Judge and direct that the convictions and sentences be set aside. The fines, if paid, will be refunded.

Sentences set aside.

---

* 1924 ALLAHABAD 677.

MUKERJI, J.

Sankat Narayan Pande.....Plff.—Appellant.

v.

Ram Bharos and others.....Defdts.-Respdts.

S. A No. 334 of 1924 decided on 24th March, 1924, against the decree of the Second Additional District Judge of Gorakhpur, dated the 17th December, 1923.

Limitation Act, Art. 126—The special article applies though general articles exist—Right is extinguished after 12 years.

Art. 126 applies being a special article to a suit by son to set aside alienation by father. On the expiry of 12 years from the date on which the alienee took possession of the property, the right of suit becomes extinguished. 64. I. C. 757 Foll.

Haribans Sahai for the Appellant.

Judgment:—The question before this Court is one of pure law.

The suit out of which this appeal arose was brought by an after-born son to set aside his father's alienation. The alienation took place on the 22nd of April, 1901. At that date the plaintiff was not alive. He had, however, a brother living, who was a minor then. The suit was brought on the 23rd of August, 1922.

The Court below dismissed the suit on the ground that as Article 126 of the Limitation Act applied to the suit, on the expiry of 12 years from the date on which the alienee took possession of the property, the right of suit became extinguished. This is the view which I myself took, though not in this Court. Article 126 is specially

applicable to a suit like this. The plaintiff is 'a Hindu governed by the law of Mitakshara' and his suit is 'to set aside his father's alienation of ancestral property.' The period within which such a suit must be brought is 12 years and the time from which the period begins to run is 'the date on which an alienee takes possession of the property.' In this case the date of alienation and the date on which the alienee took possession are one and identical. It is not suggested anywhere that these two dates are different. A special rule of law being in existence, no other Article than Article 126 can be applied. Section 6 of the Limitation Act has no application. Limitation began to run before the plaintiff's birth, and his birth did not give a fresh start to limitation. The view taken by the Court below and taken by me was also taken by two Judges of the Oudh Court in the case of *Chokhey Singh v. Hardeo Singh* (1).

Mr. Haribans Sahai has cited several cases before me including the cases of *Tulshi Ram v. Babu* (2) and *Lachmi Narain Prasad v. Kishan Kishore Chand* (3). None of the cases cited before me related to Article 126 and has any application.

The appeal fails and is dismissed under Order 41, Rule 11 C. P. C.

Appeal dismissed.

(1) (1921) 24 O. C. 330=64 I. C. 757.
(2) (1911) 33 All. 654=10 I. C. 908=8 A.L.J. 733.
(3) (1916) 38 All. 126=33 I. C. 913=14 A.L.J. 25.

1924 ALLAHABAD 678 (1).

DALAL, J.

Bidiya Misir and another....Plffs.-Appellants.

v.

Daryai Kuar and others.....Defdts.-Respondents.

S. A. No. 369 of 1924 decided on 8th April, 1924, against the decree of the Additional Subordinate Judge of Azamgarh dated the 18th December, 1923.

Agra Tenancy Act, S. 79—Scope.

The provisions apply to cases where there has been a constructive as well as an actual or physical ejectment of a tenant from his tenancy. [P. 678, Col. 2.]

G. Agarwala for the Appellants.

Judgment:—I agree with the view of law taken by the lower appellate court. One Achhaibar died and the zemindars put his daughter-in-law in possession as an occupancy tenant. The plaintiffs went to the Civil Court to dispossess the daughter-in-law of Achhaibar on the ground that they were entitled to succeed Achhaibar in the occupancy holding and not the daughter-in-law. The plaintiffs cannot be permitted to choose jurisdiction of court by the nature of their allegations. The court has to see the remedy which the plaintiffs really desire. As pointed out by a Bench of this Court in *Badri Kasaundhan* v. *Sarji Miser* (1) the provisions of Section 70 of the Tenancy Act apply to cases where there has been a constructive as well as an actual or physical ejectment of a tenant from his tenancy. It is explained there that the principle seems to be that where a person, claiming to have succeeded to a tenancy by a right of inheritance, finds that on endeavouring to take possession of the same his right is denied and his possession ousted by the zemindar, he has suffered an ejectment at the hands of the landlord within the meaning of Section 79, and his appropriate remedy is by a suit under the Tenancy Act. In the present case, the zemindars put Achhaibar's daughter-in-law in possession, so there was constructive ouster of the plaintiffs from the occupancy holding by the zamindars. The remedy of the plaintiffs lay in going to the Revenue Court to obtain possession. The period of limitation of six months cannot be extended to one of twelve years by the plaintiffs seeking remedy in the Civil Court instead of the appropriate Court of Revenue.

I dismiss the appeal under Order 41, Rule 11.

Appeal dismissed.

(1) (1914) 36 All. 55=22 I.C. 668=12 A.L.J. 29.

1924 ALLAHABAD 678 (2).

SULAIMAN AND KANHAIYA LAL, JJ.

Chet Ram.... .....Plff.—Appellant.

v.

Sita Ram and others.....Defdts.—Respondents.

L. P. A. No. 62 of 1923 decided on 8th May, 1924, from the judgment of the Hon'ble Mr. Justice Ryves dated the 22nd December, 1922.

Agra Tenancy Act, S. 79—Tenant dispossessed by subsequent registered lease-holder—S. 79 does not apply—Jurisdiction—Suit for possession cognisable by Civil Court.

Where the plaintiff claimed to hold land in suit under an oral agreement of tenancy whereas the defendants relied upon a registered lease of later date executed by the zemindars, and on the date

of suit the plaintiff admittedly was out of possession and had in the previous month been forcibly dispossessed by the defendants and his crops were cut away by defts. and appropriated, *Held* that this was not a case of dispossession by the landlord but of a dispossession by trespassers, that Section 79 of the Agra Tenancy Act does not apply, that the plaintiff would be entitled to a decree for compensation for the crops forcibly cut away by the defendants and that a decree for possession and for injunction in his favour would hold good till such time as the plaintiff is ejected in due course of law. [P. 681 Cols. 1 & 2.]

Held also that the suit was cognisable by a Civil Court. 2 A. L. J. 69; 7 I. C. 486; 13 A. L. J. 295 Dist. [P. 681, Col. 1.]

Gulzari Lal for the Appellant.

M. L. Agarwala for the Respondents.

Judgment:—This is a plaintiff's appeal under the Letters Patent from a decree of a learned Judge of this Court setting aside the decree of the lower appellate court and dismissing the suit *in toto*.

The plaintiff's allegations were that the plots in suit were the tenancies of one Ghisa, deceased. The plaintiff alleged to be an heir of Ghisa and as having been in joint cultivation with him over these plots. It was stated that on the 4th February, 1919, the lambardar had recognised the plaintiff as the tenant of these plots and had indeed attested this fact before the Kanungo, that the plaintiff was in possession of these fields by cultivation in the year 1326 Fasli, that in Kharif 1327 Fasli he actually sowed some crops but that in March 1920, the defendants wrongfully dispossessed the plaintiff by cutting away the standing crops. It is necessary to enumerate the reliefs which were claimed by the plaintiff in his plaint. They are as follows:—

(1) Rs. 100 as the value of the crops illegally cut by the defendants.

(2) Ejectment of the defendants and a decree for possession in favour of the plaintiff.

(3) A perpetual injunction restraining the defendants from ever interfering in future with the plaintiff's possession of the plots in dispute.

The defendant, Sita Ram, pleaded that he was holding the plots under a registered *kabuliat* dated the 13th February, 1919 and that the plaintiff had no right to maintain the suit against him. It was also pleaded that the Civil Court had no jurisdiction to entertain this claim which was exclusively cognizable by the Revenue Court.

The Court of first instance came to the conclusion that the suit should have been filed in the Revenue Court and ordered that the plaint be returned for presentation to the proper court. An appeal was preferred to the District Judge who came to the conclusion that the suit had been rightly instituted in the Civil Court. Instead of, however, remanding the case for disposal on the merits he proceeded under Sections 196 and 197 of the Tenancy Act and ultimately passed a decree for Rs. 80 as damages for possession of the plots and for an injunction against the defendants from interference in future with the plaintiff's possession.

The defendants preferred an appeal to this Court which has been allowed. We may note that before the learned Judge it was never urged that no appeal lay to him. The learned Judge's attention was not drawn to this question and naturally there is no adjudication on this point. The point also is not quite a clear one. This being a Letters Patent Appeal we have refused the point to be raised for the first time under the Letters Patent.

We must, therefore, assume that the learned District Judge had passed a decree which was duly appealed against to this Court.

The learned Judge of this Court after doubting whether the District Judge was right in holding that the suit was cognizable by the civil court has gone on to remark that he does "not however intend to decide this case on the point of jurisdiction" *i.e.*, he has assumed that the suit had been rightly instituted in the civil court and the learned District Judge was properly seized of the appeal and was fully justified in disposing of it on the merits.

We may note here that in our opinion there can be no doubt that the plaint as drafted and the claim as brought could only have been brought in the civil court. It is apparent that no perpetual injunction could ever have been granted by the revenne court. It is clear also that the claim was one for damages against a trespasser and for the recovery of possession against him and that the landlord was not made a party to these proceedings. The suit really was at the very best one between the rival claimants and should have been disposed of by the civil court. The learned judge, however, has dismissed the suit on the following ground. The plaintiff claims to hold this land under an oral agreement of tenancy whereas the defendants

relied upon a registered lease executed by the zemindars. On the date when the suit was instituted, the plaintiff admittedly was out of possession and had in the previous month been forcibly dispossessed by the defendants. The learned Judge, therefore, thought that in a case of this kind the plaintiff had failed to prove that he had a better title than the defendant, and that therefore the plaintiff could not be given a decree for possession. The learned Judge further thought that it followed from that that plaintiff could not even get a decree for damages for the crops which he had sown and which had been wrongfully cut by the defendants.

It is impossible for the civil court to determine the exact nature of the tenancy, but it cannot be disputed that when the plaintiff was put in possession of the plots by the lambardar who collected rents from him he became at the very least a non-occupancy tenant. A non-occupancy tenant is entitled to hold on and sow crops so long as he is not duly ejected. Up to March 1920, the plaintiff was in occupation of the plots and had actually sown crops in the field No. 3404. The learned District Judge has found distinctly that the crops which had been cut by the defendants were the crops belonging to the plaintiff which he himself had sown. He has also found that even subsequent to the registered lease of the 13th February, 1919, granted in favour of the defendant No. 1, the lambardar had received rents from the plaintiff on account of the plots in question. It is, therefore, clear that in March 1920, the plaintiff certainly had a right to retain possession of the plots until he was duly ejected by the landlord. A revenue court could not have entertained a suit for ejectment with effect from March 1920. Such a suit could under Section 60 of the Agra Tenancy Act have been filed only between the 30th of June and the 1st of October following. The plaintiff, however, was forcibly dispossessed by the defendants in the middle of the agricultural year at a time when the plaintiff's crops were standing. Had the plaintiff's dispossession been effected by the landlord himself the question as to whether the plaintiff should be restored possession or not under the proviso to Section 79 would then have arisen. As matters stand, however, the landlord did not give possession to the defendants and the plaintiff was not dispossessed by the landlord but by the defendants. It is the defendants who cut away the crops and who apparently have appropriated these crops and it is against the defendants that the plaintiff seeks relief. It is, therefore, difficult to hold under the circumstances of this case that the dispossession complained of was a dispossession by the lambardar.

Our attention has been drawn by the learned counsel for the defendants to three cases of this court and it has been contended that inasmuch as the defendants were claiming title under a registered lease granted by the zamindar the dispossession by them must be deemed to have been the dispossession by the landlord. The first case relied upon is that of *Ram Lal* v. *Chunni Lal*. (1). It will be noticed, however, that in that case although the heir of the original tenant had got her name recorded yet neither she nor her subtenants who claimed under her had ever been in actual possession of the holding.

In the same way in the case of *Sokhai* v. *Ram Prasad* (2) it was the landlord who had let out the land in the occupation of a tenant to a third party. The learned Judge understood the finding of the lower appellate court to be that if the plaintiff was ever in possession he was dispossessed by the land-holder who *thereafter* let the land to the defendant.

Similarly in the case of *Balbhaddar Chaube* v. *Somarau Rai* (3) a learned Judge of this Court had distinctly held that in that case the dispossession of the plaintiff was a dispossession by the zamindar which was manifest from the fact that in the plaint it was stated that the zamindar brought suits for rent against some tenants holding the plots in question and obtained decrees and that the plaintiff himself regarded this as amounting to his dispossession. Furthermore in that case the relief claimed by the plaintiff was not only against the principal defendant but also against the zamindars who were impleaded.

It will, therefore be apparent that in all the three cases the zamindar had been understood to have actually dispossessed the occupying tenant and then let the land to a third person. In the present case on the other hand the learned District Judge was of opinion that in spite of the registered lease granted to the defendant the lambardar acknowledged the plaintiff as the tenant, and in fact realised the rents from him.

---

(1) (1905) 27 All. 372=2 A.L.J. 69=1904 A.W.N. 281.
(2) (1910) 7 I. C., 486.
(3) (1915) 13 A. L. J. 295=21 I. C. 914.

It is also clear that it was not till more than a year after that registered lease that the defendants purported to take possession of the field and that they tried to do this in the middle of the agricultural year at a time when the plaintiff's crops were standing. The defendants must be deemed to have therefore forcibly taken possession of the plots and the dispossession of the plaintiff cannot be deemed to be an ejectment by the zamindars. The zamindars are not made parties to the suit and the defendants are merely trespassers. Even the learned Judge of this Court at the end of his judgment remarked that the arguments before him proceeded on the basis that this was a purely civil suit properly instituted in the Civil Court. Under the circumstances the principle underlying the cases referred to cannot apply to this case. Treating the suit as a suit against trespassers it is apparent that the suit was maintainable. We may also note that the suit was instituted within six months of the plaintiff's dispossession and furthermore the matter went up in appeal before the learned District Judge, who having all the materials on the record proceeded under Sections 196 & 197 to dispose of the matter finally. Under the circumstances the question as to which was the proper forum for the suit has lost its importance. The case must, therefore, be disposed of on its actual merits.

It has been contended on behalf of the plaintiff that he had no right to retain an absolute possession of these plots and that in view of the provisions of Section 50 of the Indian Registration Act the registered lease, though subsequent to the oral lease, must have priority. It is urged that at the time when the suit was brought the plaintiff was not in possession, and that inasmuch as the registered document has priority over all unregistered documents the plaintiff has not a better title, and therefore his claim for possession must be dismissed.

We are unable to accede to this contention. In the first place Section 50 of the Indian Registration Act (XVI of 1908) does not apply to leases exempted under the proviso to sub-section (1) of Section 17 of the Act. A reference to the notification published in the *U. P. Gazette* dated the 3rd December, 1885, shows that agricultural leases have been exempted from the operation of Section 17. It would follow, therefore, that Section 50 also would be inapplicable to such agricultural leases. The lease in favour of the defendants is not a lease of proprietary interest but is a mere agricultural lease though it purports to be in perpetuity. Furthermore on the date when the defendants took possession of the field they knew that the plaintiff was in possession and that his crops were actually standing on the land. They, therefore, had clear notice of the plaintiff's oral tenancy, if not of the fact that it had been attested before the kanungo. Under all these circumstances it is impossible to hold that the registered document superseded the tenancy of the plaintiff. The plaintiff even if he was a mere non-occupancy tenant at any rate had a right to remain in possession till duly evicted. The mere fact that a registered document was executed in favour of the defendants did not *ipso facto* put an end to his tenancy or extinguish his right. We are, therefore, of opinion that on the date of dispossession *i.e.*, March 1920, he had a right to remain in possession and the defendants had no right to take forcible possession of his lands. The plaintiff accordingly would be entitled to be restored to possession as against the defendants. The learned counsel for the defendants respondents has as a last resort contended that the plaintiff being at best a mere non-occupancy tenant had no right to be restored to possession in view of the provisions of Section 79 of the Agra Tenancy Act. When we have held that this is not a case of dispossession by the landlord but of a dispossession by trepassers, Section 79 of the Agra Tenancy Act does not apply. In any view of the matter the plaintiff would be entitled to a decree for compensation for the crops forcibly cut away by the defendants.

As regards the relief for injunction we are of opinion that this should not be granted in the absolute terms asked for. It is clear that the defendants hold a registered lease from the zamindar and he may have the right to get the plaintiff ejected in the ordinary way from the holding and to put the defendants in possession. A perpetual injunction, therefore, is out of the question.

We accordingly allow this appeal and setting aside the decree of the learned Judge of this Court, modify the decree of the learned District Judge by directing that the decree for possession and for injunction will hold good till such time as the plaintiff is ejected in due course of law. The rest of the decree of the District Judge will stand confirmed. The plaintiff will get his costs here and hitherto from the defendants

including costs in this Court on the higher scale.

Appeal allowed.

1924 ALLAHABAD 682 (1).

WALSH AND RYVES, JJ.

Nazir Ahmad and others.....Defendants-Appellants.

v.

Muhammad Sharif and others.....Plaintiffs-Respondents.

F. A. No. 69 of 1923 decided on 13th February, 1924, from theiorder of District Judge, Azamgarh.

U. P. Land Revenue Act (III of 1911) S. 233-K—Suit for possession of plot included in partition proceedings does not lie in Civil Court.

A Civil Court has no jurisdiction to entertain a suit by a recorded co-sharer against the recorded co-sharers for exclusive possession and damages in respect of a plot which was the subject of a partition case actually going on within the Court.

Mukhtar Ahmed for the Appellants.

Iqbal Ahmad for the Respondents.

Walsh, J.:—The plaintiffs and defendants in this suit are both co-sharers of *mouza* Nandput. The plaintiffs applied for partition under the provisions of the Land Revenue Act (Act No. III of 1901, U. P.) Both the plaintiffs and the defendants were parties to those proceedings. Subsequently the plaintiffs brought this suit against the defendants alleging that they were in exclusive possession, and had been in exclusive possession for a long time, of certain plots of land in the village, the numbers of which are given in the plaint. They said that they had sown wheat and barley on these plots, and that the defendants had trespassed and wrongfully cut the crops. They asked for the decree for exclusive possession of the plots and for Rs. 165 damages, the value of the crop misappropriated by the defendants. All these plots were included in the lands of which partition was pending. The defendants in their first plea urged that the suit was barred by Section 233 (k) of the Land Revenue Act. The learned Munsiff upheld this plea and dismissed that suit *in limene* on the ground that it was barred by that section. The plaintiffs appealed, and the lower appellate court allowed the appeal and remanded the suit for determination of the remaining issues. The defendants come here in second appeal from that order of remand. It seems to us that the legislature has given the Revenue Courts exclusive jurisdiction over the partition of a *mahal* among recorded co-sharers, and has therefore provided by Section 233 (k) that no person shall institute any suit or other proceeding in the Civil Court with respect to partition or union of *mahals* except as provided in Sections 111 and 112. The learned Judge of the court below has held that the claim for damages would undoubtedly lie in a Civil Court, and if the trial court was right, the plaintiffs were without a remedy. There is no doubt that if the plaintiffs had framed their suit so as to confine their claim merely to damages, they might have succeeded. But they have chosen to join this claim to a claim to obtain exclusive possession of certain specified plots, which undoubtedly are the subject of the partition. The learned Judge of the court below says that the plaintiffs do not raise any question of proprietary title, and therefore the jurisdiction of the Civil Court is not ousted. One of the matters which the Revenue Court has to consider is what particular plots should be given to a particular co-sharer on partition, and it seems to us that where a suit is brought to force the hands, as it were, of the Revenue Court, or to embarrass it in coming to a decision on such a question, that such a suit is excluded from the cognizance of a Civil Court. We think that this matter is concluded by authority. *Ganesh Tewari v. Salik Pande* (1) which was approved of in *Ram Subhag Singh v. Dip Narain Singh* (2).

The result is that we allow this appeal, set aside the order of the court below and restore the decree of the first court. The appellants are entitled to their costs in this Court.

Appeal allowed.

---

(1) (1914) 12 A. L. J. 949.
(2) 1922 All. 158.

---

* 1924 ALLAHABAD 682 (2).

SULAIMAN, J.

Chandar Sahai.....Plaintiff—Applicant.

v.

Durga Prasad and another.....Defendants—Opposite Parties.

Civil Rev. No. 106 of 1923 decided on 28th February, 1924 from an order of the Additional District Judge of Aligarh dated the 28th March, 1923.

Civil P. C., O. 9., R. 13—No appeal lies against order dismissing application for restoration of application to set aside exparte *decree—Civil, P., C. S. 141.*

An appeal lies from an order refusing to set aside an *ex-parte* decree, but under the Code of Civil Procedure no appeal is provided for from an order dismissing an application which is for restoration of an application for setting aside an *ex-parte* decree. Nor can a right of appeal be claimed by virtue of Section 141 of the Code of Civil Procedure, when Order 43 of the Code makes no provision for such an appeal.

Panna Lal for the Applicant.

The Opposite Parties were not represented.

Judgment:—This civil revision arises under the following circumstances:—

A civil suit was instituted by the plaintiff in the Court of the Munsiff at Kasganj. The summons was served personally on the defendant and the 8th of November, 1921, was fixed for the settlement of issues. On that date, however, the defendant did not appear. The court then passed an order that the case should be proceeded with *ex-parte* and fixed the 28th of November, for final hearing. On the 28th of November 1921, the defendant again did not appear and the suit was decreed *ex-parte*. The defendant, however, did appear later on in the court and put in an application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the *exparte* decree. He filed an affidavit in support of this application explaining why he was not able to appear on the former date and why he appeared late on that date. The court fixed the 14th of January, 1922, for the disposal of this application. On that date the defendant again did not appear and this application was dismissed for default. After this on the 21st of Januray, 1922, the defendant put in a second application purporting to be an application under Order 9 Rule 13 in which a mention was made of the circumstances under which he was not present when his previous application was dismissed for default. An affidavit was also filed showing that he was ill on the 14th of January 1922. The learned Munsiff held that this second application was a substantial application under Order 9 Rule 13 and was in fact a fresh application under that rule, but as it was filed more than 30 days after the *ex-parte* decree it could not be entertained. He accordingly dismissed the application under an order dated the 13th of July, 1922.

The defendant went up on appeal from this last mentioned order to the Court of the District Judge. The learned District Judge has allowed the appeal and set aside the order dismissing the application of the 21st of January, 1922, and not the *ex-parte* decree of the 28th of November, 1921, and has directed the court of first instance "to dispose of the application of the 21st of January, 1922, on the merits treating it as one for restoration of the application of the 28th of November, 1921."

I am of opinion that the order of the learned District Judge cannot be maintained.

The application of the 21st of January, 1922, filed by the defendant may be treated either (1) as an application for restoration of the application of the 28th of November, 1921, which had been filed for setting aside the *ex-parte* decree, or (2) as an application in itself one for setting aside the *ex-parte* decree of the 28th of Novermber, 1921.

If the application of the 21st January, 1922, was for restoration of the application of the 28th November, 1921, and not an application for setting aside the *ex-parte* decree, then even though the court of first instance had jurisdiction to entertain this sort of application, if it did not feel inclined to grant the application, no appeal from its order dismissing the second application lay to the lower appellate court. An appeal lies from an order refusing to set aside an *ex-parte* decree, but under the Code of Civil Procedure no appeal is provided for from an order dismissing an application which is for restoration of an application for setting aside an *ex-parte* decree. Nor can a right of appeal be claimed by virtue of Section 141 of the Code of Civil Proceedure, when Order 43 of the Code makes no provision for such an appeal. In this view of the matter, therefore, the lower appellate court had no jurisdiction to hear the appeal at all.

On the other hand if the application of the 21st of January, 1922, was an application for setting aside an *ex-parte* decree of the 28th of November, 1921, and the court of first instance dismissed it, an appeal would lie to the lower appellate court, though it is manifest that that application itself was barred by time and was incompetent on account of the dismissal of the previous application. Nevertheless, if the learned District Judge, in spite of the application dated the 21st of January, 1922, having been barred by time or being barred by the dismissal of the previous application, had allowed the appeal and set aside the *ex-parte* decree itself, it might have been difficult for this Court to interfere in revision on the ground of an error of law committed by the lower appellate court,

The learned District Judge, however, has not set aside the *ex-parte* decree at all but has entertained the appeal as having been preferred from the order dismissing the application of the 21st of January, 1922, treating it as an application for restoration of the previous application of the 28th of November, 1921. He has simply set aside the order of the 13th of July, 1922, and sent the case back to the court of first instance with a direction to dispose of the application of the 21st of January, 1922, treating it not as an application for setting aside the *ex-parte* decree but simply as an application for restoration of the application of the 28th of November, 1921. This order is obviously wholly irregular. I have already said that no appeal is provided for from an order dismissing an application for the restoration of an application for setting aside an *ex-parte* decree. The learned Judge, therefore, could not simply have set aside the order of the 13th of July, 1922, and asked the court of first instance to again proceed with the application of the 21st of January, 1922. If he really wanted to entertain the appeal from an order refusing to set aside an *ex-parte* decree he might himself have gone into the question and decided whether the *ex-parte* decree should or should not be set aside, and this he has not done. He has even not decided whether the application of the 21st of January 1922, should or should not be granted. He has left this latter question still open. The learned Judge has himself taken the view that the second application should in justice be taken to be an application for restoration of the previous application. He should then not have entertained an appeal from its dismissal.

The defendant in this case has entirely misconceived his remedy. If his second application was an application for restoration of the previous application for setting aside the *ex-parte* decree and an adverse order was passed against him, he might have come up straight to the High Court in revision if he could bring his case within Section 115 of the Code of Civil Proceedure, but in no case could he have gone to the lower appellate court in appeal.

I accordingly allow this application, set aside the order of the lower appellate court and restore the order of the court of first instance with costs in all courts, leaving it open to the defendant to have recourse to whatever other remedy he may be advised to take, if he considers himself aggrieved by the first court's order.

Application allowed.

---

* 1924 ALLAHABAD 684.

WALSH AND RYVES JJ.

B. Ram Nath.....Petitioner.

v.

King-Emperor..... ..Opposite Party.

Civ. Rev. No. 108 of 1923 decided on 19th March, 1924 from an order of the Commissioner of Agra Division dated the 6th July, 1923.

(a) *U. P. Municipalities Act—Clause 23 Sub-section 3—High Court can't revise order under S. 467 by election commissioner.*

An election commissioner independently of any special legislation about an election petition, is not amenable to the jurisdiction of High Court. Prohibition against an appeal or revision indicates that it was the intention of Section 23 to confine the High Court's power merely to advising and answering questions of law referred specially to it. All matters which arise in the course of an election petition which the commissioner has disposed of one way or another, are matters which are within his jurisdiction. [P, 686. Col. 1.]

(b) *Interpretation of statutes—Article, the meaning of.*

The definite article "the" is frequently used in legislation in the same sense as the Greek "tis". [P. 686 Col. 2.]

K. N. Katju, N. P. Asthana and S. C. Das for the Petitioner.

L. M. Banerji for the Opposite Party.

Walsh J.:—This is an application in revision under circumstances which we trust are exceptional, and which the order made in the present case by the learned Commissioner will render less frequent in future. In the course of an election petition there are in fact three cases but it is only necessary to mention one, because the matter has been argued as one, each case being typical of the rest. The Commissioner in a judgment, which is not before us, came to the conclusion that the election was void, and that the candidate had been guilty of such misfeasance that it was necessary to disfranchise him from elections for a period of five years. In addition to that he found that the person, who is now the applicant before us, had falsely personated a voter on the electoral roll, who may, of course, have been dead, or ill and unable to vote, or unwilling to take part in the election and that the candidate had aided and abetted. That in itself as Dr. Katju has rightly argued, is made an offence by Chapter 9-A, a new provision in the Penal Code dealing with electoral offences, and for

reasons which were no doubt desirable the legislature has required that sanction of the Local Government should be given to any criminal proceedings for offences under that new chapter. But it so happens—and the sooner it is generally known and appreciated by persons who claim to take part in the Government of the country and to send representatives to the Legislative or Municipal Assembly the better—that a person cannot, in consequence of the machinery which has been provided, successfully personate and obtain the necessary voting paper of another individual without signing, what purports to be his name, or affixing, what purports to be his thumb impression, and *prima facie*, in accordance with the provisions of Section 463 of the Indian Penal Code, whoever makes a false document with a paper impressed with the pretended thumb impression of the person who did not put his thumb impression there, with intention to cause damage to the public, commits forgery. We can imagine nothing more fraudulent in election matters and therefore damaging to the public, unless election matters are to be considered so trivial as to be of no moral importance whatever, than deliberately to utilise the machinery, intended to provide an honest result, for the purpose of deception and of securing a result which is not the true result, and may not represent the wishes of the majority of the constituents. Such conduct is bad enough in the case of an illiterate voter, who must know quite well that he is lending himself to fraud, but in the case of a candidate, who is presumed to have some measure of education and poses before the public as a person claiming to represent the view of a particular faction, such conduct is highly criminal and ought to be punished with the utmost severity. Some electoral offences like wearing badges, spending little too much money on excitement and *tamashas* using undue influence with a voter, or even sometimes exceeding the law in endeavouring to give a correct description of what you believe to be the character of your opponent, and things of that sort, are matters which arise out of heat and party conflict, and may be regarded as things which are ephemeral and do not strike deep into the roots of public policy. These are offences which, as Dr. Katju has pointed out, require the sanction of the Local Government. But there is a wide difference between these, and offences which are deliberate offences against the general law of the land. We have dwelt upon this aspect of the merits, because it has been strongly urged upon us that in any event we ought to stop this prosecution at its birth on the ground, as far as we can follow it, that if a man only commits an electoral offence within Chapter 9-A of the Indian Penal Code it does not matter what other crime he commits and that he ought not to be prosecuted for it. We think the sooner this view is declared to be fallacious and against public policy, the better. Strictly speaking it is a view rather for the criminal courts than it is for us, but inasmuch as it has been vigorously argued, it seems necessary to deal with it by way of explaining how the matter arises before us It was further contended that assuming that any *prima facie* evidence of an offence under Section 463 of the Indian Penal Code or its cognate provision could be suggested, the Commissioner in this particular case exceeded his jurisdiction, because he was neither a Civil, nor a Criminal, nor a Revenue Court, and therefore did not come within the provisions of Section 195 of the Criminal Procedure Code, nor of Section 476 of the same Code. When we talk of the Criminal Procedure Code we are of course speaking of the Code as it was in July 1923 before the amending Act came into force. For reasons which we will state in a moment it is not necessary for us to express an opinion on this subject, nor was the argument very much pressed before us for the reason that it was a little difficult to apply to this Court in revision, at any rate under Section 115, and at the same time to deny that the Commissioner sitting as an election tribunal was a Civil Court. All we have to say about that is this, that without coming to any final decision on the point, it seems to us clear from the Municipalities Act of 1916, that he is a court of some kind. He is not described in that Act as a Civil Court, but merely as entitled to exercise the powers of a Civil Court. But when one is construing the word "civil" in contradistinction to criminal and revenue, one is driven to ask oneself whether the attributes of an election tribunal cannot be said with confidence not to come within the definition either of criminal or revenue, but to come within that of a Civil Court. Elections are certainly civil matters, an election dispute is certainly a civil dispute, and as we have said, an election tribunal is at any rate not a criminal or revenue court. It is not with-

out importance in considering this matter that, until the recent legislation, namely, the Municipalities Act of 1916, these disputes were always raised and decided by the ordinary civil court. This brings us to the main question which we have to determine now. Assuming that an election dispute of this kind ought not to be prosecuted under the ordinary provisions of the Penal Code for forgery, and that the Commissioner had no jurisdiction to make a written complaint, in the way in which he has done, for further enquiry before a Magistrate, has this Court the right to interfere in revision? We think that question must be decided according to the true interpretation of sub-section 3 of clause 23 of the said Municipalities Act. Nowhere is the relation of an election court to the High Court defined. A Commissioner independently of any special legislation about an election petition, is certainly not amenable to the jurisdiction of this court in any court in which he sits and we therefore ought to find in the Act a definite statutory provision from which we may indirectly infer that it was intended to preserve intact the ordinary civil revisional jurisdiction of this Court which is exercised under Section 115 of the Civil Procedure Code. The provision in question is quite clear. It says a court may refer a question of law to the High Court under Order 46 of the first schedule of the Civil Procedure Code, and it is said that it has already been held in certain cases that where a power of reference exists, there is that relationship which may be described as either subordinate, or at any rate sufficient, to justify an application in revision. But the section in question goes on to say: "there shall be no appeal either on a question of law or fact, and no application in revision against the decision of the court". *Prima facie* that prohibition, namely against an appeal or revision, is fatal to the contention, and indicates that it was the intention of Section 23 to confine the High Court's power merely to advising and answering questions of law referred specially to it. This was challenged by Dr. Katju by reason of the presence of the word "the" in the expression "the decision". "The decision" he contended could only mean such decision as by reference to the other sections of the Act could be found to have been prescribed as part of the duties of the election tribunal, and of course directing a prosecution is not amongst the things so prescribed. This is a possible view, but on the whole we have arrived at the conclusion that it is not the correct view. The definite article "the" is frequently used in legislation in the same sense as the Greek "tis," and the next clause, namely (f) rather tends to suggest that the legislature was considering a variety of matters which an election court might have to decide, and so gave the parties a month within which they could go back to the court and ask it to review its decision on any point. Any legislative body or draftsman who attempted to foresee any point which would arise in an election petition, would be a very far-seeing person, and it would be an unusual, if not an impossible task for a draftsman to insert in the Act an explicit statement of all the matters which an election tribunal ought to decide. Dr. Katju's argument infers this view, namely that the legislature ought to give a complete statement of all the points which a Commissioner would have to decide, and that he can decide nothing which is not in the statement. We think this is a *reductio in absurdum* of the argument, and sufficient to show that all matters which arise in the course of an election petition which he has disposed of one way or another, are matters which are within his jurisdiction.

We, therefore, reject this and the connected applications in revision. We allow Rs. 32 as costs in each case.

Applications rejected.

---

* 1924 ALLAHABAD 686.

WALSH, A. C. J. AND RYVES, J.

Tara Chand and others.....Petitioners.

v.

Jugul Kishore and others.....Opposite Parties.

F. A. F. O. No. 124 of 1923 decided on 7th May, 1924, from an order of the District Judge of Saharanpur dated the 16th March, 1923.

Provincial Insolvency Act (1920) *S.* 25—*Petition is to be dismissed only after considering all the issues mentioned in the section—"Sufficient cause" for not making order must be made clear.*

Section 25 is rather a trap for Judges who do not take pains to understand it. When an act of insolvency is alleged, the learned Judge must first satisfy himself whether the creditor is a creditor for the amount alleged or for a sufficient amount to justify a petition under the Act. The court must then be satisfied of the service on the debtor of the order admitting the petition. It must then be satisfied or express its dissatisfaction, for adequate reasons with the alleged act or acts of insolvency. It must then consider whether it has been satisfied by the debtor that he is able to pay his debts,

and when the learned Judge has come to all the necessary findings on the issues indicated above and he still finds that there is *prima facie* ground for making an order against the insolvents he must consider whether there is any other sufficient cause why no order should be made. If, on the other hand he has found that the issues have not been made out against the insolvents he will dismiss the petition without considering any other sufficient cause. But he must take either one or the other of those two courses. If when the Act is properly administered, the surrounding circumstances of the case justify an order being made independently of the sufficient cause, then the court of appeal has a right to overrule the finding of the learned Judge on the question of sufficient cause even though it is merely a question of discretion. [P. 686, Col. 1 & P. 687, Col. 1.

Bhagwati Shankar for the Petitioners.

Baleshwari Prasad and Hazari Lal Kapoor, for the Opposite Parties.

Walsh, J.:—This case has never been heard. The learned Judge, as a rule, takes great trouble with his cases, but the sooner District Judges in charge of insolvency matters learn that they must get to close quarters with a case and find the necessary facts before they attempt to apply the law the better, because this sort of thing causes a great deal of trouble and waste of time, and it is not sufficient for a Judge to seize hold of a vague clause in the section that "for some other sufficient reason" no order ought to be made, unless he makes it clear what that sufficient cause is, and what the surrounding circumstances of the case are. If, when the Act is properly administered, the surrounding circumstances of the case are found to be such as to justify an order being made independently of the sufficient cause, then the court of appeal has a right to overrule the finding of the learned Judge on the question of sufficient cause even though it is merely a question of discretion. If, however, the case is not proved and the learned Judge does not want to use the vague expression "for other sufficient cause", the failure in proof is sufficient in itself to enable him to dismiss the case.

In this particular case, there were five petitioning creditors who did not put in an appearance, and if the learned Judge had decided to dismiss the application on that ground, and on the ground that he was not satisfied with the attempted proof of their debts while they were absent from court, it would have been impossible to interfere with his decision, but unfortunately he has gone a great deal further and said a great deal which cannot be justified under the Act. He has said that payment was made between the filing of the petition and the hearing, that is to say, payment by the debtor to his creditors. There is no harm in that. An insolvency petition is a mode of execution. I have heard of a distinguished lawyer in London who, before I left England, had had 39 insolvency petitions presented against him but he never had an order made because he always paid his creditor when he got before the Judge who was to hear the petition. A great many debtors get rid of petitions by paying the creditor; and a great many creditors utilise the petitions for the purpose of extracting payment. It is a lawful and a recognised method of extracting payment. When the debtor is reduced to a state of circumstances that his money is insufficient to go round and to pay every creditor who takes the trouble to press him by insolvency proceedings, then he is bound to submit to an insolvency order, and the law steps in and distributes his assets rateably amongst his creditors, but the law has never refused to reward a creditor who is diligent enough to take proceedings for enforcing payment of his debts. If anything, so far as the law in India is concerned, the chief complaint against it is that it does not reward the diligent creditor, and if the judgment under appeal were to stand, it would be another obstacle in the way of the diligent creditor.

The learned Judge has also said that insolvency proceedings are of a *quasi* criminal nature. If he was thinking of possible misconduct on the part of the insolvent he would be perfectly correct, but we are unable to appreciate what bearing it has upon the question whether the petitioning creditor has proved his debt. In this particular petition there were five petitioning creditors and they alleged in substance two things, namely, that the debtor in order to evade payment to his just creditors had executed a fictitious mortgage-deed for Rs. 10,000 in favour of a fictitious creditor whom we have allowed to argue the case on behalf of the respondents and who seems very anxious to maintain this order. If that is true the insolvent has been guilty of an act of insolvency under Section 6. The petition goes on to allege that he is transferring all his property, which is also act of insolvency, wtih a view to defeat and delay his creditor. It also alleges, that, these five creditors have debts which are unpaid. If the Judge is right that payments have been made to these creditors between the filing of the petition

and the hearing that is not a ground for dismissing the petition; it is all the better for the creditors, and if the process is continued frequently enough it may result in their being paid in full. Mr. Baleshwari Prasad representing the mortgagee-creditors contends that they have been paid as regards the major portion of their debts. Unfortunately that word does not occur in the judgment. Section 25 is rather a trap for Judges who do not take pains to understand it. When an act of insolvency is alleged, as in this case, the learned Judge must first satisfy himself whether the creditor is a creditor for the amount alleged, or for a sufficient amount to justify a petition under the Act, or, in other words, that the creditor has a right to present the petition. The court must then be satisfied of the service on the debtor of the order admitting the petition. It must then be satisfied or express its dissatisfaction, for adequate reasons, with the alleged act or acts of insolvency. It must then consider whether it has been satisfied by the debtor that he is able to pay his debts. We may mention by the way, that Mr. Baleshwari Prasad contends, that the learned Judge was satisfied that the debtor either had or was able to pay his debts. How he discovered that the Judge was satisfied we are unable to say, because the Judge has said nothing about it in his judgment, and we can only take notice of what he says in his judgment, but it will be open, on the re-hearing of the petition for Mr. Baleshwari Prasad's clients, to persuade the learned Judge the next time to put in his judgment what he says he has unfortunately omitted on this occasion. In conclusion, when the learned Judge has come to all the necessary findings on the issues which we have indicated above, and he still finds that there is *prima facie* ground for making an order against the insolvents, he must consider whether there is any other sufficient cause why no order should be made. If, on the other hand, he has found that the issues to which we have referred have not been made out against the insolvents, he will dismiss the petition without considering any other sufficient cause. But he must take either one or the other of those two courses. What other sufficient cause means under this section we do not venture at this moment to say. It is a matter which has been much debated in the English Courts in certain cases, and we have not yet succeeded in meeting anybody in these Provinces who knows what exactly was intended by this provision. All we can do is to say that when the learned Judge has decided the other issues and has given his reasons and stated in the ordinary form upon an issue of law what the other sufficient cause is, we shall be prepared on appeal to adjudicate upon it and decide whether it is adequate or not.

The appeal must be allowed, and inasmuch as Mr. Baleshwari Prasad's client is a creditor who is obviously an interested party and has some very good reason for wanting to uphold the order, he must pay the costs of the appeal. The matter will be remitted to the learned District Judge to re-hear the petition according to law and the costs of the first and second hearings will abide the result. Costs in this court will include fees on the higher scale.

Appeal allowed and case remitted.

1924 ALLAHABAD 688.

MUKERJI, J.

Sidh Nath Raut and another...Defendants—Applicants.

v.

Jharbandhan Prasad and another...Plaintiffs—Opposite Parties.

Civ, Rev. No. 133 of 1923 decided on 9th January, 1924 from the order of 2nd District Judge of Gorakhpore dated 24th April 1923.

Arbitration—Decree passed in accordance with award after dismissing objections is not appealable—Entertaining appeal can be revised.

Where a District Judge entertained an appeal against a decree passed in accordance with an award after dismissing objections, *held* that the appellate decree was liable to be upset and the High Court is entitled to pass such orders as the justice of the case might require. [P. 689, Col. 1.]

S. P. Sinha for the Applicants.

S. N. Mukerji for the Opposite Parties.

Judgment:—This application for revision has been made under the following circumstances:—The applicants were defendants in an original suit filed in the court of the Munsiff of Dearia. There was reference to arbitration and an award was made. Objections were taken to the validity of the award. One of the grounds taken was that there was no valid reference to arbitration as one of the defendants in the case did not at all join in the reference. The learned Munsiff passed a very unsatisfactory order which runs as follows:—

"No evidence is adduced in support of the objection. The objections are frivolous and vexatious: must be repelled. Let a decree be made in terms of the award."

Although no appeal lay against the decree which followed the award, an appeal was filed by the plaintiffs. The learned 2nd Additional District Judge held that there was no valid reference and therefore the award could not stand. He accepted the appeal, set aside the decree of the court of first instance and remanded the suit for trial on the merits.

It is contended for the defendants applicants that the learned District Judge had no jurisdiction to hear the appeal and his decree must be set aside. This contention is supported by the case of *Harishanker v. Mt. Rampyari* (1).

It is contended on behalf of the opposite parties that the learned District Judge was right in his view of the case and there was really no valid reference for arbitration. They also ask this court to take up the matter and pass such orders as the justice of the case may demand.

I propose to take this course. It appears to me that the objections to the award taken by the plaintiffs were not properly heard. There was no necessity for any evidence to be adduced and the objections were not frivolous and vexatious. The remarks of the learned District Judge show that on the face of the record there are good grounds for the objections.

I therefore set aside the decree of the learned 2nd Additional District Judge, send back the case through the lower appellate court to the court of first instance setting aside its order dated the 9th September, 1922. I direct the learned Munsiff to rehear the objections taken by the plaintiffs and decide the case according to the law.

As for the costs it is urged that the applicants should get them. I think in the circumstances parties should pay their own costs in this court and in the lower appellate court.

Decree set aside.

(1) 1923 All. 502.

* 1924 ALLAHABAD 689.

DANIELS AND DALAL, JJ.

Raghunandan Prasad.....Decree-holder—Appellant.

v.

Ghulam Alauddin Beg.....Judgment-Debtor—Respodt.

Ex. F. A. No. 149 of 1923 decided on 24th March, 1924, from the decree of the Subordinate Judge of Bareilly dated the 8th March, 1923.

Decree—Execution.

The court executing the decree must take the decree as it stands and has no power to go behind it or entertain an objection to the legality of the decree. . The terms of Section 74 of the Contract Act are not applicable to a decree. [P. 689, Col. 2, P. 690, Col. 1.]

U. S. Bajpai for the Appellant.

N. P. Asthana for the Respondent.

Dalal, J.:—This is an appeal from an order passed by the court of the Subordinate Judge of Bareilly in execution proceedings. The plaintiff decree-holder had brought a suit for damages for Rs. 5,346 for failure on the part of the defendant to deliver sugarcane juice. A decree was passed in terms of a compromise arrived at between the parties. The terms of the decree were that the defendant was to pay Rs. 2,600 to the plaintiff within one month of the date of decree and on his failure to do so he was to be liable to pay simple interest at 3 per cent per mensem from the date of the decree. Payment was not made by the judgment-debtor within the time stipulated, so the decree-holder applied for execution for the principal sum of Rs. 2,600 with interest at the stipulated rate. The judgment-debtor objected that the contract was penal and that he should be relieved from the burden thereof. The learned Subordinate Judge held that though the contract was embodied in a decree the executing court was entitled to interfere and granted relief to the judgment-debtor by ordering interest to be recovered at the rate of 1 per cent. per mensem.

We are of opinion that the view of law taken by the lower court was not correct. The executing court cannot go behind the decree. As laid down in *Kalipada Sarkar* v. *Hari Mohan Dalal* (1) the court executing the decree must take the decree as it stands and has no power to go behind it or entertain an objection to the legality of the decree-

(1) (1917) 44 Cal. 627=24 C. L. J. 375=35 I. C. 856=21 C. W. N. 1104.

The terms of Section 74 of the Contract Act are not applicable to a decree. We think that the decree-holder is entitled to reçover the interest at the rate prescribed in the decree. We therefore set aside the order of the lower court, decree this appeal and direct execution to take place as applied for by the decree-holder. The appellant shall receive costs of this court on the higher scale.

Order set aside.

---

* * 1924 ALLAHABAD 690.

WALSH AND RYVES, JJ.

Mohammad Ashiq Ali.....Judgment-Debtor—Applt.

v.

Mt. Hajra Bibi..... ....Decree-holder—Respondent.

Ex. F. A. No. 159 of 1923 decided on 25th April, 1924, from a decree of the Subordinate Judge of Gorakhpur dated the 6th January, 1923.

Civil P. C., S. 152—Decree can be amended to correct material but palpable mistakes.

A dower decree made all deft.'s heirs of plff.'s husband jointly and severally liable for the whole amount of dower.

Held that the decree could be amended so as to apportion the dower debt on the several heirs in proportion to their shares.

Iqbal Ahmad for the Appellant.

Mushtaq Ahmad for the Respondent.

Walsh, J.:—This appeal succeeds. The matter is really quite simple. A suit for dower debt was brought by a widow against certain heirs of her husband. She herself exempted her property, and therefore her share in the contribution to the debt, in the plaint, and she finally claimed the balance of the debt, namely Rs. 7,500, against the balance of the heirs. Owing to carelessness, which we are afraid is too frequent, her pleader did not in the relief claim specifically the exact shares in which she was entitled to succeed against each defendant. This may quite well have been due to the fact that it had been mentioned in the body of the pleading, and it was so well-known to everybody that no child in the business of the law required to be told what the shares were. The relief claimed was in the alternative, joint or several. The contest was about the amount of the dower and other matters. There was no dispute about the share of liabilities. The judgment gave the relief as prayed. If the decree had been drawn up as prayed, it would have been had for duplicity. It was drawn up, as my brother pointed out in the argument, in general terms, which, having regard to the plaint, were ambiguous. All this is quite wrong, but it does not affect the substance of the matter. The suit was decreed and an appeal was brought to this court. The question of the form of the decree was lost sight of in this court as in the court below owing to other more important issues then being disputed. The result was that nobody, until this ingenious person in execution raised the question troubled about the precise form. Now objection is raised in execution that the decree makes all the defendants jointly and severally liable, that is to say, each of them liable for the whole amount. Everybody connected with the case knows that that was never the intention, and the only question is whether the law is so helpless as to be unable to give effect to the rights of the parties. The law is not helpless. We are of opinion that the learned Judge is wrong and that he was bound to construe the decree in the light of the admitted fact that both parties were fighting over a dower decree. If the decree itself created any obstacle, justice could still be done not fancifully but on well established principles, enunciated for example in the House of Lords in the case of *Hotton* v. *Harris* (1), where the courts in Ireland with the approval of the House of Lords amended a palpable mistake about interest in a decree nearly fifty years afterwards, also in the case of *Lakshmi Narain* v. *Jwala Nath* (2), and in the case of *Srinivasa Rao Saheb* v. *Yamunabhai Ammal* (3), both of which are examples of the application of the plain injunction to courts of law in India contained in Section 152 of the Code. To remove any doubt we order that this decree be amended by apportioning the shares as between Ghasiti, the mother, now represented by Ashiq Ali on the one hand and Ismail on the other to ⅓rd and 5/12ths respectively. The appeal must be allowed with costs here and below and in this court fees on the higher scale. The lower court must be directed to pay to the decree-holder the amount paid into court by the appellant less the amount of costs which we have just ordered, when ascertained. The payment will, therefore, be delayed until the costs have been ascertained and are ready to be deducted. The lower court will also amend the decree in accordance with the foregoing observations. The

1. (1892) A. C. 547.
2. (1896) 18 All. 344=1896 A. W. N. 87.
3. (1906) 29 Mad. 84=16 M. L. J. 50.

amount namely Rs. 3,333-5-4 deposited is to be in full discharge of the judgment-debtor's liabilities.

Appeal allowed.

---

* 1924 ALLAHABAD 691.

SULAIMAN, J.

Mathura Prasad and others.....Plaintiffs—Appellants.

v.

B. B. and C. I. Railway. .....Defendants—Respondents.

Civil Rev. No. 164 of 1923 decided on 12th February, 1924 against the order of Additional Judge, Aligarh.

Provincial Sm. C. C. Act, S. 25—Civil P. C., S. 115.

Gross errors of law are not revisable under S. 115 Civil P. C. though they are revisable under S. 25 Sm. C. C. Act.

G. Agarwala for the Appellants.

L. P. Zutsh for the Respondents.

Judgment.—This is an application in revision from a decree of the District Judge of Aligarh setting aside the decree of the Munsiff of Kasgunj.

Six bales of yarn had been booked to the plaintiff's address but only five were delivered by the defendant Railway Company. The plaintiffs brought a suit for damages in respect of the loss of one bale. The goods had been sent under a risk note Form B. The learned Munsiff came to the conclusion that there was no theft from a running train and also that the defendant company's servants were guilty of wilful neglect inasmuch as they had left the waggon unlocked, which was only bolted and sealed. On appeal the learned District Judge came to the conclusion that there was a theft from a running train though he was not prepared to find definitely that there was a robbery in the strict sense of that word. He however relying on certain observations contained in a judgment of this court, even though opposed to the view of the Oudh Court, held that 'theft' had the same meaning as 'robbery'. He has also expressed some doubt as to the correctness of the finding of the Munsiff that there was a wilful neglect on the part of the Railway Company. He accordingly dismissed the suit *in toto*.

The plaintiffs have come up in revision and have taken three grounds in their petition. These grounds raise questions of law and attack the judgment of the court below on the ground that the learned Judge's view was entirely erroneous.

A preliminary objection is, however, taken on behalf of the respondent company that no such ground can be raised in this revision. In my opinion this objection is quite correct.

In a case which is diposed of by a court of Small Causes the High Court under Section 25 of the Provincial Small Cause Courts Act has power to call for the record of the case and pass such order with respect thereto as it thinks fit. The scope of Section 25 is very wide indeed and gross errors of law may very well come within it. The present, however, is not such a case. Here though the suit was of a Small Cause Court nature it was tried by the Munsiff of Kasgunj. An appeal lay from the decree of the learned Munsiff to the Court of the District Judge which was heard and disposed of. It is under Section 102 of the Code of Civil Procedure that a second appeal is prohibited. It follows, therefore, that the present application cannot be entertained as being one under Section 25 of the Provincial Small Cause Courts Act. It can only be considered as an application under Section 115 of the Code of Civil Procedure. It is well settled that the scope of that section is very much limited. Unless the lower appellate court can be said to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested in it, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, this court has no power to interfere in revision. It is manifest that an error of judgment on questions of law does not come under either of these three categories. The learned District Judge had jurisdiction to hear the appeal. He has not refused to exercise his jurisdiction at all. He has committed no irregularity of procedure in the exercise of his jurisdiction. The utmost that can be said is that he has committed an error of judgment or has committed an error of law in the exercise of his jurisdiction. This cannot be a good ground for entertaining the application in revision. The application is dismissed with costs.

Application dismissed.

1924 ALLAHABAD 692 (1).

LINDSAY, J.

The Secretary of State for India in Council...
Petitioner—Defendant.

v.

Radhey Lal.....Opposite-Party—
Plaintiff.

Civil Rev. No. 176 of 1923 decided on 11th March, 1924 against the order of the Judge of the Court of Small Causes at Muttra dated the 13th October, 1923.

Post Office Act, Ss. 6 & 34—Non-tracing sender or addressee is not loss or misdelivery.

Where the article sent was never lost in the course of transmission, but all that happened was that by reason of the label having been torn it was not possible to deliver it to the addressee. *Held* that S. 6 or 34 did not exempt the Post Office from liability. [P. 693, Col. 2.]

R. Malcomson for the Applicant.

N. P. Asthana for the Opposite Party.

Judgment:—I have heard the counsel in this case. I do not think any ground has been made out for interference with the judgment of the court below. The facts are simple enough. The plaintiff Radhey Lal sent off a parcel containing a number of brass rings from Muttra to Badrinath.

This parcel was sent by V. P. P. and apparently never reached the consignee at Badrinath. The evidence is to the effect that the label had become torn and the result of all this was that in due course the parcel reached the Dead Letter Office at Lucknow.

There the parcel was opened but no clue having been obtained as to where the parcel had come from nothing more could be done. The officer-in-charge of the Dead Letter Office says that the seal of the office of posting had left an indistinct impression so that it was impossible to say from what post office the article had been posted. After being kept in the Dead Letter Office for a period of about a year the parcel was sold and brought a sum of Rs. 15 odd.

The plaintiff in this suit claimed the value of the goods contained in this parcel, the amount stated being Rs. 86-8-0 for which the court below has given a decree.

The Secretary of State sought to avoid liability on the basis of Sections 6 and 34 of the Post Office Act. I think the court below was right in holding that Section 6 did not apply in this case inasmuch there was no loss, misdelivery or delay of, or damage to any postal article in the course of transmission by post. The article sent was never lost in the course of transmission. All that happened was that by reason of the label having been torn it was not possible to deliver it to the addressee. As for Section 34 that too does not seem to me to have any application. The suit here is not one for recovery of money which the Secretary of State had recovered or was bound to recover from the addressee of the V. P. Parcel. On the contrary the suit was brought to recover the value of the property which was sent by post.

It seems to me on the whole that this is not a case in which the Secretary of State can disclaim liability and I think the order of the court below should be upheld. I dismiss this application with costs to the opposite party.

Application dismissed.

---

* 1924 ALLAHABAD 692 (2).

DANIELS AND NEAVE, JJ.

Firm Raghunandan Ram Gopi Ram.....
Plaintiff—Appellant.

v.

The G. I. P. Railway.....Defendant—
Respondant.

S. A. No. 351 of 1923 decided on 15th April, 1924, from a decree of the District Judge of Ghazipur, dated the 23rd December, 1922.

(a) *Railways Act, S. 72—Requires risk note in writing—Signing blank form does not constitute agreement—No witnesses are required.*

Section 72 requires that an agreement limiting the responsibility of the Railway shall be in writing. To sign a blank paper on which an agreement is afterwards written is not the same thing as executing an agreement in writing. Neither is it sufficient to sign a printed form in which no details relating to the particular consignment are recorded. Section 72 does not require that it shall be attested though the agreement provides a space for the signature of attesting witnesses. [P. 693, Col. 2.]

(b) *Evidence Act, S. 115—Consignor's agent—Representation to Railway and getting reduced rate thereby creates estoppel.*

Where consignor's agent represented to the Railway that he was booking the goods at owner's risk subject to the conditions embodied in the contract in the form of risk note B. and the Railway accepted the goods on the strength of this representation and upon it conveyed them for the plaintiff at a lower rate than that at which they would otherwise have conveyed them. *Held*, under these circumstances the principle of estoppel applies and it is not open to the consignor to deny that he agreed that the goods should be conveyed under the conditions contained in the risk note. [P. 693 Col. 2.]

M. L. Agarwala for the Appellant.

Ladli Prasad Zutshi for the Respondent.

Daniels, J.:—This appeal arises out of a claim by the plaintiff against the G. I. P Railway for the value of two bales of cloth sent by that Railway from Bombay to Rasra and not delivered. Three bales were consigned of which only one was delivered. The Railway pleaded in defence that they were protected by a risk note in Form B under which the goods were consigned. The plaintiff denied the execution of the risk note. The trial court decreed the suit on a finding that execution of the risk note was not proved. The risk note form was signed on behalf of the plaintiff by one Shankar Balaji. It appears that this man signs a very large number of risk notes and his evidence is that when the details are being agreed upon he sometimes signs the printed form and leaves the details to be filled in by the railway clerk afterwards. These details include the number of the rail receipt, the nature of the goods and the stations from which and to which the goods are consigned. The trial court also held that loss of the goods was not proved and if there was loss it was not due to the negligence of the company and its servants.

The learned District Judge agreed with the court below in holding that it was not proved that the form had been filled in when signed by Shankar Balaji. He held, however, that the parties certainly intended to enter into an agreement in the form of Ex. B the risk note in question and that on the strength of this agreement the Railway accepted the goods and conveyed them at the owner's risk rate. He held that under these circumstances it was not open to the plaintiff to dispute the agreement. The issues which arise for decision in second appeal are :—

1. Whether on the finding of the District Judge it can be held that the risk note was executed by Shankar Balaji.

2. If not, whether the plaintiff is estopped from denying the agreement.

3. Whether the agreement is invalid because it was not attested by two witnesses in presence of Shankar Balaji.

The learned counsel for the appellant has also attempted to challenge the findings of the court below that loss of the goods is proved and that loss was due to theft from a running train, but these are findings of fact and we do not see our way to go behind them.

In so far as the learned Judge appears to hold that it does not matter whether the particulars were filled in before the agreement was signed or not we are unable to agree with him. Section 72 of the Indian Railways Act requires that an agreement limiting the responsibility of the Railway shall be in writing. To sign a blank paper on which an agreement is afterwards written is not the same thing as executing an agreement in writing. Neither is it sufficient to sign a printed form in which no details relating to the particular consignment are recorded.

We think, however, that the learned Judge was right on the second ground on which he has dismissed the suit. The appellant's agent certainly represented to the Railway that he was booking the goods at owner's risk subject to the conditions embodied in the contract in the form of risk note B. The Railway accepted the goods on the strength of this representation and upon it conveyed them for the plaintiff at a lower rate than that at which they would otherwise have conveyed them. Under these circumstances the principle of estoppel applies, and it is not now open to the plaintiff to deny that he agreed that the goods should be conveyed under the conditions contained in the risk note. It has been argued by the appellant that no plea of estoppel was raised in the courts below. It may not have been taken distinctly in the written statement, but it was certainly raised before the learned District Judge and this is substantially the ground on which the learned Judge has decided the appeal. The learned Judge says that it is not open to the plaintiff to deny the terms of the agreement. This is another way of saying that he is estopped from doing so.

On the third question we agree with the learned District Judge. Section 72 of the Railways Act requires that the agreement shall be in writing. It does not require that it shall be attested, and we are unable to read any such requirement from the mere fact that the agreement provides a space for the signature of attesting witnesses.

The result is that the appeal fails and we accordingly dismiss it with costs including in this court fees on the higher scale.

Appeal dismissed.

* * 1924 ALLAHABAD 694 (1).

STUART, J.

Umed Singh.....Applicant.

v.

King-Emperor.....Opposite Party.

Cri. Rev. No. 517 of 1923 decided on 12th December, 1923 from the order of Sessions Judge, Kumaon, dated 31st August, 1923.

Penal Code, S. 499, 10th Exception—Informing of communication to caste fellows is no offence.

Where a person was outcasted and the accused informed some persons of his caste not to take water from the hands of that person and that if they did so they will be ex-communicated. *Held*, that no offence was committed.

M. L. Agarwala for the Applicant.

Asst. Government Advocate and K. N. Katju for the Opposite Party.

Judgment:—The matter now before me has dragged on for nine months. The facts can be stated very shortly. A certain Uchhab Singh of Kumaon took water from the hands of a certain Lachhi and for so doing was put out of caste by a meeting of his caste fellows. The charge is that the applicant Umed Singh told three men Sohan Singh, Nar Singh and Balkrishan not to take water from the hands of Uchhab Singh and if they did so they would be liable to be put out of caste. This statement has been found to be true. Uchhab Singh had taken water from the hands of Lachhi and had been put out of caste and anyone who took water from the hands of Uchhab Singh was liable to be put out of caste. On these allegations Umed Singh was found guilty of the offence of defamation and sentenced under Section 500 of the Indian Penal Code to one month's imprisonment. He has already served this sentence. The Magistrate in his judgment has laid stress on the fact that Umed Singh, the applicant, is a scheming busy body who is always endeavouring to make trouble in the district and that he had probably been sedulously circulating rumours to the detriment of Uchhab Singh in this connection in a large number of villages. It is difficult to find how the evidence supports this conclusion in full. The Magistrate was, however, in no way concerned with anything except the charge before him and I find it hard to understand how after a perusal of the charge itself, once the facts were ascertained, he could have considered the conviction supportable. Both the learned Sessions Judge and the Magistrate have laid stress on the fact that Umed Singh had denied having made the statement which he is found to have made and they refused to look at a plea of justification. But the plea of justification is so extricably connected with the finding of fact that it is a matter of no consequence that it was not raised explicitly. The case is covered clearly by the 10th Exception to Section 499 and a very slight consideration would show how impossible the charge was. The man had been put out of caste, so the imputation was true and any person taking water from his hands was liable to be put out of caste. Thus a caution not to take water from his hands was for the benefit of the person who received it. The learned Sessions Judge has referred to the decision *Queen Empress* v. *Vidya Sankara*(1)

That case, however, has no bearing upon the present one. The conviction there was upheld upon a point which does not arise here. The point was that the author of the ex-communication had published the ex-communication in such a manner as to make it known to persons unconnected with the caste. Here the case is different. The communications were made only to members of the caste and for their benefit.

I therefore set the conviction aside. The matter is academic. The sentence has already been served and if the applicant has come into this court in order to benefit his reputation he has failed in that object.

Conviction set aside.

(1) (1883) 6 Mad. 381.

1924 ALLAHABAD 694 (2).

SULAIMAN, J.

Sheo Prasad Singh and others.....Applicants.

v.

Mahangoo Nania.....Opposite Party.

Crl. Ref. No. 541 of 1923 decided on 6th October, 1923.

Cr. P. Code, S. 107—Costs cannot be awarded to complainant in proceedings under S. 107—Cr. P. Code, S. 545.

S. 545 of the Cr. P. Code does not apply to a case under S. 107; consequently an order directing the accused to pay costs of the complainant is *ultra vires*. [P. 695, Col. 1.]

Judgment:—This reference must be accepted. The accused persons were bound over under Section 107 of the Criminal Procedure Code and were also ordered to pay Rs. 75 as costs of the case to be paid to the complainant Mahangoo.

Under Section 117 Sub-clause 2 of the Criminal Procedure Code the inquiry had to be as nearly as might be practicable in the manner prescribed for conducting trials and recording evidence in summons cases. That provision was ignored and the case was tried as if it were a warrant case.

Then again the order as to the payment of costs was altogether illegal. Section 545 of the Code of Civil Procedure cannot possibly apply to a case under Section 107 inasmuch as no fine was or could have been imposed. The order directing the accused persons to pay Rs. 75 as costs to the complainant was therefore *ultra vires*.

On the merits too the case must fall to the ground. Only three witnesses were produced by the complainant and none of them expressly stated that there was any likelihood of a future breach of peace. On the other hand, the third witness, the Chaukidar of the village when cross-examined admitted that he himself felt no fear of a breach of the peace on seeing the happenings alleged by the complainant. It is proved that there was no previous enmity between the parties. The complainant's case is that there have been a series of bad years, impoverished crops and bad out-turns and that therefore he made efforts to pay up his arrears of rent to the accused zemindars by division of his crops instead of in cash, but the zemindars refused the offer. The trying Magistrate remarked:—"The adamantine hearts of these oppressors of the poor have been untouched by the sight of helpless poverty and stricken misery." The amount of the arrears of rent stated to be due was only Rs. 42-11-6. In the same breath the complainant said to be in "helpless poverty-stricken misery" alleged that the accused persons owed him Rs. 85 as the price of sugarcane crops sold to them last year and that in spite of demands the money had not been paid. It is difficult to conceive that on the one hand the accused would not pay up the debt due from them and on the other they would insist on the payment of arrears of rent due from their creditor. Having read the judgment of the trying Magistrate as well as the reference by the Sessions Judge I have come to the conclusion that this is a case in which the order passed under Section 107 should be altogether set aside.

I accordingly set aside that order and direct that the sum of Rs. 175 if already paid by the accused persons should be refunded.

Order set aside.

---

* 1924 ALLAHABAD 695.

SULAIMAN, J.

Uttam Chand Singh.....Applicant.

v.

King-Emperor.....Opposite Party.

Crl. Ref. No. 554 of 1923 decided on 9th October, 1923.

(a) *Crl. P. Code, S. 107—Proceedings treated as warrant case.*

Trying a case under S. 107 as a warrant case is an irregularity vitiating the proceedings, especially where the punishment in default of security was rigorous. [P. 696, Col. 1.]

(b) *Crl. P. Code, S. 112—Proceedings must strictly conform to provisions in S. 112.*

Proceedings started on a *rubkar* based on a police report not on file and in absence of the substance of the information and the other particulars required by the section are irregular and must be set aside. The provisions of Sec. 112 must be strictly complied with. [P. 695, Col. 2.]

Judgment:—In this case Uttam Chand Singh has been ordered to furnish under Section 107 of the Code of Criminal Proceedure a bond and two sureties to keep the peace for one year or in default to undergo rigorous imprisonement for that period.

The proceedings in this case appear to have been very irregular from the very start. Originally a complaint under Section 107 of the Code of Criminal Procedure was filed against Uttam Chand Singh but it was dismissed. Without fresh complaint, or any report by the police, a case under that section was started on the 12th of May, 1923, under a *rukkar* purporting to have been based on some police report. No such police report is on the file, nor is there any order in writing setting forth the substance of the information received and other particulars as required by Section 112 of the Code of Criminal Procedure. The provisions of that section ought to have been complied with strictly.

Another irregularity was that although under Section 117 (2) of the Code, the enquiry should as nearly as practicable have been in the manner prescribed for conducting a charge and recording evidence in summons cases, the case was treated as a warrant case.

The final order directing that in default of furnishing the required security the

accused should undergo rigorous imprisonment for one year was also altogether illegal. Section 123 (5) most clearly provides that imprisonment for failure to give security for keeping the peace shall be simple. This provision was fully ignored it may have been under an oversight.

In view of all these circumstances I set aside the order under Section 107 passed against Uttam Chand Singh and direct that securities if furnished should be cancelled, and the accused, if in jail, should be released.

Order set aside.

1924 ALLAHABAD 696 (1).

RYVES AND MUKHERJI, JJ.

Tara Chand and others.....Decree-holders—Appellants.

v.

Murtaza Hussain.....Judgment-Debtor—Respondent.

Ex. S. A. No. 587 of 1923 decided on 18th December, 1923 against the decree of Sub.-Judge, Agra, dated 24th November, 1922.

T. P. Act, S. 88—New C. P. C.

Where the preliminary decree in a mortgage suit was passed before and the final decree after the new Civil Procedure Code, *held*, that an application for execution beyond 12 years after the date of the final decree is barred since the new Civil Procedure Code governed the case, final decree being the only executable decree. [P. 696, Col. 2.]

N. P. Asthana for the Appellants.

Gulzari Lal for the Respondent.

Judgment:—This is a decree-holders' appeal. The suit in which the decree was passed, was based on a mortgage. The preliminary decree was passed on the 4th of May, 1908. As on this date the new Code of Civil Procedure had not come into force the decree was passed under Section 88 of the Transfer of Property Act. The final decree was obtained by the decree-holders on the 19th of August, 1909, when the new Act had come into force. The last application for execution was presented after the expiry of the 12 years from 19th August, 1909. The question, therefore, arises whether this last application should be governed by the old Code of Civil Procedure or by Act V of 1908. If the old Code governed the case the 12 years limitation would not apply because the decree in the case is a mortgage decree. If the new Code applies the application would be barred by time.

The learned counsel for the appellants relies on the case of *Kaunsilla v. Ishri Singh* (1). But in that case both the decrees under Sections 88 and 89 of the Transfer of Property Act had been passed before the new Code of Civil Procedure came into force. In the case before us the only decree that is executable was passed under the new Code of Civil Procedure and therefore the rules of procedure laid down in that Code should apply.

The decree of the Court below seems to be right and the appeal is dismissed with costs including in this court fees on the higher scale.

Appeal dismissed.

---

(1) (1910) 32 All. 499.

---

* 1924 ALLAHABAD 696 (2).

SULAIMAN, J.

Dalganjan and others.....Applicants.

v.

King-Emperor.....Opposite Party.

Crl. Rev. No. 632 of 1923 decided on 12th December, 1923 from the Order of Sessions Judge, Allahabad dated, 18th September, 1923.

Penal Code, S. 97—Right to defend even another's property exists.

Property of even another person can be protected and right of private defence can be claimed against an act which is theft, robbery or criminal trespass or an attempt to commit theft, robbery or criminal trespass. [P. 697, Col. 2.]

Kumuda Prasad for the Applicants.

Asst. Government Advocate for the Opposite Party.

Judgment:—The present applicants have been convicted under Section 323 read with Section 147 of the Indian Penal Code. One Jalpa, tenant, was in possession of a certain mango grove in village Osa which belonged to the Raja Saheb of Bara. On his death he left two stepsons and a step daughter, who was married to a cousin of Thakurdin. It is found that Thakurdin was in possession of this grove about May 1923. He applied to the Raja Saheb for the grant of a lease of the crops to him; while that application was pending the Raja Saheb's *Sazawal* auctioned the crops to one Rameshwar Kurmi and made a report with a recommendation that the lease to Rameshwar should be sanctioned. On the 12th of May the Raja Saheb accepted the lease in favour of Thakurdin and not Rameshwar. The *Sazawal* after having been informed of this order put Thakurdin in actual possession of

the crops. He did not, however, inform Rameshwar of this. What next happened may well be described in the words of the learned Additional Sessions Judge himself :—

"On the morning of the 15th of May Rameshwar with two other men went and plucked some mangoes from those trees. They were obstructed by Ujagar, appellant, who took away from them the fruits plucked by them. Rameshwar then went and complained to Deo Saran, the head of the Kurmi party and the latter took him again along with him to pluck the mangoes. This time Deo Saran, Rameshwar and Bachchu went to pluck the mangoes armed with lathis and Deo Saran challenged that he would take the fruits and any one who could, might oppose him. It was wholly wrong on the part of Rameshwar and Deo Saran to have gone there with lathis to enforce their supposed right by show of force and challenge Ujagar and others of the other party. The appellants, Ujagar and others, in response to the challenge went there armed with lathis to resist the taking of fruits by Deo Saran's party. There was an exchange of hot words between Deo Saran and Dalganjan, a servant of Behari Lal, and they then came to blows; many other kurmis also arrived and a fight commenced, in which Deo Saran on one side and Dalganjan and his brother Sheo Partap on the other were hurt and felled down. The others then went away."

The learned Additional Sessions Judge has found that Thakurdin was in rightful possession of the mango crops and that as Rameshwar's lease had not been sanctioned he and his party had no right to the crops and had no right whatsoever to take the fruits by force. He has also found that it was quite wrong of Rameshwar to go there and pluck such fruits. He has also found that when they went a second time to pluck the mango fruits they went there armed with lathis and challenged that they would take the fruits and any one who wanted to resist them should come forward. This conduct has been found by the learned Additional Sessions Judge to have been wholly wrong. It has been also found that in response to the challenge the members of Ujagar's party went there to resist tne taking of fruits by Deo Saran's party. It is clear that the accused went there to resist the other party, that hot words were exchanged and they ultimately came to blows. In the fight which took place one man Deo Saran was hurt on the other side and received some simple hurts, whereas two men were hurt on the accused's side and were actually felled down.

The actual facts cannot now be much disputed and they were fully proved by the evidence of a number of neighbours who happened to be present near the scene. The accused at the trial raised the plea of private defence of property. The learned Additional Sessions Judge has over-ruled that plea on a ground which is not quite apparent. In the course of his judgment he has remarked : "It would have been a different thing if Thakurdin had tried to protect his possession against Rameshwar". What the learned Judge probably thought was that as the crop was in the possession of Thakurdin he alone could have put forward a plea of self-defence and that the other accused persons who are not directly related to Thakurdin could not claim that protection. This view was clearly wrong. He has also remarked that "the fight commenced before any fruits were plucked by the opposite party". Under Section 97 of the Indian Penal Code it is provided that every person has a right to defend the property whether moveable or immoveable of himself *or of any other person* against any act which is an offence falling under the definition of theft, robbery or criminal trespass or which is an *attempt* to commit theft, robbery or criminal trespass. On the findings arrived at by the learned Additional Sessions Judge himself there can be no doubt whatsoever that there was certainly an attempt on the part of the opposite party to commit both theft, if not robbery, and mischief as well as criminal trespass in defence of Thakurdin's right and it was quite immaterial whether the present accused persons did or did not themselves own the mango crops. I may also add that the learned Additional Sessions Judge has not found that the case came under Section 99 of the Indian Penal Code. It is not suggested that there was time to have recourse to the protection of the public authorities or that there was more hurt caused than was absolutely necessary for the purpose of the defence. The opposite party having been the aggressors were altogether in the wrong and I am of opinion that the accused persons under the circumstances were justified in defending the rights of Thakurdin and resisting the attack of the opposite party.

I accordingly allow this revision, set aside the convictions and the sentences passed on the applicants and acquit them of the offences

with which they have been charged. I also direct that the order calling upon them to furnish security be cancelled.

Revision allowed, conviction set aside.

---

* 1924 ALLAHABAD 698.

SULAIMAN AND MUKERJI, JJ.

Superior Bank, Limited, Muzaffarnagar.....
Decree-holder—Appellant.

v.

Budh Singh and others....Judgment-Debtors—
Respondents.

Execution S. A. No. 682 of 1923 connected with Civ. Rev. 96 of 1923 decided on 27th February, 1924 from the decree of the Additional District Judge of Meerut, dated 26th January, 1923.

(a) *Civil P. C., O 21, R. 90—Application by D. H. auction purchaser to set aside sale as being a nullity is covered by S. 47, C. P. C.—C. P. C., S. 47.*

If the sale is to be set aside on the ground that it was absolutely illegal and not merely irregular the case would not come within the four corners of Order 21 Rule 90 which refers to 'material irregularity or fraud in publishing or conducting it'. When the auction purchaser is the decree-holder himself and when an application is made to have the sale set aside on a ground other than that covered by Order 21 Rule 90 and there is not an application under Order 21 Rule 89, then it raises a question within the meaning of the expression "execution, discharge or satisfaction of a decree" as mentioned in Section 47 C. P C. [P. 699, Col. 1.]

(b) *Civil P. C., O. 21, R. 90—Revision.*

Allowing application to set aside sale as being illegal under R. 90 without substantial injury to applicant owing to irregularity is revisable. [P. 699 Col. 2.]

(c) *Civil P. C., O. 41, R. 5—Effect.*

Stay order on condition of security by appellate court comes into effect when security is given. [P. 699 Col. 2.]

P. L. Banerji for the Appellant.

The Respondents were not represented.

Sulaiman, J.:—Execution Second Appeal No. 682 of 1923 and Civil Revision No. 96 of 1923 have been connected and have been filed from the same order. The revision has been filed by way of a precaution in case it be held that no second appeal lies.

A mortgage decree was in execution and the 17th of August, 1922, was fixed for sale of the properties mortgaged. A day before the sale, namely, on the 16th of August, two of the judgment-debtors put in an application that one of the houses should not be sold tiil the other two houses had been put up for sale and the decree had not been satisfied. This application was rejected on that very date by the execution court at Muzaffarnagar. That Court was subordinate to the court of the District Judge at Meerut. On the 17th of August, 1922, an appeal was preferred before the District Judge from the order dismissing the judgment-debtor's application and on the same date an application for stay of execution was also filed. On that date the learned District Judge passed an order in the following terms:—"I order that the south faced compound be not sold provided the applicants guarantee to make up the amount outstanding to Rs. 1,640 odd if the sale of the other houses does not fetch that amount". An intimation by telegram was sent to the court at Muzaffarnagar. The telegram was received by the telegraph office at 1-25 p. m. and was sent to the court which is at a distance of only a few minutes' walk. The sale was conducted by the Amin and was completed at 2 p. m. that afternoon. It is said by the learned Munsiff in this case that the sale had been finished before the Amin received the order postponing the sale and even before the learned Munsif passed such an order on receipt of the telegraphic communication by the appellate court. It is not clear, however, whether the court had received the actual intimation of this stay order before 2 p. m. though the learned District Judge is inclined to the view that the probability is that the court at Muzaffarnagar must have received such intimation before the sale was actually completed. On receipt of this intimation the court was not prepared to act on a mere telegram without a certified copy of the order. It accordingly merely postponed the sale for two days. The sale, as we have already remarked, had taken place before this last order was passed by the execution court.

The appeal before the District Judge was ultimately dismissed on the 29th of November, 1922 and the stay order was automatically discharged.

An application under Order 21 Rule 90 was however presented on behalf of the judgment-debtors for setting aside the sale which took place after the order of the stay of execution had been passed by the District Judge. The learned Munsiff refused to set aside the sale by his order dated the 23rd of September, 1922. An appeal was preferred from this order and the learned District Judge has allowed the appeal and set aside the sale. The execution second appeal and the revision have been filed to this Court from the order of the appellate court dated the 26th of January, 1923.

The first question which we have to decide is whether an appeal lies or whether we must consider this case on the revisional side.

It is to be noted that in this particular case, it was the decree-holder himself who had purchased the property at an auction sale and it is the decree-holder alone who has come up to this court. The interest of any third party like a stranger auction purchaser has not come in at all. Had that been the case there would have been no difficulty in saying that the application was one falling exclusively under Order 21 Rule 90. We have had that application read to us and the substantial ground raised in it was that the sale itself was a nullity and not only that there had been an irregularity in the conduct of it. It is to be noted that, if the sale is to be set aside on the ground that it was absolutely illegal and not merely irregular the case would not come within the four corners of Order 21 Rule 90 which refers to 'material irregularity or fraud in publishing or conducting it' When the auction purchaser is the decree-holder himself and when an application is made to have the sale set aside on a ground other than that covered by Order 21 Rule 90 and there is not an application under Order 21 Rule 89, then, we are of opinion that, it raises a question within the meaning of the expression "execution, discharge or satisfaction of a decree" as mentioned in Section 47 of the Code of Civil Procedure. Such a question has to be determined by the execution court under the powers conferred on it by that section. Then under Section 2 of the Code of Civil Procedure all such orders are really decrees and can be appealed against as such. The application for setting aside the sale, although ostensibly one made under Order 21 Rule 90, was obviously a composite application, and the ground on which the sale was sought to be set aside, was that it was altogether null and void and illegal and not that it was merely irregular. We are therefore of opinion that the order passed by the learned Munsiff fell under Section 47 of the Code of Civil Procedure. In that view of the matter there was a first appeal before the District Judge and the appellant is competent to come up in second appeal to this Court.

We may mention that even if we were considering this case on the revisional side we would be disposed to interfere. If the order passed by the District Judge was not an order passed under Section 47 of the Code of Civil Procedure at all but was an order which was passed by an appellate court hearing an appeal from an order refusing to set aside the sale, on an application under Order 21 Rule 90, then it is clear that the learned District Judge has committed a material irregularity in the exercise of his jurisdiction. If he was proceeding to dispose of an application made under Order 21 Rule 90 he had to fix his attention not only on the material irregularity alleged in the application but had also to see whether that material irregularity had or had not resulted in any substantial injury to the applicants. The learned District Judge does not use the word 'irregularity' in his judgment at all but calls the sale illegal, and he has not gone on to consider whether there has or has not been any substantial injury caused. Even in this view of the matter, therefore, the order of the District Judge cannot stand.

Coming to the merits of the case we are of opinion that the sale which took place on the 17th of August, 1923, should not have been set aside. In the first place we have to consider the wording of the actual order for stay passed by the lower appellate court, which has been set forth in full in the opening portion of our judgment. It is clear that that order was not an absolute order for stay which came into effect as soon as it was passed. It is clear that the order was contingent on the applicant guaranteeing to make up the amount outstanding to Rs. 1,640 odd. The order was obviously addressed to the execution court where the guarantee had to be given. We are of opinion that so long as the condition required for coming into effect of that conditional order was not fulfilled the order did not come into effect. The facts recited by us make it clear that on the day fixed for sale all that the execution court did was to postpone the sale for two days. The judgment-debtors offered no guarantee to the execution court and none was taken. It is clear, therefore, that there was no absolute stay order in force at the time when the sale actually took place at 2 p.m., that afternoon. In this view, therefore, the sale was not at all illegal.

So far as the order postponing the sale passed by the execution court itself is concerned it is clear that that order was passed after the sale had actually taken place. The sale, therefore, cannot be said to be invalid in

view of the order passed by the execution court.

Under the circumstances it is unnecessary for us to consider the broader question whether a stay order passed by an appellate court automatically comes into effect as soon as it is passed or whether it does not take effect until it has been communicated to the execution court.

We accordingly allow this appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts.

In view of this order no separate order is now necessary on the application for revision.

Appeal allowed and decree set aside.

---

* 1924 ALLAHABAD 700.

MUKERJI AND DANIELS, JJ.

Sanwal Das.....Decree-holder—Appellant.

v.

The Collector of Etah,.....Judgment-Debtor—Respdt.

Execution S. A. No. 944 of 1923 decided on 12th March, 1924, from the decree of the District Judge of Aligarh, dated the 10th April, 1923.

Civil P. C., S. 42—Court transferring decree can't decide questions under S. 47, C. P. C.

The enactment of S. 42 is clearly intended to be of general application and to remove all questions arising out of the decree, such as those dealt with by Section 47 of the Code and the like, from the cognisance of the court which made the transfer. 43 All. 394, Foll. [P. 300, Col. 2.]

K. N. Katju for the Appellant.

L. M. Banerji for the Respondent.

Daniels, J.:—This is a second appeal by the decree-holder in execution proceedings. The facts are that a simple money decree was obtainable by the appellant against one Rao Maharaj Singh in the court of the Subordinate Judge of Allahabad. The judgment-debtor held property in Aligarh. After the decree was passed the estate of the judgment-debtor was taken over by the Court of Wards. The appellant decree-holder applied to the learned Subordinate Judge to have the Collector of Etah as manager of the estate of the judgment-debtor under the Court of Wards added on the record and for the decree to be transferred for execution to the court of the Subordinate Judge of Aligarh. The Collector was given notice of this application. He apparently at one time contemplated filing objections, for he sent a telegram asking for time to do so. Ultimately, however, no objections were filed and an order was passed adding the name of the Collector as manager on behalf of the Court of Wards and transferring the decree for execution to the Aligarh District. When the decree came before the executing court in Aligarh the Collector objected to the execution on the ground that as the decree-holder had failed to notify his claim under Section 17 of the Court of Wards Act his demand must be deemed in law to have been satisfied under Section 18 of the same Act. This contention was rejected by the Subordinate Judge but was accepted by the learned District Judge in appeal. The decree-holder comes here in second appeal relying an Order 21 Rule 28 of the Code of Civil Procedure and urging that on account of the failure of the Collector to take objections before the learned Subordinate Judge of Allahabad the matter in dispute must be deemed to be *res judicata* between the parties. We think that there is no force in this contention. Unless it can be held that the matter has been expressly or impliedly decided between the parties, there is no doubt that the court to which the decree was transferred for execution had jurisdiction to entertain the objection preferred to it. This is expressly laid down in Section 42 of the Code of Civil Procedure. That section has been interpreted by this Court in *Sital Prasad v. Messrs. Clement Robson & Co.* (1) and it has been held that the enactment is clearly intended to be of general application and to remove all questions arising out of the decree, such as those dealt with by Section 47 of the Code and the like, from the cognisance of the court which made the transfer. We think that neither the impleading of the Collector as a party as representing the Court of Wards which had taken over the superintendence of the judgment-debtor's estate, nor the order transferring the decree for execution (the latter order might have been, though in fact it was not, passed *ex parte*) amounts to a decision of the question whether the decree-holder's demand must be deemed to have been satisfied under Section 18 of the Court of Wards Act; and we hold that the judgment-debtor was not precluded from taking this plea before the learned Subordinate Judge of Aligarh.

(1) (1921) 43 All. 394=61 I.C. 401=19 A.L.J. 187.

We accordingly dismiss the appeal with costs including in this court fess on the higher scale.

Appeal dismissed.

---

* 1924 ALLAHABAD 701.

SULAIMAN, J.

Yamin and another.....Appellants.

v.

King-Emperor.....Respondent.

Criminal Appeal No. 973 of 1923 decided on 29th February, 1924, against the order of the Sessions Judge of Saharanpur dated the 9th October, 1923.

(a) *Penal Code, S. 395—For robbery in a house, owners being scared away after (not before) accused's entering the house is not necessary.*

In order that the offence of robbery be committed it is not necessary that fear should be caused to the owner of the house after the robbers have entered the house. If the robbers scared away the owner on account of the fear caused in his mind before they had been able to make an entry in his house the offence of robbery would be quite complete. [P. 701, Col. 2.]

(b) *Evidence Act, S. 114—Theft.*

From the mere fact that the articles were discovered in accused's possession soon after the theft the Judges did not draw the presumption that accused was the thief himself. [P. 702 Col. 2.]

Hamid Hasan for the Appellants.

The Government Pleader for the Respondent.

Judgment:—This is a criminal appeal by Yamin and Barkat from an order convicting them under Section 395 of the Indian Penal Code and sentencing them to 5 years' rigorous imprisonment each.

There can be no doubt that on the 24th of August, 1923, a very serious and deplorable communal riot took place at Saharanpur. It is neither necessary to go into the history of that riot nor to give any details of it. The present appellants were charged with having been concerned in the looting of the shop of the complainant Rupchand. Rupchand's statement is that at about 3 or 4 O'clock on that afternoon he was at his shop when a great gathering of Mahomedans took place in the bazaar. They were taking out their *akharas*. He says that he saw a crowd of 50 or 60 Mahomedans coming from the Halwais' quarter crying "*Kafiron ko mar lo.*" When he saw them he naturally got frightened, locked his shop and went straight away to his home, which is at some distance from the shop. He did not actually see his shop being broken into or looted. He remained at his house for 2 or 2½ hours and then, when he heard that things had settled down, he went to his shop and discovered that it had been broken into and looted. There is absolutely no reason to doubt the evidence of Rupchand and I accept it in its entirety. It may, therefore, be taken for granted that Rupchand saw a large crowd of 50 or 60 Mahomedans shouting that non-Mahomedans should be beaten, and that it was on account of the fear to his person and property that he locked his shop and went away from it. If it were established that it was this crowd of 50 or 60 Mahomedans or any members of this gang who looted his shop I would have no hesitation in holding that the offence committed was one of robbery and not merely a theft in a dwelling house. In order that the offence of robbery be committed it is not necessary that fear should be caused to the owner of the house after the robbers have entered the house. If the robbers scared away the owner on account of the fear caused in his mind before they had been able to make an entry in his house the offence of robbery would be quite complete. On the other hand if Rupchand had been scared away by this crowd of 50 or 60 men but the gang which actually robbed his house was not this gang but was some other band, then I would be compelled to hold that it was simply a case of theft in a dwelling house and not robbery. If the band which actually robbed the house was not the band which had caused fear in Rupchand's mind the act of this second band would not amount to an offence of robbery but would merely amount to a theft in a dwelling house, because neither the theft was committed in the presence of Rupchand nor was any fear caused in his mind by the gang which looted the shop.

The only other evidence regarding the looting of Rupchand's shop is the statement of the prosecution witness Banu Mal. This witness owns a shop opposite that of Rupchand. His statement is that he was sitting at his shop that afternoon and kept the door of his shop partly open in order to see what was happening outside and yet to be ready to close his shop in case he feared that the crowd were going to attack it. He says that he saw some 10 or 15 Mahomedens removing the shutters of Rupchand's shop and entering it and looting it. He was, however, unable to identify the men who actually looted the shop. It is unfortunate that Banu Mal was not asked the exact time when this looting took place. It is, therefore, not

possible to say definitely that the 10 or 15 Mahomedans who Banu Mal mentioned were out of the crowd of 50 or 60 men who were seen by Rupchand. Nor is it possible to say that the looting took place within a few minutes of the departure of Rupchand. As there was a general commotion in the town of Saharanpur it is not impossible that there were several bands of rioters marching down the streets at various times and at different places. The evidence of Rupchand and Banu Mal leaves a gap and it is impossible to say that the 10 or 15 men who were seen by Banu Mal looting the complainant's shop were men of the group of 50 or 60 men who had frightened Rupchand away. In the absence of any such evidence I am compelled to say that it cannot be held that the 10 or 15 men who looted Rupchand's shop had caused any fear in the mind of Rupchand of any hurt or wrongful restraint to his person. The looting committed by the band of 10 or 15 men cannot amount to the offence of robbery as defined in Section 390, I. P. C., but would be an offence of theft in a building used for the custody of property as mentioned in Section 380, I. P. C. The shop of Rupchand was looted some time between 3 P.M. and 5 P.M. The exact time cannot now be stated. The accused persons were arrested in the street between 4-40 and 4-45 P.M, The accused Yamin was found in possession of several articles namely a *dhoti*, a *sangi* and three pieces of chintz. These were new pieces of cloth and they have been identified by the complainant as part of the property looted from his shop. I have, no doubt, in my mind whatsoever that these articles belonged to the complainant and were part of the stolen property. These were capable of being identified and they were unsewn pieces of cloth which would not ordinarily be worn. The accused Yamin was carrying them under his arm. In the Court of Sessions Yamin had denied having been found in possession of these articles, but I am satisfied that he was found in possession of these articles at the time of arrest.

The other accused Barkat was found to wear chintz turban on his head. The accused before the Magistrate claimed this turban as his own property. The turban, however, bore the label of the shop of Ratnam & Co., glued to the stuff and the chintz was quite unwashed and was fully recognised by the complainant as belonging to him. I am satisfied that it was a part of the stolen property and was found on the person of the accused Barkat at the time of his arrest.

It is, however, to be noted that no one was able to identify either Yamin or Barkat as being among those men who entered the shop of Rupchand and looted it. The conviction of Yamin and Barkat rests on the evidence of their being found in possession of the stolen articles very soon after the offence. When the stolen property is found in the possession of a person soon after the theft the court is under Section 114 of the Indian Evidence Act entitled to presume that either that person is himself the thief or he has received the goods knowing them to be stolen unless he can account for his possession. In the present case both the accused have entirely failed to adequately account for their possession of these articles. It was, therefore, open to the court to draw the presumption either that they themselves had stolen these articles from the shop of Rupchand or that they had received these articles knowing them to be stolen. The learned Judge has held that the presumption is that these accused persons were themselves the principal offenders. He has given reasons for drawing that presumption. On the other hand it has been brought to my notice that in another case arising out of a similar looting which took place on the same day at the same town, *viz.*, Saharanpur, a Division Bench of this Court in the case of Bashir, accused (Criminal Appeal No. 1109 of 1923 decided on the 15th of February, 1924) held him guilty under Section 411, I.P.C., because he was found in possession of certain articles which had been stolen from the house of the complainant in that case. From the mere fact that the articles were discovered in his possession soon after the theft the learned Judges did not draw the presumption that Bashir was the thief himself. As there is always a possibility that the accused got these articles, which they must have known were stolen, from some other persons or might have picked them up when dropped by the real thieves, I think that it would be safe to follow the precedent referred to by me. I would, therefore, draw only the presumption that the accused persons having been found in possession of the stolen goods soon after the theft had received the goods knowing them to be stolen, as they were not able to account for their possession.

I have already found that on the statement of the complainant Rupchand and that of the only other prosecution witness Banu

Mal it is impossible to hold that a robbery had been committed. It follows, therefore, that the accused persons must be convicted under Section 411, I.P.C. for having received properties which they knew had been stolen and which in fact had been stolen in the course of a theft inside a shop.

Under the circumstances of this case, however, I must impose the maximum sentence of imprisonment permissible under Section 411, I.P.C. I accordingly set aside the conviction and sentence of both the appellants under Section 395, I. P. C. and instead convict both the appellants under Section 411, I. P. C. and sentence them each to rigorous imprisonment for a term of three years. With this modification the appeal is dismissed.

Appeal dismissed.

---

* 1924 ALLAHABAD 703.

DANIELS AND MUKERJI, JJ.

Chhote Lal.....Judgment-Debtor—Appellant.

v.

Kedar Nath and others.....Decree-Holders—Repdts.

Execution Second Appeal No. 977 of 1923 decided on 13th March, 1924, from the decree of the District Judge of Agra.

Insolvent Debtors Act, Ss. 7, 26, and 27—Before discharge Insolvent is not incompetent to contract and deal with after-acquired property.

All persons dealing with an undischarged insolvent *bona fide* and for a consideration are discharged from making a further payment, to the Official Assignee, provided the transactions took place before the Official Assignee intervened and claimed the property on behalf of the insolvent's estate. An insolvent who had not obtained his final discharge has power with respect to after-acquired property to buy and sell and give discharge and do all other acts which he could have done before his insolvency. This law applies to both moveable and immoveable property. 8 Cal. 556, Foll. [P. 704 Col. 1.]

K. N. Katju for the Appellant.

L. M. Banerji, P. L. Banerji and N. P. Asthana for the Respondents.

Mukerji, J.:—The facts of this case are briefly these. One Kedar Nath of Agra was adjudicated insolvent in Calcutta under the Insolvent Debtor's Act on 4th September, 1906. On 11th of January, 1910, Kedar Nath obtained an order for personal discharge, but he continued to be an adjudicated insolvent so far as the property was concerned. In 1921 Kedar Nath sued one Chhotte Lal for recovery of a certain sum of money on the ground that it was due to him for certain services rendered to Chhote Lal. He obtained a decree on 19th January, 1922. On 11th February, 1922, Kedar Nath sold the decree to Baijnath. Chhote Lal filed an appeal against the decree and made an application to the court for the stay of execution pending the appeal on the ground, *inter alia*, that Kedar Nath was an undischarged insolvent. It appears, however, that the parties came to terms on 22nd February, 1922. A compromise was filed in the execution department by which on payment of a sum of Rs. 2,300 to Baijnath, the transferee, the decree was taken as fully satisfied. The appeal was also dismissed on an application by the appellant, Chhote Lal. The Official Assignee then, for the first time, intervened on 3rd March, 1922. On that date he made an application to the learned Subordinate Judge of Agra asking that his name might be substituted in place of Kedar Nath and that he might be permitted to execute the decree.

We may point out here that, the learned Judge of the lower appellate court, has made a mistake in saying that the application was made on 21st February, 1922. That was the date on which the Official Assignee in Calcutta signed the application which was actually filed on 3rd March, 1922. The application of the Official Assignee was dismissed on 4th March, 1922, by the learned Subordinate Judge on the ground that, the decree had been satisfied and there could be no substitution of names. On 24th March, 1922, the Official Assignee made an independent application for execution of the decree which had been obtained by Kedar Nath. Chhote Lal came in and pleaded that he had satisfied the decree and it could not be executed against him. He led evidence before the court of the first instance to prove the *factum* of payment. The learned Subordinate Judge came to the conclusion that there was a payment but that payment could not exonerate Chhote Lal. On appeal, the District Judge came to the same conclusion and dismissed the appeal of Chhote Lal.

In this Court it has been contended on behalf of Chhote Lal that having regard to the law as has been interpreted by various rulings of court, he was not to be called upon to make a second payment.

On behalf of the respondent it was urged that, there was really no finding on the part of the first court to the effect that, there was a *bona fide* payment

and that no such finding was confirmed by the learned District Judge. We have, however, heard a portion of the evidence and notice that the Official Assignee led no evidence to contradict that evidence which had been adduced on the part of Chhote Lal. We must, therefore, hold and do hold that Chhote Lal did as a matter of fact make a payment of Rs. 2,300, and that payment was a *bona fide* one to satisfy the decree passed against him.

Now the question is whether the fact that, Chhote Lal was aware that Kedar Nath was an undischarged insolvent precluded him from making a valid payment of the decree. We have been referred to Sections 7, 26 and 27 of the Insolvent Debtor's Act and to the following cases, namely 25 Q. B. D. 262, 47 Cal. 696, 8 Cal. 556, 30 Mad. 145 and 43 Bom. 890. It appears to us as a result of these authorities that in spite of the fact that by order passed under Section 7 of the Insolvent Debtor's Act, the future property of Kedar Nath was to vest in the Official Assignee, Kedar Nath was left free to dispose of any property that he might acquire after being declared an insolvent and that, all persons dealing with him *bona fide* and for a consideration were to be discharged from making a further payment, to the Official Assignee, provided the transactions took place before the Official Assignee intervened and claimed the property on behalf of the insolvent's estate.

The leading case on the point is that of *Cohen* v. *Mitchell* (1). That case was quoted in 43 Bom. 890 and Shah, J. on page 903 says:—"In India long before the decision in *Cohen* v. *Mitchell* (1) it was held in *Kristocomul Mitter* v. *Suresh Chunder Deb* (2) that so long as the Official Assignee had not interfered, an insolvent who had not obtained his final discharge, had power with respect to after-acquired property to buy and sell and give discharge, and do all other acts which he could have done before his insolvency." He has shown at page 905 of the report that this law applied to both moveable and immoveable property. We are dealing with moveable property, namely a decree.

The authorities, therefore, establish the proposition for which the appellant contends. Indeed, Mr. Asthana, the learned counsel on the other side, agrees that the point cannot be controverted. We accordingly allow the appeal with costs, which will include fees in this Court on the higher scale and set aside the decrees of the courts below, and dismiss the application for execution made, by the Official Assignee. The appellant will get his costs in the courts below as well.

Appeal allowed.

(1) 25 Q. B. D. 262=59 L. J. Q. B. 409=63 L.T. 206=38 W.R. 551 = 7 Morrel 207.
(2) (1882) 8 Cal. 556=12 C. L. R. 253.

1924 ALLAHABAD 704.

MUKERJI AND DANIELS, JJ.

B. Shahzad Singh.....Decree-holder—Appellant.

v.

B. Hanuman Rai and others..... ..Judgment-Debtors—Respondents.

Execution S. A. No. 1251 of 1923 decided on 12th March, 1924, from the decree of the District Judge of Ghazipur dated the 27th June, 1923.

Civil P. C., S. 68—Civil Court has no power after transfer—Collector alone can resell for realizing price.

Where once the case has been transferred to the Collector, the Civil Court has no power to pass any order in that case. In spite of the sale having taken place, it is for the Collector to decide whether he would re-sell the property or not in order to realise the balance of the purchase money. Under rules framed by Local Government (Rule No. 26), it is entirely in the discretion of the Collector to decide whether he would or would not realise the balance of the purchase money by re-sale. [P. 705 Col 1 & 2.]

U. S. Bajpai and S. N. Verma for the Appellant.

M. L. Agarwala and Janaki Prasad for the Respondents.

Mukerji, J.:—This appeal arises under peculiar circumstances. The appellant, Shahzad Singh, obtained a mortgage decree for sale of the property of Hanuman Rai and others, the final decree having been passed some time in December 1920. The appellant put in his application for execution of the decree on 1st July, 1921 and declared that the property was ancestral. He also stated that the property was subject to no encumbrances. His duty included the production of a certificate from the Sub-Registrar as to whether there was any encumbrance or not, and this he performed. But it was the duty of the Collector and Collector alone to find out with the assistance of both the decree-holder and the judgment-debtor what were the encumbrances that were to be notified as existing over the property. The decree was transmitted to the Collector for execution, apparently with a note that there were no

encumbrances over the property. The property was sold by the Collector and the decree-holder himself purchased the same for the sum of Rs. 5,200. He gave a certificate of satisfaction of his own decree and had under the rules to pay the balance. He then discovered that there was heavy encumbrance over the property, the date of which was more than 12 years prior to the date of the sale. It was on this account that this encumbrance was not shown in the Sub-Registrar's certificate which was only for 12 years. The decree-holder, naturally, found that he had made a bad bargain and attempted to resile from it. He did not put it in the balance of the purchase money and he asked the Collector to re-sell the property declaring the encumbrance which he discovered. The Assistant Collector who was in charge of the sale refused to hear him, being of opinion that he could not go behind the orders of the Civil Court. An appeal was lodged to the Collector and he also thought that the remedy of the appellant lay in the Civil Court. He said:—

"If the Civil Courts agree to this the sale will be set aside. I agree with the sale officer in not encroaching on the jurisdiction of the Civil Courts and I dismiss the appeal with costs."

The appellant then went to the Civil Court and asked the learned Subordinate Judge to declare that the property was really non-ancestral. His object was clear. He wanted that if the property was declared non-ancestral the Civil Court would call back the papers and proceed with the sale afresh. If that had happened he would have been entitled to show to the Civil Court that there was an encumbrance. The learned Subordinate Judge, however, held that once the case had been transferred to the Collector, the Civil Court had no power to pass any order in that case. I entirely agree with this view which was also upheld by the learned District Judge. In Chapter IV, Rule IX of the General Rules (Civil) of 1911 for Civil Courts, it is expressly laid down that, "A Civil Court has no power to interfere with the procedure of a Collector in the execution of a decree which has been transferred to him under Section 68 of Act V of 1908". The question whether the property was ancestral or not was already decided between the parties and that decision was binding on both. The decree having been sent to the Collector for execution the Civil Court ceased to have any jurisdiction over the execution proceedings. All that it could do was to recall the papers. But the result would be that, when the decree-holder again applied for execution, the papers would have to be sent back to the Collector the property having been declared to be ancestral.

The appellant has now come to this Court for his remedy. I am afraid we cannot give him any. But it seems to me perfectly clear that the learned Assistant Collector and the Collector were wrong in assuming that they had no jurisdiction to find out what were really the encumbrances over the property. In spite of the sale having taken place, it is for the Collector to decide whether he would re-sell the property or not in order to realise the balance of the purchase money. Under rules framed by Local Government (Rule No. 26) it is entirely in the discretion of the Collector to decide whether he would or not realise the balance of the purchase money by re-sale. It is to be noted that the decree-holder is not at all at fault. If he was not aware of any encumbrance in spite of an enquiry into the Sub-Registrar's office, it was no fault of his. His conduct in purchasing the property for Rs. 5,200 shows that he was really unaware of the encumbrance. Otherwise he would not have paid such a large value for the property. As I have said, the learned Collector thought that it was for the Civil Court to give directions in the matter and not for him or the Assistant Collector to do anything. I am sure if the decree-holder goes again to the Collector and represents how the law stands on the point his prayer will be granted. In this appeal I am afraid nothing can be done. I would, therefore, dismiss the appeal with costs.

Daniels, J.:—I concur generally. The rules which determine the respective functions of the Civil Court and of the Collector when a decree has been transferred to the latter under Section 68 of the Civil Procedure Code are, however, not the rules framed by this Court but the rules framed by the Local Government under Section 70 of the Civil Procedure Code. These rules are contained in the Board of Revenue Circulars, Volume I, Department II, Circular No. 25. Under Rules 10, 11 and 18 of those rules it is the duty of the Collector to ascertain the existence of encumbrances and to issue the sale proclamation. I concur in the order proposed.

By the Court:—The appeal is dismissed with costs.

Appeal dismissed.

* 1924 ALLAHABAD 706.

DANIELS AND NEAVE, JJ.

Lala Baij Nath and another.....Decree-holders—Appellants.

v.

Panna Lal.....Judgment-Debtor—Respdt.

Ex. S. A. No. 1264 of 1923 decided on 22nd April, 1924, from a decree of the Additional Subordinate Judge of Aligarh dated the 25th April, 1923.

Civil P.C.,O.21, R. 2—Statement by D. H. is no certificate—Application by D. H. within reasonable time and court's order are necessary.

A statement in an execution application of money having been paid by the judgment-debtor is not a certificate of payment as is contemplated by Order 21 Rule 2 and has not the effect of saving limitation. Order 21 Rule 2 clearly contemplates a formal proceeding consisting of two steps, first an application by the decree-holder informing the court of the payment, and secondly a formal order of the court recording the payment. This proceeding must be separate from and prior to the execution proceeding in which it is desired that the payment should be recognised. 12 A. L. J. 387; 12 A. L. J. 825; 38 All. 204, Foll. [P, 706 Col. 2.]

Gulzari Lal for the Appellants.

Panna Lal for the Respondent.

Daniels, J.:—This appeal has been referred to a Bench for a decision of the question whether a statement in an execution application of money having been paid by the judgment-debtor is such a certificate of payment as is contemplated by Order 21 Rule 2 of the Civil Procedure Code and has the effect of saving limitation. The authorities of this court are against the contention. The authority of other High Courts is the other way and the learned Judge who referred the case doubted the correctness of this court's rulings.

The facts are these:—The decree was passed on 25th March, 1914. It was a compromise decree and provided for payment by annual instalments on the 15th of March each year commencing with 1915. There was also a provision that on two instalments falling into arrear the whole decretal amount should become payable. The instalments for the first three years, 1915 to 1917, were paid on due date and were duly certified to the court. No further payment was certified. On 7th September, 1922, the decree-holders filed the present application for execution. Column 5 of the form of application which is intended to show any previous payment or adjustment is left blank. In the body of the application the decree-holders stated that the instalments for the years 1918 to 1920 had been paid and that as the instalments for 1921 and 1922 were in arrears they claimed the balance due under the decree.

We think that the rulings of this court are correct and should be followed. The first is that of Knox, J. in *Gokal Chand v. Bhika* (1). All the decisions of other High Courts in favour of the decree-holders proceed on the ground that no period of limitation is fixed for an application by the decree-holder to certify a payment and that no particular form of certificate is prescribed. Both these arguments are noticed by Knox, J. who holds that Order 21 Rule 2 clearly contemplates a formal proceeding consisting of two steps, first an application by the decree-holder informing the court of the payment, and secondly a formal order of the court recording the payment. This proceeding must be separate from and prior to the execution proceeding in which it is desired that the payment should be recognised. The second decision is that of Piggott, J. in *Bhajam Lal v. Chheda Lal* (2). He refers to the contention that an execution application may be treated as an application certifying a payment as an ingenious suggestion, and follows without hesitation the view taken in 12 A. L. J. 387. The third case is that of *Chattar Singh v. Amir Singh* (3). This is a decision of Richards, C. J. and Rafiq J. upholding in a Letters Patent Appeal a decision of Sir Edward Chamier. This case was absolutely on all fours with the case now under appeal. The decree was an instalment decree and unless the statement in the execution application could be treated as a compliance with Order 21 Rule 2 the decree was time-barred. The Calcutta and Madras authorities were considered and it is stated that whatever may be the practice in those provinces the practice in the Agra province is to require a payment to be certified and recorded in a separate proceeding prior to the execution application, that this is in accordance with the spirit of Order 21 Rule 2, and that if the court which is called on to execute the decree finds that no payment has been certified and recorded when the application is made to it it is bound to assume that no payment has been made and to dismiss the

(1) (1914) 12 A. L. J. 387=23 I. C. 753.
(2) (1914) 12 A. L. J. 825=24 I. C. 215.
(3) (1916) 38 All. 204=32 I.C. 590=14 A.L.J. 132.

application. We think that this view is correct and that the point of time at which the court is called on to consider whether the payment has been certified or recorded is the moment when the application is made to it to execute the decree. It is objected that this is taking a very technical view, but if the intention of the law is plain it is not in the public interest that it should be strained in any way in favour of the decree-holder. It is placing very great temptation in the way of the decree-holder, when he has kept silent as to an alleged payment and exposed the judgment-debtor to the risk of having to pay the amount over again so long as the decree remains effective, to allow him to come forward when it has become on the face of it time-barred to escape the plea of limitation by stating in his execution application that subsequent payments have been made. It is true that he will have to prove the payments but evidence of this kind is easy to bring forward and difficult to test, especially when the payments are alleged to have taken place nearly three years earlier. We may add that though no period of limitation has been prescribed for an application by the decree-holder to certify, the intention of the law appears to be that the payment should be certified within a reasonable time of its being made. It is primarily the decree-holder's duty to certify. If he fails to do so Clause (2) of the rule allows the judgment-debtor to inform the court of the payment, and for the judgment-debtor's application a period of ninety days has been provided by Article 174 of the Limitation Act. We see no reason to differ from the view of the law which has prevailed in this court ever since the year 1914, and we accordingly dismiss the appeal with costs including in this court fees on the higher scale.

Appeal dismissed.

1924 ALLAHABAD 707.

DANIELS, J.

Ram Bharosay and others....Decree-holders—Appellants.

v.

Sohan Lal.....Judgment-Debtor—Respondent.

Ex. S. A. No. 1724 of 1923 decided on 9th April, 1924, from a decree of the District Judge of Budaun dated the 7th September, 1923.

Limitation Act, S. 15—Bar of arrest under C.P.C., S. 55 (4) does not suspend complete execution—C. P. C., S. 55 (4.)

Though the decree-holders may have been debarred from one particular mode of execution still it is open to them to execute their decree in any other way *e. g.* by attachment and sale of any moveable or immoveable property of the judgment-debtor. Therefore Section 15 of the Limitation Act does not apply. [P. 708 Col. 1.]

Harnandan Prasad for the Appellants.

S. P. Sinha for the Respondent.

Judgment:—The question for decision in this appeal is whether the appellants-decree-holders' application for execution is time-barred. The application in question was presented on 10th January, 1923. The last previous application was made on 31st October, 1919, considerably more than three years earlier. The previous application was for the arrest of the judgment-debtor. The appellants rely on the fact that when the judgment-debtor was brought before the court on 17th November, 1919, he gave security and applied to be declared an insolvent. As the law stood the court was obliged to release him from arrest under Section 55 (4), C. P. C. He was released and made an application to the insolvency court. While the insolvency proceedings were pending the execution application was struck off. This was on 18th December, 1919. On 11th February, 1920, the application to be declared an insolvent was finally rejected. In order to bring their present application within time the decree-holders require to deduct the whole period during which the insolvency proceedings were pending and this is what they claim to do under Section 15 of the Limitation Act. The learned District Judge has rejected this plea on the ground that under the Provincial Insolvency Act of 1907, which was then in force the mere presentation of an insolvency application does not prevent execution of the decree. If an order of adjudication was subsequently passed under Section 16 of the Act that adjudication would relate back to the date of the insolvency petition and would prevent any execution proceedings being taken except by leave of the court. In this case no order of adjudication was ever made and therefore the creditor cannot take advantage of this provision. It has, indeed, been held in a Madras case that even the passing of an order of adjudication does not amount to a suspension of execution under Section 15 of the Limitation Act because after the adjudication execution proceedings could still be carried on by leave of the insolvency court. That is a much stronger case than the present one where no adjudication was made.

The appellants rely on the language of Section 55 (4), C.P.C. Their learned Counsel argues that on the language of that clause it was not open to them to apply again for the arrest of the debtor so long as the insolvency application was still undetermined. He argues from this that until final orders were passed by the insolvency court execution of the decree must be deemed to have been stayed. It is difficult to reconcile this argument with the actual language of Section 15 of the Limitation Act. In the first place in order to bring Section 15 into operation it is necessary that execution shall have stayed by an injunction or order. In this case there was no injunction and no order staying the execution. If however this be a somewhat technical point the larger objection remains that execution of the decree was not stayed by the provisions of Section 55, C. P. C. The decree-holders may have been debarred from one particular mode of execution but it wns still open to them to execute their decree in any other way *e. g.* by attachment and sale of any moveable or immoveable property of the judgment-debtor. In my opinion Section 15 of the Limitation Act does not apply. The learned Counsel for the appellants puts forward an alternative plea that his present application should be treated as being in continuation of the application of 31st October, 1919. Seeing that the application in question was formally dismissed on 18th December, 1919, there is no ground for accepting this plea either.

The appeal therefore fails and it is accordingly dismissed with costs.

Appeal dismissed.

---

* 1924 ALLAHABAD 708.

SULAIMAN AND MUKERJI, JJ.

Sanmukh Pande and another.....Defendants-Appellants.

v.

Jagannath Pande.....(Plaintiff)

and Ram Saran Pande.....(Defendant)—Respondents.

S. A. Nos. 1 and 2 of 1922 decided on 26th February, 1924, from the decree of the District Judge of Ghazipur, dated the 29th September, 1921.

(a) *Hindu Law—Alienation—Antecedent debt.*

In order to be an antecedent debt the previous debt need not necessarily be a simple debt but may also be a mortgage debt. [P, 708 Col. 2.]

(b) *Hindu Law—Alienation—Legal necessity—Sale is set aside where no legal necessity is proved for considerable portion.*

Where the defendants have succeeded in establishing necessity or antecedent debt with respect to a part of the consideration the difficulty often arises whether the sale deed should or should not be upheld. It is impossible to lay down any hard and fast rule which could apply equally to every case; for every transaction has to be considered on its own merits and the court has to come to a finding on the merits of every case. Where the balance which is not proved to have been for valid necessity or antecedent debt is not so insignificant as to be ignored. *Held* the sale deed should be set aside on payment by the plaintiffs of the sum which has been found to be a good consideration. 25 All. 380; 27 All. 494; 32 All. 392; 1922 All. 321, Foll. [P. 709 Col. 1.]

M. L. Agarwala for the Appellants.

U. S. Bajpai for the Respondents.

Sulaiman, J.:—Second Appeal No. 1 of 1922 and Second Appeal No. 2 of 1922 arise out of two independent suits Nos. 416 and 440 of 1920 respectively which were suits brought by Hindu sons to set aside a deed of sale dated the 4th September, 1905 and the 28th of June, 1912, in the second case. In these second appeals we are not now concerned with the mortgage deed of the 28th of June, 1912.

As regards the sale deed both the courts below have come to the conclusion that out of the consideration of Rs. 1,000 for which it was executed by the plaintiff's father, Rs. 500 were paid in order to pay off the amount due on a previous usufructuary mortgage deed which has been held not to be an antecedent debt, and out of the balance of Rs. 500, Rs. 200 have not been proved to have been paid as recited in the deed.

We may say at once that the view that he amount due on the previous mortgage deed was not a good antecedent debt cannot now be upheld in view of the opinion recently pronounced by their Lordships of the Privy Council in the case of *Raja Bahadur Raja Brij Narain Rai* v. *Mangala Prasad Rai* (1). It was laid down in that case that in order to be an antecedent debt the previous debt need not necessarily be a simple debt but may also be a mortgage debt

As regards the balance of the sale consideration Rs. 200 were left in the hands of the vendee to be paid to one Nand Kishore. The

(1) 1924 P. C. 50=46 All. 95=51 I. A. 129=21 A. L. J. 934=5 L. R. P. C. 1=28 C. W. N. 253=46 M. L. J. 23=5 P.L.T. 1=2 Pat. L. R. Civ. 41=19 M. L. W. 724=1924 M. W. N. 68=33 M, L. J. 457 (P. C.)

defendants were not liable to produce evidence which would satisfy the courts below either that this debt was actually due to Nand Kishore or that such a payment was made to him. The finding on this point is a finding of fact which we must accept as final.

The result, therefore, is that so far as the sale deed is concerned, Rs. 200 out of the total consideration of Rs. 1,000, have not been proved to have been required for any necessity or to have been an antecedent debt. In a case of this kind where the defendants have succeeded in establishing necessity or antecedent debt with respect to a part of the consideration, the difficulty often arises whether the sale deed should or should not be upheld. It is impossible to lay down any hard and fast rule which could apply equally to every case; for every transaction has to be considered on its own merits and the court has to come to a finding on the merits of every case. The balance which is not proved to have been for valid necessity or antecedent debt is not so insignificant as to be ignored. Therefore, having regard to the course of rulings in this Court, we have to come to the conclusion that this sale deed should be set aside on payment by the plaintiffs of the sum of Rs. 800 which has been found to be a good consideration. We may refer to the cases reported in *Gobind Singh* v. *Baldeo Singh* (2), *Ram Dei Kunwar* v. *Abu Jafar* (3), *Bachchan Singh* v. *Kamta Prasad* (4), *Jai Narain Pande* v. *Bhagwan Pande* (5).

We accordingly allow Second Appeal No. 1 of 1922 to this extent that we direct that if the plaintiffs pay Rs. 800 within three months of this date they would be entitled to recover possession of the property covered by the sale deed together with costs from the defendants. In default of payment, the suit shall stand dismissed with costs. The costs in this Court will include fees on the higher scale.

As to Second Appeal No. 2 of 1922, which arises out of suit No. 440 of 1920, the finding of the lower appellate court is that this mortgage deed was for a sum of nearly Rs. 700 out of which nearly Rs. 250 were paid in cash and the balance was said to have been due on five previous mortgage deeds. So far as the payment of cash is concerned, the finding is that there is no proof of necessity whatsoever. As regards the previous mortgage deeds which had to be paid off by the mortgage deed in suit it is to be noted that the second mortgage deed was not filed on the record and the 4th and the 5th mortgage deeds, though filed, were not proved. The defendants, however, succeeded in proving the existence of the mortgage of 1902 for Rs. 99-15-9 and the mortgage in favour of Hira Pande for Rs. 49-15-6.

The result, therefore, is that according to the findings Rs. 149-15-3 represent that part of the consideration for the mortgage which must be upheld as being binding on the sons.

We accordingly modify the decrees of the courts below to this extent that we grant the plaintiffs a declaration that the total amount which the plaintiffs are bound to pay in order to redeem the mortgage deed, dated the 4th of September, 1905, is Rs. 149-15-3. Having regard to the partial success of the suit we direct that the plaintiffs do recover one-third of their costs throughout, including in this court fees on the higher scale. The defendants will bear their own costs.

Decrees modified.

(2) (1903) 25 All. 330 = 1903 A. W. N. 57.
(3) (1905) 27 All. 494 = 1905 A. W. N. 63.
(4) (1910) 32 All. 302 = 5 I.C. 585 = 7 A. L. J. 337.
(5) 1922 All. 821.

---

* 1924 ALLAHABAD 709.

MEARS, C. J. AND PIGGOTT, J.

Sat Narain Prasad and others.....Appellants.

v.

Ram Autar and others.....Respondents.

L. P. A. No. 51 of 1922 decided on 21st December, 1923, from the Judgment of Stuart, J. dated 12th January, 1922.

Practice—Points of law.

Questions of law dealing with the admissibility and the legal effect of evidence will not as a general rule be entertained in second appeal if they have not been taken at least at the stage of first appeal. [P. 710 Col. 2]

K. N. Katju for the Appellants.

S. N. Sen for the Respondents.

Piggott, J.:—This was a suit for redemption of a mortgage. The plaintiffs pleaded that they were unable to produce any written instrument of mortgage. They tendered certain evidence to prove that, in the year 1869, in the district of Mirzapur, certain parties had mortgaged certain land with possession to certain other parties, in return for a payment of Rs. 200. Other points regarding the title of the plaintiffs to

represent the interest of the original mortgagors, and also with regard to certain other charges on the land set up by the defendants in possession, were gone into. All questions in issue were decided by the trial court in favour of the plaintiffs, and they got a decree for redemption on payment of Rs. 200. The defendants then went up in first appeal. Their first plea was that the plaintiffs had totally failed to prove their title to redeem the mortgage, and also the particular mortgage set up by them. There were other pleas taken with respect to the other transactions which the defendants had set up, and it was alleged that those transactions were fully proved. There was a general plea that the evidence produced by the plaintiffs in the trial court was altogether worthless and unworthy of credit. All these pleas were carefully dealt with by the learned Subordinate Judge. He reviewed the evidence in detail and confirmed all the findings of the trial court in favour of the plaintiffs.

The defendants then came to this Court in second appeal. By this time the record had been examined on their behalf by a legal practitioner competent to appreciate all the difficulties arising out of the pleadings and the evidence in the two courts below. It now occurred to the defendants that the Registration Act of 1866 was in force in the Mirzapur District in the year 1869. In their memorandum of appeal to this court, therefore, they laid hold of statements in the plaint and certain statements made by one of the plaintiffs' witnesses in the trial court. They put these forward as establishing beyond doubt the fact that the transaction of mortgage set up by the plaintiffs was embodied in a written instrument. From this they went on to contend that this instrument, not having been registered, was inoperative and could not have been admitted in evidence. The further contention followed that therefore secondary evidence of the contents of this document was also inadmissible. They also took the point that the plaintiffs had failed to lay the foundation required by law for the admission of secondary evidence before they tendered such evidence in the trial court, and finally they contended that the evidence which the plaintiffs did tender, which had been accepted and acted upon by two courts, was not within the definition of admissible secondary evidence under the provisions of the Indian Evidence Act. The learned Judge of this court, who heard the appeal, has in substance refused to entertain these pleas, because they were not taken before the lower appellate court. It is true that in an earlier part of his judgment he discusses the question whether the plaintiffs had or had not laid a sufficient foundation for the production of secondary evidence of some sort or kind; but with regard to the remaining pleas, which we have set forth above, he frankly bases his decision on the ground that it would not be fair to the opposite party, under the circumstances, to permit these pleas to be taken for the first time in second appeal. In taking this line we are satisfied the learned Judge of this court was within his discretion. We think it would be in the interests of the administration of justice in this province if it were generally understood that questions of law of this nature, more particularly questions dealing with the admissibility and the legal effect of evidence, will not as a general rule be entertained in second appeal in this court, if they have not been taken at least at the stage of first appeal in the court below. We are not prepared to hold that the learned Judge of this court was wrong in taking the line which he did. We dismiss this appeal with costs.

Appeal dismissed.

1924 ALLAHABAD 710.

BANERJI, A. C. J. AND PIGGOTT, J.

Syed Ata Hussain.....Plff.—Appellant.

v.

Ramman Lal and another.....Defdts.—Respondents.

Letters Patent Appeal No. 82 of 1922 decided on 13th July, 1923, against the judgment of Justice Stuart, dated the 3rd April, 1922.

Agra Tenancy Act, S. 20—Occupancy holding cannot be mortgaged.

Mortgage of occupancy holding is void under the Act and mortgagee can't recover possession if ejected by mortgagor who, however, can't sue for possession without returning mortgage money. [P. 711 Col. 1.]

Bhagwati Shankar for the Appellant.

Kumuda Prasad for the Respondents.

Judgment:—This appeal arises out of a suit for arrears of rent brought in the Revenue Court by the plaintiff, Ata Husain against Ramman Lal, defendant, and others. The rent claimed was for the years 1324, 1325 and 1326 *fasli*. The land in respect of which the rent was claimed formed the

occupancy holding of one Musammat Katwari. The plaintiff alleges himself to be the mortgagee of the holding from Mt. Katwari, and he said in his plaint that the defendant was his sub-tenant and was therefore liable to pay him rent. The defendant, Ramman Lal, denied that the relationship of landlord and tenant existed between the plaintiff and him. He asserted that he had taken the land from Mt. Katwari and that he had paid the rent claimed to the latter. There can be no doubt that Mt. Katwari was incompetent to mortgage her occupancy holding and that the alleged mortgage in favour of the plaintiff is void in law. Therefore the plaintiff has no right to the land in suit.

The lower appellate court held this to be one of the grounds on which the plaintiff's suit was bound to fail. That court further found that the defendant had paid the rent sued for by the plaintiff to Mt. Katwari and that the defendant was not the plaintiff's tenant. That court dismissed the suit.

The plaintiff appealed to this court and his appeal was dismissed by a learned Judge of this court.

Two contentions have been raised before us. The first is that even if the plaintiff has no title the defendant took the land from him and therefore could not deny his title as the defendant's landlord and the second contention is that the plaintiff has obtained a decree against the defendant for his ejectment from this holding, and that the effect of that decree is that the defendant must be deemed to be the plaintiff's tenant.

As we have already said, the mortgage alleged to have been made in the plaintiff's favour being in contravention of the provisions of the Agra Tenancy Act, is a void mortgage and therefore the plaintiff has no title to the land in respect of which rent is claimed. Mt. Katwari, the mortgagor, was competent to resume possession of the land, although she could not bring a suit in court for recovery of possession unless she made good to the plaintiff the money which she had received from him. At the same time if Katwari dispossessed him the plaintiff could not come into court to enforce his right as mortgagee and to eject her from the property. The fact as found by the lower appellate court, of Mt. Katwari having realised the rent from the defendant is equivalent to Mt. Katwari having resumed possession of the land, and if she resumed possession of the land the plaintiff has no remedy as against her so far as the land is concerned. If he had no remedy against Mt. Katwari, he could not have any remedy against the defendant who has paid the rent to her, and on this ground the plaintiff's claim was bound to fail.

Again the passing of a decree for the ejectment of the defendant cannot affect the rights of Mt. Katwari, and if she realised the rent from the defendant and thus took back possession of the holding which she had mortgaged to the plaintiff, the ejectment proceedings against the defendant cannot prejudice her rights and by reason of payment of rent to her the defendant has been relieved of liability to pay rent to the plaintiff.

From any point of view, therefore, the plaintiff who has taken an illegal mortgage cannot receive any remedy at the hands of the court. If a decree were passed against a tenant under such circumstances, it would enable an occupancy tenant whom the legislature intended to protect, to circumvent the law and allow a mortgagee from him to take possession of his holding. Further more in the present case there was an allegation by the defendant that he had not taken the land from the plaintiff. That allegation was not repudiated by the plaintiff, nor was any issue raised in the court of first instance on that point. Therefore we cannot assume that the land had been let to the defendant by the plaintiff. If the defendant had already been cultivating the land before the mortgage to the plaintiff was made, the plaintiff who has really no title under his mortgage, cannot seek to realise the rent from him if he refuses to pay it. The appeal is, therefore, in our opinion untenable, and we dismiss it with costs.

Appeal dismissed.

---

* 1924 ALLAHABAD 711.

MUKERJI AND DALAL, JJ.

Lala Jwala Prasad and others.....Defdts.—Applts,

v.

Hoti Lal..... .....Plff.—Respondent.

F. A. No. 91 of 1922 decided on 1st April, 1924, from decree of the Subordinate Judge of Aligarh dated the 21st December, 1921.

Interest Act—No interest is allowable unless there is contract or notice in writing or any law.

The Interest Act provides that interest would be payable if debts or sums are due by virtue of some written instrument or, if payable otherwise than from the time when demand of payment shall have been made in writing so as such demand shall give notice to the debtor that interest shall be claimed from the date of such demand until the term of payment. Interest depends on contract express or implied or on some rule of law allowing it. If there is no contract, allowance of interest can be made only as a matter of law. 17 A. L. J. 169; 17 A. L. J. 177; 40 All. 497, Foll. [P. 713, Col. 1.]

Gulzari Lal and K. N. Katju for the Appellants.

Panna Lal for the Respondent.

Dalal, J.:—That is an appeal from a final decree passed by the learned Subordinate Judge of Aligarh in a suit for accounts. The grounds of appeal are:—

(1) That the amount of profits alleged to have been recovered by the defendant between the years 1904 to 1907 as fixed by the Commissioner who took accounts was excessive.

(2) That the defendant has wrongly refused credit for three items:—(a) of Rs. 2,791, (b) of Rs. 1,505, and (c) of Rs. 608-10.

(3) That the defendant was not liable to pay interest on the taking of accounts and he was wrongly saddled by the lower court with the payment thereof.

The ground of appeal No. 5 was abandoned.

As regards the calculaion of profits of the two markets which it is now decided was received by the defendant we think that the Commissioner has correctly assessed them. The Commissioner did not trust for valid reasons the account books produced by the defendant and his opinion was that the safest way of assessing the income for the period from 1st January, 1904 to 30th April, 1907 was to apply the average of eight months from May to December, 1907. This is as good a way of valuing the profits as any other that may be suggested. We, therefore, affirm the finding of the lower court on this point.

The item of Rs. 2,791 is made up of several items, a detail of which will be found at page 10 of part 3 of the printed book under the heading Statement C. As regards only one item of Rs. 600 there is evidence that this money was paid by the defendant on behalf of the plaintiff, when the plaintiff was a minor, to one Jwala Prasad son of Kharag Sen. There was a partnership firm of which this Jwala Prasad and the plaintiff were partners and, on dissolution of that partnership, certain sums were paid to this Jwala Prasad who undertook the liability to pay himself the debts due from the firm. The agreement executed by Jwala Prasad is Ex. K. It is stated in the agreement that he received Rs. 600 from Mihin Lal, father of the defendant. The defendant is entitled to set off this sum of Rs. 600. The other items the defendant claims on the basis of entries in his account books which have been found to be untrustworthy. There is, further, no other evidence to render the plaintiff liable and so under Section 34 of the Evidence Act the entries in the account books by themselves are not sufficient to saddle the plaintiff with the liability for the payment of these sums.

Coming next to the item of Rs. 1,505 we find it made up of different items of Statement D at page 10 of part 3 of the printed book. As regards a sum of Rs. 200 a receipt alleged to have been given by Kalyan Das (Ex. N) was put in by the defendant but it has not been proved in the ordinary way. There is no proof of the payment by defendant of any of the many items making up the sum of Rs. 1,505. We therefore disallow this claim of the defendant.

The payment of the third item by the defendant on behalf of the plaintiff, when the plaintiff was a minor, is proved. The agreement referred to above declares that Jwala Prased received Rs. 500 from Mt. Sukha, widow of Tota Ram. The evidence of Makhan Dal a *munim* of the firm of Nathu Ram Jwala Prasad has proved that Mt. Sukha obtained this money by pledging her ornaments with that firm and that subsequently the defendant paid this money, got the ornaments redeemed and returned them to Mt. Sukha. It was pointed out by the respondent's learned Counsel that Jwala Prasad, defendant, was one of the partners of this firm. This fact is not sufficient to make us distrust the testimony of Makhan Lal. We are satisfied that the sum really came out of the pocket of the defendant. He is entitled to credit for this sum.

Finally there remains the question of interest. In two judgments of a Bench of this Court of 1918 it was pointed out that the only grounds upon which interest can be claimed upon a sum of money is when the liability for the sum established are to be found either in Section 73 of the Contract

Act, illustration (n) or in the Interest Act, No. 32 of 1839. In the present case interest is not recoverable on either ground. Obviously there was no contract between the parties for the payment of interest. The Interest Act provides that interest would be payable if debts or sums are due by virtue of some written instrument or, if payable otherwise, then from the time when demand of payment shall have been made in writing so as such demand shall give notice to the debtor that interest shall be claimed from the date of such demand until the term of payment, *Lalman* v. *Chintamani* (1). The principle was affirmed by the same Bench in *Nathu* v. *Ghansham Singh* (2). The judgment in the second case was delivered by the other learned Judge constituting the Bench. At page 187 of the Report the same principle was affirmed. There is a Privy Council authority which has not been cited in either of these rulings. There was such authority for the opinion of the Bench of this court. In *Kalyan Das* v. *Magbus Ahmad* (3) their Lordships of the Privy Council observed at page 504 of the report that interest depends on contract, express or implied, or on some rule of law allowing it. If there is no contract allowance of interest can be made only as a matter of law. In the present case the money in the hands of the defendant was not demanded till 6th January, 1920 and there was no contract for the payment of interest. It was pointed out that the plaintiff was a minor. If it be argued that for that reason he could not make a demand, the reply would be that the defendant would not know to whom to make the payment upon a sufficient receipt during the infancy of the plaintiff. We think that the plaintiff is not entitled to receive any interest up to 6th January, 1920.

In the result we allow the appeal for the principal sum of Rs. 1,208-10-0 and direct that interest at 6 per cent per annum shall be charged from the 6th January, 1920, till the date of realisation. The lower court granted a decree for Rs. 12,300-4-7½, so that decree shall be altered to one of principal amount of Rs. 11,091-10-7½ and interest on it shall run from 6th January, 1920, till the date of realisation. In the decree the plaintiff shall be allowed a further sum of principal of Rs. 1,194-0-0 with interest at 6 per cent per annum from the date of the final decree of the lower court till the date of realisation. These are the only sums decreed to the plaintiff. Parties shall receive and pay costs of both courts according to their success and failure. Costs in this court will include fees on the higher scale.

Appeal allowed.

(1) (1919) 41 All. 254 = 49 I.C. 696 = 17 A.L.J. 169.
(2) (1919) 41 All. 259 = 49 I.C. 737 = 17 A.L.J. 177.
(3) 40 All. 497.

1924 ALLAHABAD 713.

MEARS, C. J. AND PIGGOTT, J.

Shaikh Abdur Rashid.....Defendant—Appellant.

v.

Mt. Qudrat-un-nissa Bibi.....Plaintiff—Respondent.

L. P. A. No. 110 of 1922 decided on 7th March, 1924 from the judgment of Justice Kanhaiya Lal dated the 8th June, 1922.

Civil P. C., O. 2, R. 2.—First suit against minor and her father for ejectment does not bar suit for dower debt against minor's father and minor wherein joint decree is claimed along with minor, though some facts to be proved in both cases are the same.

One M died on 28-1-1914. Her heirs under the Muhammadan law were her husband R, her sister Q and a daughter K at that time a minor. On 10-11-1914 Musammat Q. filed a suit in which she impleaded R and K as defendants. The suit was one for recovery of possession of the one fourth share in certain specified zamindari property which had come to the plaintiff by inheritance on the death of her sister. The allegation made in the plaint was that the defendant R had improperly taken possession of the whole of the zamindari property of the deceased, and that he was purporting to do this in the name and in the interests of his minor daughter K. In the next suit the allegations were that the dower debt due from R to Musammat A was Rs. 10,000 which was unpaid on the date of A's death. Her husband being himself an heir to the estate to the extent of one-fourth, it was assumed that one-fourth of this debt had been automatically discharged, inasmuch as the husband had himself inherited the right to receive the same. The plaintiff had obtained a succession certificate in respect of the balance of Rs. 7,500, which then constituted the whole of the debt due to the estate of the deceased. She sued to recover one-third of this, or Rs. 2,500, for her own benefit and the remainder of Rs. 5,000 for benefit of the defendant K whom she described (somewhat loosely) as being "in collusion" with the first defendant in this matter. *Held*, the expression 'cause of action' means and includes every fact which it would be necessary for the plaintiff to prove if traversed by the defendant in order to support his right to the judgment of the court. The cause of action against K in the second suit, that is to say, the fact which rendered it necessary for her name to appear on the record as a defendant, was that, being a minor girl living with her

father, who was the debtor against whom the suit was brought, she was not in a position to join with Musammat Q in preferring any claim against R and therefore O. 2 R. 2 did not apply. 8 Mad. 520; 21 Cal. 157, Foll. [P. 715, Col. 1 & 2.]

K. N, Katju for the Appellant.

Iqbal Ahmad and Haider Medhi for the Respondent.

Piggott, J.:—This is an appeal under the Letters Patent in a case in which two learned Judges of this court have differed on a question of law raised before them in a second appeal. As might be expected the question is one of some delicacy, but in its essence it is simple enough. The facts are as follows :—

One Musammat Ashraf-un-nissa died on the 28th of January, 1914. Her heirs under the Muhammadan law were her husband Abdul Rashid, her sister Qudrat-un-nissa and a daughter Kaniz Fatma, at that time a minor.

On the 10th of November, 1914, Musammat Qudrat-un-nissa filed a suit in which she impleaded Abdul Rashid and Kaniz Fatma as defendants. The suit was one for recovery of possession of the one-fourth share in certain specified zemindari property which had come to the plaintiff by inheritance on the death of her sister. The allegation made n the plaint was that the defendant Abdul Rashid had improperly taken possession of the whole of the zemindari property of the deceased, and that he was purporting to do this in the name and in the interests of his minor daughter Kaniz Fatma. This last allegation was supported by the fact that mutation of names in the Revenue Court had been effected at the instance of Abdul Rashid in the name of Kaniz Fatma.

On the 30th of January, 1917, the suit was brought, out of which the present appeal has arisen. Musammat Qudrat-un-nissa was again the plaintiff and the defendants were the same, namely Abdul Rashid and Kaniz Fatma. In this plaint the allegations are that the dower debt due from Abdul Rashid to Musammat Ashraf-un-nissa was Rs. 10,000 which was unpaid on the date of Ashraf-un-nissa's death. Her husband being himself an heir to the estate to the extent of one-fourth, it was assumed that one-fourth of this debt had been automatically discharged, inasmuch as the husband had himself inherited the right to receive the same. The plaintiff had obtained a succession certificate in respect of the balance of Rs. 7,500 which then constituted the whole of the debt due to the estate of the deceased. She sued to rccover one-third of this, or Rs. 2,500 for her own benefit and the remainder of Rs. 5,000 for the benefit of the defendant Kaniz Fatma, whom she described (somewhat loosely) as being "in collusion" with the first defendant in this matter. The fact, of course, was that Kaniz Fatma as a minor, living under the guardianship of her father, was not in a position to prefer any claim in respect of her own share in this dower debt. Kaniz Fatma died while this suit was pending and, after making necessary amendments in the plaint, Qudrat-un-nissa obtained a decree for Rs. 2,500 due to her from the defendant Abdul Rashid alone. The suit was resisted on various grounds, one of the pleas taken being that the dower debt was not Rs. 10,000 but Rs. 160 only. The suit was decreed by the trial court as stated above and an appeal by Abdul Rashid was eventually dismissed by the District Judge, after most unfortunate delay, due to the fact that the defendant had wrongly filed the appeal in the first instance in this court. Upon a second appeal the learned Judges of this court have differed as already noted upon the question of law. The result of their difference was that Abdul Rashid's appeal was again dismissed.

The question of law is as follows :—It was contended throughout that the present suit was barred by the provisions of Order 2 Rule 2 of the Code of Civil Procedure, on the ground that Musammat Qudrat-un-nissa was under an obligation by law to have claimed in the previous suit, instituted by her on the 10th November, 1914, the relief which she sought in the present suit,

In considering this point we are bound to treat the subsequent death of the girl Kaniz Fatma as a mere accident which has no bearing on the determination of the question before us. That question refers us back to the 10th of November, 1914, the date of the institution of the first suit. In substance two more or less distinct points have been argued before us. On the one hand it has been sought to ignore or put on one side, for the sake of argument at any rate, the position of Kaniz Fatma as a defendant in both suits, and to discuss the question only in so far as it affects the defendant Abdul Rashid. The appeal cannot really be decided on this basis and it is not incumbent on us to discuss the purely hypothetical question thus raised at

any length. The learned Judge of this Court who decided in favour of Musammat Qudrat-un-nissa, has referred to an important decision by their Lordships of the Privy Council, *Pittapur Raja* v. *Suriya Rau* (1) which comes very near to determining by authority the question now before us. We have also been referred to a number of other decided cases, the most important of which seems to be that of *Mahomed Reasat Ali* v. *Hasin Banu* (2). The correct definition of the expression 'cause of action,' which has been quoted in numerous decided cases, is that these words include every fact which it would be necessary for the plaintiff to prove if traversed by the defendant in order to support his right to the judgment of the court. On the strength of this definition it is contended that in the claim for recovery of possession over a share of the zemindari property the plaintiff's complete cause of action consisted, not only of the fact that she was an heir to one-fourth of the estate of the deceased lady under the Muhammadan law, plus the fact that the property claimed had formed part of that estate, but also of the further fact that Abdul Rashid was wrongfully keeping her out of possession over the same. The Madras case was very similar; but it so happened thar the plaintiff in that case had obtained possession peaceably over the immoveable property claimed, after the death of the person from whom she had inherited, and that her cause of action was based upon a subsequent ouster by another of the heirs who was, as in the present case, the husband of the deceased. We think it sufficient to say that we doubt whether a valid distinction can be drawn between that case and the one before us, even if we limit our consideration to the position of the defendant Abdul Rashid.

When, however, we pass on to consider the position of the defendant Kaniz Fatma the case seems much clearer. She was beyond question a necessary party to the first suit. Her father Abdul Rashid was sheltering himself behind her and by obtaining mutation of names in the Revenue Court in her favour, he was putting her forward, and not himself, as the rival claimant to the property which Musammat Qudrat-un-nissa was seeking to recover. In order, therefore, to obtain in that suit the relief which she was asking from the court, Musammat Qudrat-un-nissa had to implead both Abdul Rashid and Kaniz Fatma. In the second suit, for recovery of the outstanding balance of the dower debt Musammat Kaniz Fatma again appeared in the array of defendants, but the cause of action as against her was wholly different. The suit was actually being brought in part for her benefit. The cause of action against her, that is to say, the fact which rendered it necessary for her name to appear on the record as a defendant, was that, being a minor girl living with her father, who was the debtor against whom the suit was brought, she was not in a position to join with Musammat Qudrat-un-nissa in preferring any claim against Abdul Rashid. It seems to us, therefore, that the learned Judge of this court was right when he affirmed the decision pronounced by the two courts below and overruled the plea based upon the provisions of Order 2 Rule 2 of the Code of Civil Procedure.

We dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

(1) (1885) 8 Mad. 520=12 I. A. 116 (P. C.).
(2) (1894) 21 Cal. 157=20 I. A. 155 (P. C.).

---

* 1924 ALLAHABAD 715.

MEARS, C. J. AND PIGGOTT, J.

Hanuman Prasad and another.....Plffs.—Appellants.

v.

Raghunath Prasad.....Defdt.—Respondent.

L. P. A. No. 129 of 1922 decided on 7th March, 1924, from the judgment of Justice Gokul Prasad dated the 14th July, 1922.

Highway—Private right of access to highway from adjoining property if infringed causes special damage to justify action.

A right of immediate access from private property to public highway is recognised in law as a private right distinct from the rights of the owner of that property to use the highway itself as one of the public. Although the plaintiffs must show a particular damage it is clear that a private right of this kind has been recognised as being particular damage in the case of individual members who had enjoyed access to the highway from adjoining property. [P. 716 Cols. 1 and 2.]

Benoy Kumar Mukerji and P. L. Banerji for the Appellants.

K. N. Katju for the Respondent.

Mears, C. J.:—This appeal arises out of a suit in which the plaintiffs asked that a certain portion of a recently constructed building which had been put up by the defendant might be removed inasmuch as it

was interfering with a right of way which the plaintiffs had in respect of the houses they occupy. Shortly their case was that for a period of over 40 years they had been accustomed to travel by foot, with ekkas and carts over what is marked upon the map before us as "public way BBBB." They traced the origin of this public way by saying that at one remote period round about 1864 the land was covered with houses which at some date not specifically stated fell down and that for a very long period of time there were marks of where the houses had been and portions of the ruined houses, that there arose a practice of passing over the site of the ruined houses and that for a period longer than is necessary to obtain a prescriptive right ekkas and carts and foot passengers had uniformly, openly and without interruption passed to the houses lying to the east along this defined route. Recently the defendant having purchased the land has erected buildings upon it. The particular building which is said to interfere with the right of way is the smaller southern rectangular building. According to the map it completely blocks out the old route and a new road appears to the south and is indicated by letters YY, but the plaintiffs' complaint is that YY is only 4' 11" in width whereas the previous public way was more than 6' 7" wide. The lower appellate court accepted the contention of the plaintiffs that the building of the smaller southern rectangular portion of the house was an infringement of the right of way which they had acquired and though the pleadings indicated a private right of way the discussion in the courts seemed to have opened out until this right of way was being talked of as a public right of way. To our mind the matter is not one of great practical importance because what the plaintiffs are complaining of is the particular damage which they now suffer inasmuch as whereas formerly they were able to drive ekkas and carts right up to their houses, they are now compelled to leave those ekkas and carts some 400 or more yards away from their house. It has been contended by Dr. Katju that this action is not competent to be brought by the plaintiffs because they have not suffered a particular damage over and above that which other people have suffered; but that is not quite a complete statement of the law because, although the plaintiffs must show a particular damage it is clear that a private right of this kind has been recognised as being particular damage in the case of individual members who had enjoyed access to the highway from adjoining property, and if authority were needed for that passage it is to be found in the case *Lyon* v. *Wardens of Fishmongers Co., H. L.* (1). Lord Selborne said after referring to several authorities:— "These authorities recognised such a right of immediate access from private property to public highway as a private right distinct from the rights of the owner of that property to use the highway itself as one of the public". Therefore the plaintiffs in this case can be regarded in two capacities, one as ordinary members of the public in relation to this road and secondly as having a particular right in it by virtue of the long user. In our opinion the decision of the learned Judge of this court cannot stand. It is certainly not in conformity with the case of *Mahant Ram Chandra* v. *Joti Prasad* (2), nor with the case of *Bhawan Singh* v. *Narottam Singh* (3) and the decision of this court in the unreported case of *Mahpal Singh* v. *Manwa and Jankia.*(4). This is a case in which we set aside the judgment of the learned Judge of this court and restore that of the lower appellate court, but we stay execution for three months if within that period the defendant is able to provide a way by deepening YY to the south which will permit of an uninterrupted access. We think that this is a case in which the defendant should confer with the Municipality and if the defendant can within three months produce before us an alternative scheme which will do away with the necessity of cutting their smaller building in half as will be the consequence of the order of the lower appellate court we will vary our order by embodying such scheme in our decree. In our opinion all that would be necessary would be for the defendant to obtain the consent of the Municipality to a passage 6' 7" passing round the southern part of the smaller building and proceeding northway until it joins the public way BBBB. We have very roughly in blacklead pencil indicated the sort of pathway that we mean but the object of the defendant's obtaining the help of the Municipality is that there may not hereafter come forward some owner of land lying to the eastward of the smaller

(1) 46 L. J. Ch. Div. 69.
(2) (1911) 33 All. 287=8 I. C. 808=8 A. L. J. 19.
(3) (1909) 31 All. 444=21 I. C. 365=6 A.L.J. 499.
(4) L. P. A. No. 35 of 1914 decided on 7-11-1914.

building who will contend that the road is an invasion of his private right. On this point we must have proper assurances. Our decision, therefore, to-day is that we restore the judgment of the lower appellate court subject to our embodying in the decree an alternative arrangement within three months if such alternative arrangement can be arrived at. The period of three months is not to be extended unless for good cause shown. The question of costs will be decided later.

Appeal allowed.

1924 ALLAHABAD 717.

GOKUL PRASAD, J.

Lalsa Rai and others...Plaintiffs—Appellants.

v.

Udit Rai and another.....Defendants and

Ram Sumer Rai.....Plaintiff—Respondents.

S. A. No. 146 of 1922 decided on 7th May, 1923 from the Sub-Judge, Azamgarh, dated 17th December, 1921.

Civil P. C., S. 2 (11)—Intermeddler—Decree against—Binding nature on the true heirs.

When a person intermeddles with the property of the deceased he is a legal representative of the deceased for the purposes of procedure to the extent of the property with which he has intermeddled, but there is no principle of law which makes him the representative of the deceased so far as succession to the property of the deceased is concerned. The definition of "legal representative" in the Code of Civil Procedure is only for the purposes of procedure in instituting and defending suits. Any definition for the purposes of adjective law cannot alter the rule of substantive law and the mere fact that an intermeddler is joined as a party to the suit for recovery of possession cannot make a decree in that suit in any way binding on the real heir who is not a party to that suit and who later on gets a decree against the intermeddler declaring his superior right. [P. 718 Col. 1].

Harnandan Prasad for the Appellants.

P. L. Banerji for the Respondents.

Judgment:—This is a plaintiffs' appeal arising out of a suit brought under the following circumstances:—It appears that one Ugrah Rai was the owner of certain property. He mortgaged it to the defendant first set. The defendant first set brought a suit for sale on his mortgage and impleaded as defendant Musammat Bhagwanta, the widow of a pre-deceased son of Ugrah Rai, who was found to be in possession of the property. The matter was compromised between the two sets of defendants and the mortgagee decree-holder has now put his decree in execution and asked for sale of the property. The plaintiffs alleged (1) that this decree was not binding in them as they being the next reversioners to the estate of Ugrah Rai were the owners of the property and were not made a party to the decree and (2) that under the compromise decree the mortgagee applied for sale of more property than was mortgaged to him. They therefore sued for a declaration that they were the reversioners and as such owners of the property left by Ugrah Rai and that the defendant No. 1 the mortgagee has no right to execute the decree he obtained against the defendant second set, against the property of Ugrah Rai. The defence of the mortgagee was (1) that the plaintiffs were not the reversioners to the estate of Ugrah Rai, (2) that he was the mortgagee under a mortgage by Ugrah Rai and wanted his money and (3) that Ugrah Rai having died more than twelve years ago the defendant No. 2 who had been in adverse proprietary possession had acquired a full title to the property and was competent to enter into the compromise.

The first court came to the conclusion that the plaintiffs were the heirs of Ugrah Rai and that Musammat Bhagwanta had not perfected her title by adverse possession because she had not been in possession for 12 years before the plaintiffs got a decree declaring their title against her. It also found that the decree obtained by the mortgagee on a compromise with Musammat Bhagwanta was not a fraudulent and collusive decree. It further found that the mortgagee should have obtained a decree against the plaintiffs who were the rightful owners of the property, and therefore the plaintiffs were not bound by the decree and the property in suit was not liable to sale in execution thereof. On these findings it decreed the plaintiffs' suit. The defendant mortgagee went up in appeal and the learned Judge of the lower appellate court has decreed the appeal and dismissed the plaintiffs' suit. He has come to the conclusion in accordance with the court of first instance that the plaintiffs have proved that they are the next heirs of Ugrah Rai and that Musammat Bhagwanta was not the heir of Ugrah Rai. He has also found that Musammat Bhagwanta was in possession for 8 years only when the plaintiffs sued her and obtained a decree for Ugrah Rai's property against her. He also agreed with the Munsiff in finding that the decree obtained by the mortgagee against Musammat Bhagwanta for sale of the property was not a fraudulent

and collusive decree, but he says that Musammat Bhagwanta was the legal representative of Ugrah Rai and intermeddled with his estate (see Section 2 Clause (II) of the Code of Civil Procedure) and therefore by some process of reasoning he comes to the conclusion that the decree being against the legal representative of Ugrah Rai was binding on the plaintiffs. It is quite true that when a person intermeddles with the property of the deceased he is a legal representative of the deceased for the purposes of procedure to the extent of the property with which he has intermeddled, but I do not see any principle of law which makes him the representative of the deceased so far as suucession to the property of the deceased is concerned. The definition of 'legal representative' in the Code of Civil Procedure is only for the purposes of procedure in instituting and defending suits. Any definition for the purposes of adjective law cannot alter the rule of substantive law and it is not easy to understand how the mere fact that an intermeddler is joined as a party to the suit for recovery of possession can make a decree in that suit in any way binding on the real heir who is not a party to that suit and who later on gets a decree against the intermeddler declaring his superior right. I see no reason in law or justice under which the present plaintiffs can be held to be bound by the compromise decree entered into between the mortgagee and Musammat Bhagwanta Kuar. That decree could in no sense be binding on the plaintiffs who have already got a decree declaring their superior title as against Musammat Bhagwanta. On the findings arrived at by the lower appellate court the plaintiffs' claim should have been decreed and the judgment of the court of first instance should not have been interfered with. I therefore allow the appeal, set aside the decree of the lower appellate court and restore that of the Munsiff with costs in all courts including in this court fees on the higher scale.

Appeal allowed.

---

* 1924 ALLAHABAD 718.

MUKERJI AND DALAL, JJ.

Tara Chand.....Appellant.

v.

Mt. Champa.....Respondent.

E. F. A. No. 150 of 1922 decided on 12th May, 1924 from the decree of the Subordinate Judge of Meerut, dated the 18th March, 1922.

Civil P. C., S. 144—Court has inherent power of restitution—Civil P. C., S. 151.

Jurisdiction as to restitution does not arise merely under Section 144. It is inherent in the general jurisdiction of the court to act rightly and fairly, according to the circumstances, towards all parties concerned. 1922 P. C. 269; 1923 All. 394 (F. B.) Foll. [P. 719, Col 1.]

K. N. Katju and S. B. Johri for the Appellant.

Nehal Chand for the Respondent.

Dalal, J.:—This is an appeal by a judgment-debtor Lala Tara Chand, from the dismissal of his application for restitution under Section 144 of the Civil Procedure Code. He was made a party defendant to a partition suit while he was a minor. He was then over 18 years of age, but under 21; and was therefore not a major, being a ward of the Civil Court. On his being brought on the record, he entered into contest after appointing a pleader, and decrees (preliminary and final) were passed against him. He filed two appeals to this court and his appeals were dismissed. Subsequently, the plaintiff of the suit recovered her costs of the first court and this court. The present application was for refund of the costs. The preliminary and final decrees in the partition suit have been declared by this court to-day to be null and void.

The learned Judge of the first court refused to order restitution and hence Tara Chand has appealed. It is argued here that the principle of Section 144 applies, though the decrees themselves were not varied or reversed in appeal. The same words, varied and reversed, are used in Sections 98 and 99 of the Code with reference to an appeal. It is, therefore, difficult to believe that they are used in this section with a different meaning. At the same time, we are aware of the ruling of the Madras High Court that the provisions of this section may be extended to cases where a decree is set aside as null and void in a separate suit (*40 Mad.* 299). Whether the provisions apply or not, it is clear that this court has jurisdiction under the provisions of Section 151 to exercise its discretion and make such order as may be necessary for the ends of justice. Their Lordships observed in *Jai Barham v. Kedar Nath Marwari* (1) at page 493, "Nor indeed does

---

(1) 1922 P. C. 269=2 Pat. 10=49 I. A 351=21 A. L. J. 490=4 P. L. T. 61=69 I. C. 278=1923 M.W.N. 368=32 M.L.T. 10=27 C.W.N. 582=18 M.L.W. 802=44 M.L.J. 735=25 Bom. L.R. 643=4 L. R. P. C. 117 (P. C.)

this duty or jurisdiction arise merely under the said section (*i. e.* Section 144). It is inherent in the general jurisdiction of the court to act rightly and fairly, according to the circumstances, towards all parties involved. A Full Bench of this court acted in accordance with these principles in *Bindeshri Prasad v. Badal Singh* (2).

The question, therefore, is whether in this present case it will be necessary for the ends of justice to restore the costs paid by Tara Chand. In our opinion, it will not be. As regards the costs in the High Court, there can be no equity in refunding those costs. Tara Chand himself did not appeal through his next friend; he appealed himself. It was not the fault of the respondent, Musammat Champa, that he did not appeal through his next friend. As regards the costs of the first court also, we do not think it will be equitable to relieve him of the costs, which he was ordered to pay. He himself must have known that he was a minor. He concealed that fact and entered into litigation. He was over 18 years at that time and was a minor, because the age of majority was put off by a guardian being appointed to his property and person by the District Court. There is evidence that at that time Tara Chand did all his business himself without intervention of his guardian, who was his natural mother. Tara Chand was adopted out of the family and had ceased to do anything with his natural mother. Only when he brought the suit for cancellation of the decrees passed in the partition suit, he sued through his guardian. These are circumstances which do not entitle him to the refund of the costs recovered from him.

We dismiss this appeal with costs here on the higher scale.

Appeal dismissed.

(2) 1923 All. 394=45 All. 369=21 A. L. J. 228=4 L. R. A. Civ. 161 (F. B.)

1924 ALLAHABAD 719.

WALSH, A. C. J. AND PIGGOTT, J.

Lachman Pande and another.....Plaintiffs—Appelts.

v.

Tribeni Sahu.....Defendant—Respdt.

Letters Patent Appeal No. 160 of 1922 decided on 2nd April, 1924 from the judgment of Justice Gokal Prasad dated the 19th July, 1922.

Mortgagee—Lease—Mortgagee leasing mortgaged property and not suing to recover it back is still not dispossessed mortgagee.

Where the mortgagee, having been unable or unwilling to obtain possession by occupation, himself leased the mortgaged property to the mortgagor for a term of 7 years and during those 7 years remained in possession by the receipt of the rents and where the mortgagee has taken no active steps to turn him out. *Held* the ordinary presumption was that the mortgagor has remained in possession with the mortgagee's consent without an express agreement, and that the mortgagee was not a dispossessed mortgagee. [P. 719 Col. 2.]

(b) *Agra Tenancy Act*, S. 201 (3)—*Usufructuary mortgagee of mortgagor lambardar can sue for profits.*

The usufructuary mortgagee of a co-sharer in possession of the share is entitled to maintain a suit against the *lambardar* for profits. The fact that Lambardar happens also to be the mortgagor of the plaintiffs does not in any way affect the maintainability of the suit. [P. 720 Col. 1.]

(c) *Co-sharer—Adverse possession—Mere non-payment of profits by Lambardar is not ouster.*

Mere non-payment by a *lambardar* to any co-sharer of the said co-sharer's property *quota* of the annual divisible profits of the *mahal* does not in the absence of evidence to the contrary constitute an ouster of the said co-sharer from possession. [P. 720 Col. 1.]

N. Upadhiya for the Appellants.

Kumudu Prasad for the Respondent.

Walsh, A.C.J.:—We find ourselves unable to agree with the view taken by the learned Judge of this court who heard this appeal. I desire merely to say this. The whole of his judgment is based upon the legal hypothesis that the mortgagee, the plaintiff, is a dispossessed mortgagee. The facts to which this expression is applied are that the mortgagee, having been unable or unwilling—it really does not matter which—to obtain possession by occupation, himself leased the mortg ged property to the mortgagor for a term of 7 years and during those 7 years remained in possession by the receipt of the rents. Since those 7 years expired the mortgagor has continued to remain in possession. The mortgagee has taken no active steps to turn him out. The ordinary presumption is that the mortgagor has remained in possession with the mortgagee's consent without an express agreement. All I can say is I find myself entirely unable to accept the description of "dispossessed mortgagee" applied to a mortgagee who is in the position which I have just described. He has not been dispossessed in any shape or form. The possession of the mortgagor under the lease was certainly lawful and

with the consent of the mortgagee. It has continued and nothing appears to the contrary. If it were put as a finding of fact I should hold that there was no evidence on which anybody could find that this mortgagee had been dispossessed. The whole of the judgment appears to me to be based upon this fallacy and it is sufficient for my purpose though there are other reasons for disagreeing with it to compel us to allow the appeal and restore the decree of the lower appellate court with the usual consequences, that is to say, the defendant must pay the costs of this appeal and of the appeal to the learned Judge of this court and the decree of the lower appellate court will be restored.

Piggott, J.:—I agree for the reasons given and also because of the provisions of Section 201 (3) of the Tenancy Act. The usufructuary mortgagee of a co-sharer in possession of the share is entitled to maintain a suit against the *lambardar* for profits. The plaintiffs in this case are recorded in the village papers as being mortgagees in possession of a certain share. The defendant is the *lambardar* of the *mahal* to which that share appertains. The fact that he happens also to be the mortgagor of the plaintiffs does not in my opinion in any way affect the maintainability of the present suit. The court was bound to presume that the plaintiffs had the right recorded in their favour in the village papers on the strength of which they instituted the present suit, namely the right to recover from the *lambardar* the rateable share due on account of profits of a share of 3 annas 1 pie of which they stood recorded as the mortgagees in possession. In the case quoted to the learned Judge of this court and relied upon by him—a case which has never for obvious reasons found its way into the regular Law Reports—we find on going further into the matter that the question of the unrebuttable presumption raised by Section 201 (3) aforesaid was not only not raised before this court but was expressly excluded from consideration when the matter was carried further by an appeal under the Letters Patent. I may add also in connection with what has been said by the learned Acting Chief Justice that it being well settled law that mere non-payment by a *lambardar* to any co-sharer of the said co-sharer's proper *quota* of the annual divisible profits of the *mahal*, does not in the absence of evidence to the contrary constitute an ouster of the said co-sharer from possession, I do not see why a different principle should be applied to the case of a usufructuary mortgagee who happens to have taken his mortgage from the particular co-sharer who is filling at the time the office of the *lambardar*. I agree with the order proposed.

By the Court:—The order of the court is that the appeal is allowed and the decree of the lower appellate court restored. The defendant must pay the costs of this appeal and of the appeal to the Judge of this court.

Appeal allowed.

1924 ALLAHABAD 720.

MUKERJI, J.

Hira Lal.....Plff.—Appellant.

v.

Hoti Lal.....Defdt.—Respondent.

S. A. No. 193 of 1922 decided on 17th March, 1924 from the decree of the District Judge of Aligarh, dated the 17th November, 1921.

(a) *Agra Tenancy Act—Suit for rent.*

It is not open to a landholder to sue a tenant in the same suit in respect of different holdings. [P. 721 Col. 1.]

(b) *Civil P. C., O. 2 R. 6—Does not apply to rent suits under the Agra Tenancy Act.*

The rule of Civil Procedure Code as to the joinder of causes of action does not apply to suits for rent under the Tenancy Act. Where it is not open to the plaintiff to combine separate causes of action in one suit no question of an order by a court for separate trials of different causes of action can arise. [P. 721 Col. 1.]

Sankar Saran and Panna Lal for the Appellant.

The Respondent was not represented.

Judgment:—In this appeal the respondent is not represented. The appellant was the plaintiff in the court of first instance. He brought a suit for the recovery of arrears of rent against the respondent for a period of three years, namely *Rabi* of 1324 Fasli, complete 1325 and 1326 Faslis and *Kharif* 1327 Fasli. He showed in his claim that his claim in respect of 1324 Fasli was for a holding of 17 bighas 17 biswas. In 1325 Fasli, it was for a holding of 33 bighas 12 biswas. In 1326 Fasli, it was for a holding of 33 bighas 12 biswas and in 1327 Fasli, it was for a holding of 17 bighas 17 biswas. The rent alleged varied in different years. The defendant contended in his written statement that it was not open to the plaintiff to join a claim for occupancy and non-occupancy holdings, that is to say, he could not combine suits in respect of different engagements. This plea found favour with both the courts below.

The court of first instance dismissed the suit in *toto* but the learned Judge gave a decree for the *Rabi* of 1324 Fasli after deduction of what had been admittedly paid by the defendant for that period.

In second appeal it was contended before a learned Judge of this court that the view taken by the courts below was erroneous. The learned Judge before whom the appeal came on for hearing remitted three issues enquiring whether the areas of 17 bighas 17 biswas and the larger area were held under the same engagement or different engagements. The findings returned were that there was a holding of 17 bighas 17 biswas and there was another holding for some additional land in the years 1325 and 1326 Faslis.

In the case of *Jagannath Prasad* v. *Tore* (1) a Division Bench of this court consisting of two Judges held that it was not open to a landholder to sue a tenant in the same suit in respect of different holdings. It was laid down in that case very distinctly that the Tenancy Act contemplated that there should be different suits in respect of different holdings. That ruling still holds good and has not been dissented from so far as I am aware. It is quite clear that in view of that ruling this suit of the plaintiff was not maintainable.

I am now asked to permit the plaintiff to amend the plaint and thereby to withdraw the claim which related to the additional lands in two years namely 1325 and 1326 Faslis. The ruling quoted above was quoted in the judgment of the learned Assistant Collector, but in the teeth of this ruling the appellant filed his appeal in the lower court and in this court, without ever asking for permission to amend his plaint. It has been argued before me that it was the duty of the court to order a separate trial in cases where different causes of action had been joined and Order 2 Rule 6 of the Civil Procedure Code has been relied upon. That rule of law applies only when it is open to a plaintiff to combine several causes of action in one suit. In the ruling quoted, it has been distinctly laid down that the rule of Civil Procedure Code as to the joinder of causes of action does not apply to suits for rent under the Tenancy Act.

It follows that it was not open to the plaintiff to combine separate causes of action in one suit and as it was not permitted to the plaintiff, no question of an order by a court for separate trials of different causes of action could arise.

The result is that the appeal fails and is hereby dismissed. There is no order as to costs as the respondent is not represented.

Appeal dismissed.

(1) (1906) 29 All. 18=3 A. L. J. 610=1906 A. W. N. 253.

---

* 1924 ALLAHABAD 721.

DANIELS, J.

Sheo Den Singh.....Plaintiff—Appellant.

v.

Habhi Ullah Khan. .....Defendant—Respondent.

S. A. No. 276 of 1922 decided on 16th May, 1923 from the Addl. Dt. Judge, Gorakhpur, dated 25th November, 1921.

(a) *Hindu Law—Joint family—Antecedent debt—Pre-emption money.*

Money payable by the successful plaintiff in a pre-emption suit is not antecedent debt for the purpose of supporting an alienation of the family property. It does not follow from this that the payment of a pre-emption decree might not be binding on the family on the ground of legal necessity or benefit to the estate. A. I. R. 1923 All. 218, Foll. [P. 722 Col. 1.]

(b) *Hindu Law—Alienation—Legal necessity—Re-purchase of property.*

The re-purchase of property sold by a separated brother is not however a purpose which constitutes legal necessity under Hindu Law. [P. 722 Col. 1.]

(c) *Hindu Law—Alienation—Ratification by co-parcener.*

A transaction by the Manager can be ratified by the son so as to estop the latter from afterwards disputing it. 38 Mad. 396, Foll. [P. 722 Col. 1.]

Gulzari Lal for the Appellant.

Iqbal Ahmad for the Respondent.

Judgment.—This was a suit by the plaintiff-appellant to recover possession of property alienated by his father Jeoraj Singh under the sale deeds in the years 1913 and 1916 respectively on the ground that these were transfers without legal necessity. The suit has been decreed as regards the property covered by the first sale deed and this property is not now in dispute. It has been dismissed as regards the property covered by the second sale deed and as to this the plaintiff appeals. The dispute relates to one single item but this item is by far the largest item out of the sale consideration. The sale deed in question was for a sum of Rs. 9,565, out of this Rs. 1,562-14-0 was set off against the amount of a previous bond

executed by Jeoraj Singh on 29th July, 1913. The principal amount in this bond had been Rs. 930 and with interest it had mounted up to Rs. 1,562-14-0 at the time of sale. The main item in this bond of Rs. 930 was a sum of Rs. 800 which Jeoraj Singh had to pay in satisfaction of a pre-emption decree which he had obtained for certain property. It has been recently held by a Bench of this court, overruling a previous decision to the contrary, that money payable by the successful plaintiff in a pre-emption suit is not antecedent debt for the purpose of supporting an alienation of the family property *Chatarbhuj* v. *Govind Ram* (1). It does not follow from this that the payment of a pre-emption decree might not be binding on the family on the ground of legal necessity or benefit to the estate. The dfficulty in this case is that both the courts have found that this particular transaction was not a prudent transaction for Jeoraj Singh to have entered into; in fact the trial court described it as having brought the ruin of the family. The lower appellate court says that the transaetion was one which could not be financially successful. The learned Judge, however, seems to think that there was a sort of pious duty on Jeoraj Singh to reacquire this property because it originally belonged to two of his separate brothers. The repurchase of property sold by a separated brother is not however a purpose which constitutes legal necessity under Hindu Law. The decree, therefore, cannot be supported on this ground.

The second ground on which the learned Judge has dismissed the suit as regards this sale deed is that the transaction was subsequently ratified by the present plaintiff Sheodan Singh. Mutation was applied for on this sale deed and Sheodan Singh was examined as a witness. He had objected regarding certain other property as to which mutation was sought. With regard to the property covered by this sale deed he said explicitly he had no objection to mutation being made and further on in his statement he said that he had no objection whatever regarding the land of this sale deed.

It is not denied by the appellant that a transaction by the Manager can be ratified by the son so as to estop the latter from afterwards disputing it. *Narayana Aiyar v. Ram Aiyar*, (2) is a case in point and Travelyan's Hindu Law second edition pages 306 and 486 have also been referred to. The appellant's contention is that the plaintiff's representation did not amount to acquiescence in the transaction or create any estoppel against him. The trial court took the view that all that the plaintiff did was to consent to mutation of names and that he did not say in terms that he accepted the sale. This is a very narrow view to take. When the plaintiff stated not only that he had no objection to mutation but that he had no objection as regards the property covered by this sale deed, the purchaser would naturally understand him to mean that he accepted the transaction as binding upon him. In all probability the plaintiff at that time did so accept it. Having regard to the strong feeling which exists in Indian families against losing property which had once belonged to the family, the probability is that the father and son were alike desirous to recover the property for which they had got a pre-emption decree. But however they may be I have no doubt that the learned Judge was right in holding that this was a clear representation by the plaintiff that he accepted the sale deed as a valid transaction binding on him. It is urged that the defendant was not prejudiced by the representation. With this I cannot agree. If the defendant had not been led to believe that the plaintiff accepted the sale as a good sale he might have taken steps to give up the property and get back his purchase money and so have saved the expenses and worry of the present litigation, which has lasted for over three years. If the person entitled to avoid sale of property leads the purchaser to believe that his title is good, the purchaser is certainly prejudiced if the party making the representation is allowed to resile from it and to attack the purchaser's title after an interval of several years. I therefore agree with the court below that the plaintiff is estopped from disputing the defendant's title under this sale deed. I accordingly dismiss the appeal with costs including fees in this court on the higher scale.

Appeal dismissed.

(1) A. I. R. 1923 All. 218.

(2) (1913) 38 Mad. 396=1913 M. W. N. 588=20 I. C. 625=14 M. L. T. 89=25 M. L. J. 219.

1924 ALLAHABAD 723 (1).

KANHAIYA LAL, J.

Mohamed Taqi Husain Khan.....Piff.—Appellant.

v.

Dori and others .....Defendants-Respondents.

S. A. No. 346 of 1922 decided on 20th November, 1923, against the decree of the District Judge of Pilibhit dated the 9th December, 1921.

Landlord and Tenant—Abadi—Tenant cannot raise building on open land in abadi *without landlord's consent.*

A tenant cannot enclose and construct a house upon a plot of open land in the *abadi* without the consent of the landlord, though he may have been using it for temporary purposes for a long time. 25 I. C. 59, Foll. [P. 723 Col. 1.]

Iqbal Ahmad for the Appellant.

S. C. Das for the Respondents.

Judgment:—In this case certain issues were remitted by this court on the 21st of June, 1923. The effect of the findings on those issues is that the plaintiff is entitled to a decree for possession of the disputed land and for the removal of the construction made thereon by the defendants. The people of the village have evidently been using the land as a threshing floor for some time past. It was recorded as *Kharmangat* or threshing floor in the *Khasra* prepared at the last settlement. They had, however, no right to construct an enclosure thereon and thereby to appropriate the whole land to their exclusive use. As held in *Chatterpal* v. *Gajadhar Upadhya* (1) a tenant cannot enclose and construct a house upon a plot of open land in the *abadi* without the consent of the landlord, though he may have been using it for temporary purposes for a long time.

The appeal is, therefore, allowed and the claim of the plaintiff decreed for possession of the disputed land and for the removal of the structures built thereon by the defendants with costs here and hitherto. The defendants will be entitled to remove the materials of the construction which they have made. The right of the defendants to use the land as a threshing floor in common with the other tenants of the village will remain unaffected. The defendants will bear their own costs throughout.

Appeal allowed.

(1) 25 I. C. 59.

1924 ALLAHABAD 723 (2).

LINDSAY AND SULAIMAN, JJ.

Ganesh Singh.....Defendant—Appellant.

v.

Jai Mangal Singh and another...Plaintiffs—Respondents.

S. A. Nos. 354 and 355 of 1922 decided on 21st November, 1923 from the decree of 2nd Addl. District Judge, Gorakhpur.

Pre-emption—Wajib-ul-arz—Absence of transfer.

Absence of an actual transfer in accordance with a custom recorded in a *wajib-ul-arz* in a pre-emption does not rebut the presumption raised by the *wajib-ul-arz*. [P. 724 Col. 1 & 2.]

S. N. Sen for the Appellant.

N. Upadhiya for the Respondents.

Lindsay, J.:—These two appeals have been heard and argued together and are to be decided on one common ground. The question in both cases is whether the existence of the custom of pre-emption was established. The lower appellate court has held that the custom was established and it has given a decree for pre-emption accordingly.

It is now argued before us that the evidence upon which the learned Judge relied in his finding was not adequate to establish the existence of the custom alleged.

We may say at once that the case in many respects resembled a case which was reported in *Sarju Rai v. Bhumlot Misir* (1).

The principal piece of evidence upon which the plaintiffs took their stand was a *wajib-ul-arz* prepared in the year 1860. It is admitted before us that no *wajib-ul-arz* for the settlement of 1833 was before the court.

We start, however, with this *wajib-ul-arz* of 1860 and on the principles which govern all the decisions in matters of this kind it must be presumed that the record set forth in this *wajib-ul-arz* is a record of custom, and there can be no doubt that a custom of pre-emption is set out in the *wajib-ul-arz*. The presumption, however, may be overturned by other evidence and we have therefore to see what was the nature of the attempt made in the courts below to overthrow this presumption. Dr. Sen has taken his stand upon the the entries in the document known as the *kaifiat sherista nizamat*. That document and the other *kaifiat*, namely, the *kaifiat mahtavi* are on the record.

(1) 8 A. L. J. 947.

Now it is undoubtedly stated in the *kaifiat sherista nizamat* that up till the year 1833 the settlement of this village was made with a single person who was apparently a Raja. After that time we find that the settlement is made with a numerous body of proprietors, all Thakurs, and the Raja is treated as excluded from the settlement. He is allowed a certain *malikana* allowance as the excluded superior proprietor. From what we can gather, this arrangement has continued down to the latest date regarding which we have any evidence in this case.

It cannot, however, be properly argued from this material that no custom could possibly have come into existence prior to the year 1833 on the ground that the village was the property of a single owner. The fallacy in our opinion is the assumption that there was a single owner. Having regard to what took place at the settlement of 1833 when numerous body of co-sharers were admitted to engage for the government revenue, it seems to us highly probable, that the constitution of this village had been the same for a long period. At any rate it is more reasonable to assume this than to assume the contrary. It is stated in the *Gazetteer* of the Gorakhpur District that in a great many of these Rajas there were large numbers of *birtyas* who were treated as inferior proprietors. It seems to have been the policy in the earlier years of the British administration to deal with the superior proprietor and to take the revenue engagement from him but this policy was reversed and from the year 1833 settlement began to be made with the *birtyas* who were in fact the real owners of the villages.

The co-existence of these superior and under-proprietors ought, we think in the circumstances, to be assumed and we do not think it would be safe to argue in the present case that there was only a single proprietor up to the year 1833 and that for that reason no custom could have then come into existence. The Judge of the court below we think dealt with this part of the case on these lines.

Then there remains the further argument that it has not been shown by the plaintiff in this case that the custom could have grown up inasmuch as it is said that no evidence of transfers is forthcoming, that is to say, transfers to which the custom would attach. The same argument, however, was raised in the case which we have already cited from the 8th Volume of the A.L.J.R. and so far as we can see it was considered of no avail for the purpose of over-turning the presumption which was raised by the *wajib-ul-arz* (in that case too the *wajib-ul-arz* was of 1860.) Having regard to all the facts which have been brought before us in connection with the documentary evidence we think that the judgment of the court below ought to be affirmed and we therefore dismiss these appeals with costs including in this court fees on the higher scale. The order staying execution is discharged.

Appeals dismissed.

---

* 1924 ALLAHABAD 724.

RYVES, J.

Narain Das.....Plaintiff—Appellant.

v.

Behari Kahar.... ...Defendant—Respondent.

S. A. No. 389 of 1922 decided on 25th June, 1923 against the decree of the Second Additional District Judge of Gorakhpur, dated the 22nd December, 1921.

(a) *Easement Act, S. 15—60 years user is necessary in case of Govt. land even where private person is in occupation.*

Where the land over which the plaintiff claims his easements undoubtedly belongs to government, in order to establish his right of easement he must prove user of the kind mentioned in Section 15 of the Act for a period of at least 60 years. If he fails to establish an easement over that land he cannot establish easement against a person who is merely in occupation of that land, for a less period. A easement is a right which attaches to one piece of land or building over another piece of land and not against A or B. [P. 726 Col. 1.]

(b) *Specific Relief Act, S. 52—Discretion.*

It is within the discretion of a court to grant an injunction or not. [P. 726 Col. 1.]

(c) *Practice—Appeal—Judgment of lower court containing unnecessary passage—Only way of interference is to order expunging it.*

Where the judgment of the lower court contained a passage which on appeal was found to be unnecessary for the purpose of the case, *Held* that the only way in which High Court could interfere with it would be to order that particular sentence to be expunged from the judgment. [P. 726 Col. 1.]

K. N. Malaviya for the Appellant.

A. Sanyal for the Respondent.

Judgment:—The suit out of which this appeal arises was brought by Babu Narain Das against three defendants (1) Behari Kahar, (2) the Municipal Board of Gorakhpur and (3) the Secretary of State. The

plaintiff was the owner of a house or adjoining houses lying to the south and west of two triangular pieces of land lying between the northern and eastern walls of his house or houses and the street, painted pink in the map forming part of the decree of the trial court. The land in question was *nazul*, that is to say, belonged to Government, and that is why the Secretary of State was made a party. It had been handed over to the Municipal Board by Government for management and the Municipal Board had leased it to Behari Kahar on the 23rd of January, 1918, for a period of 30 years for building purposes. The plaintiff came into court on the allegation that Behari Kahar had made certain constructions on the northern portion of this land which interfered with his right of easement both of access and of light over that portion of the land, and with regard to the eastern portion, he alleged that Behari Kahar intended to build on that portion in such a way as to interfere with his easements of access and light and air on that side also and he therefore prayed that the buildings on the northern side be removed and that a perpetual injunction be issued restraining the defendants from building on the eastern side in a way which might interfere with plaintiff's easements.

The trial court decreed the suit against all the three defendants. All three defendants appealed and their appeals were decided by one judgment and all were decreed. The plaintiff comes here in second appeal only against the decree of the lower appellate court so far as it set aside his suit against Behari Kahar. The court below held that in order to prove his case it was necessary for the plaintiff to prove that he had enjoyed the easements which he claimed for a period of 60 years and it came to the conclusion that so far as the piece of land on the north was concerned it was not proved that that part of the house had been in existence for anything like 60 years. The learned Judge seems to have been of opinion that that portion of the plaintiff's house could have been in existence for probably about 20 years. With regard to the eastern side of the house the lower appellate court has held that that was in existence probably for over 60 years.

Having come to the conclusion that the northern portion of the plaintiff's houses that is to say the *junglas* or barred windows and that *phatak* or gate and *darwaza* or door had not been in existence for anything like 60 years and that being so the plaintiff had failed to establish the easements which he claimed over that portion of the land in dispute, because that land admittedly belong to Government and therefore under Section 15 of the Indian Easements Act the plaintiff must prove uninterrupted user for at least 60 years, and for this reason it held that the plaintiff's suit must fail. With regard to the eastern portion of the land in dispute the court held that although the plaintiff had established the easements which he claimed it was premature to ask the court to issue an injunction because although there was every probability that Behari Kahar would build on that land there was nothing to show that he would build in such a way as to interfere with the rights of the plaintiff and therefore the court dismissed this portion of the suit also, merely warning Behari Kahar that if he did build on this eastern portion in any way so as to interfere with the plaintiff's easements he would have to bear the consequences. Incidentally the learned Judge, who inspected the premises, came to the conclusion that the plaintiff had a means of ingress and egress through a door on the west side of the house and that so long as the defendant Behari did nothing to encroach on the plaintiff's convenient means of approach to this door, the plaintiff could claim nothing more. He therefore added in his judgment a note to the effect that the defendant should do nothing that would interfere with the land immediately in front of this door. This, however, was not included in the decree which formally set aside the decree of the trial court and dismissed the suit. The plaintiff comes here in second appeal and urges three points. The first is that the limitation applicable was 20 years and not 60 years. Counsel on his behalf has quoted three cases, *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (1), *Pullanappally Sankaran Nambudri* v. *Vittil Thalakat Muhamod* (2) and *Kutha Perumal Rajali* v. *The Secretary of State* (3). In my opinion none of these cases is applicable to the present case. They have nothing whatever to do with the question of easements.

(1) (1905) 32 Cal. 129=31 I. A. 203= 8 C W.N. 809=6 Bom. L. R. 765= 1 A.L.J. 585= 8 Sar. 698 (P. C.)

(2) (1905) 28 Mad. 505=15 M. L. J. 416.

(3) (1907) 30 Mad. 245=17 M. L. J. 174.

The land over which the plaintiff claims his easements undoubtedly belongs to Government and therefore in order to establish his right of easement he must prove user of the kind mentioned in Section 15 of the Act for a period of at least 60 years. If he fails to establish an easement over that land it seems to me that he cannot establish easement against a person who is merely in occupation of that land, for a less period. A easement is a right which attaches to one piece of land or building over another piece of land and not against A or B. It seems to me that on this point the court below was right, and if that is so then the finding of fact that the windows and doors and gates on the north side have not been in existence for anything like 60 years concludes that portion of the case.

Next it is urged that on the finding of the court below that the plaintiff has established 60 years user over the land on the east the injunction should have been granted. Here again I think the court below was right. It was within its discretion to grant an injunction or not. It clearly told the defendant Behari that he must not build on this portion of the land so as to obstruct any of the easements which the plaintiff had acquired, and practically told the defendant that if he did so it would be at his peril. I am not prepared to say that the court was wrong in not granting this injunction. The third point is that the court should not have said anything about the door on the west side of the plaintiff's house. This ground is raised in the second paragraph of the memorandum of appeal to this court. I agree to this extent that it was unnecessary for the court to have said anything about it. The court has only done so in order to tell the parties clearly what in its opinion were their rights. This portion of the judgment is not incorporated in the decree and really amounts to nothing more than an expression of opinion. The only way in which I could interfere with it would be, I presume, to order that particular sentence to be expunged from the judgment. In my opinion the appeal fails and is dismissed with costs.

Appeal dismissed.

1924 ALLAHABAD 726.

KANHAIYA LAL, J.

Mukat Singh and others...Defts—Appellants.

v.

Misra Paras Ram and another.....Plffs.—Respondents.

S. A. No. 406 of 1922 decided on 30th July, 1923 from the decree of the District Judge, Mainpuri, dated the 23rd February, 1922.

(a) *T. P. Act, Ss.* 106 *and* 111 *(g)—In suit for ejectment denial of landlord's title before suit is filed is necessary for dispensing with notice.*

Where there is no proof that plaintiffs' title had been denied prior to the suit, they ought to have given notice to the defendants before instituting suit for ejectment and the denial of their title by the defendants in the suit is not a sufficient answer. [P. 727 Col. 1.]

(b) *T. P. Act, S.* 106—*Is liable to be overruled by custom or contract.*

S. 106 is subject to the exception of being set aside in particular cases by proved usage or contract. [P. 727 Col. 1.]

(c) *Evidence Act, S.* 115—*Execution sale—Objection to—Judgment-debtor who might have objected to sale of property in execution cannot afterwards object.*

A judgment-debtor who might have raised objections to a sale in execution of a decree against him but has refrained from doing so or who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable. 29 All. 612 & 28 Bom. 125, Foll. [P. 727 Col. 2.]

(d) *Execution sale—Setting aside—Stranger to suit is justified in believing that the court had authority to sell.*

A person who is a stranger to the suit is justified in believing that the court had authority to attach and sell the property sold by it in execution. 25 Bom 337, Foll. [P. 727 Col. 2.]

Panna Lal for the Appellants.

G. Agarwala for the Respondents.

Judgment:—This appeal arises out of a suit brought by the plaintiffs-respondents for the recovery of possession of a certain house and a wall which they allege to have purchased at an auction sale held in execution of a decree against Mukat Singh and the other defendants. The allegation of the plaintiffs was that they purchased the house on the 5th of November, 1914 and got possession through court on the 12th of January, 1917 and that after such possession had been obtained the defendants took the house from them on an agreement to pay a rent of Re. 1 per mensem. It was further stated that it was settled at the time that the plaintiffs would, when they would like, be entitled to have the house vacated. The defendants

denied the tenancy and pleaded that they had no knowledge of the auction sale and that even if the defendants were proved to be the tenants of the plaintiffs, they could not have been ejected without notice. There was a further plea that they were cultivators and that the sale, if any, was invalid.

The court of first instance dismissed the claim, holding that no tenancy was proved. The lower appellate court, however, held that the plaintiffs had purchased the house at auction on the 5th of November, 1914 and got formal possession in 1917 and that the defendants had subsequently taken a lease of the house from the plaintiffs on an agreement to pay a rent of Re. 1 per mensem. On the question of notice, the latter court observed that inasmuch as the defendants had denied the title of the plaintiffs no notice was necessary. There was no proof, however, that the title of the plaintiffs had been denied prior to the suit; and as held in *Haidri Begam* v. *Nathu* (1) that ground cannot be sustained.

But it still remains to consider whether a notice was in the circumstances alleged in the plaint at all necessary. Section 106 of the Transfer of Property Act (No. IV of 1882) does not require the sending of such a notice where there is a contract or local law or usage to the contrary. The allegation in the plaint was that the defendants had agreed to vacate the house on demand. That agreement was sought to be proved by the evidence of two witnesses, Lalta Prasad and Sirnam Singh, whom the lower appellate court believed. Those witnesses said that the defendants had agreed to vacate the house whenever the plaintiffs wanted them to do so. One witness also said that a lease was agreed to be written out, but it is admitted that none was actually reduced to writing. There is no allegation that any term was fixed for the tenancy; and in view of the evidence, which goes to show that the defendants had agreed to vacate the house when the plaintiffs wanted, Section 106 cannot be made applicable and the omission to give the notice cannot be regarded as fatal to the present suit.

It remains also to consider the other objection taken by the defendants in the trial court, namely that the house in question was not liable to sale under Section 60, Clause (c) of the Code of Civil Proceedure. No issue was framed on that point by the trial court or finding recorded. There is some evidence to show that the defendants are agriculturists or ex-zamindars; but it is not open to them at this stage to go behind the sale proceeding to which they were parties and set up a plea which they had omitted to raise at the time of the judgment or prior to the sale. As held in *Umed* v. *Jas Ram* (2) and *Pandurang Balaji* v. *Krishnaji Govind* (3), a judgment-debtor, who might have raised objections to a sale in execution of a decree against him but who has refrained from doing so or who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable. In *Dwarka Nath Pal* v. *Tarini Sankar Ray* (4) and *Lala Ram* v. *Thakur Prasad* (5) a similar view was taken.

On behalf of the defendants reliance is placed on a decision in *Katwari* v. *Sita Ram Tewari* (6) but in that case an objection was taken prior to the sale and no sale had, in fact, taken place. So far as the parties to the sale and execution proceedings are concerned, a person who is a stranger to the suit is justified in believing that the court had authority to attach and sell the property or to use the language of Lord Hobhouse in *Malkarjan* v. *Narhari* (7) that the court had done that which by the directions of the Code it ought to do. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

(1) (1894) 17 All. 45=1894 A.W.N. 196.

(2) (1907) 29 All. 612=1907 A. W. N. 193=4 A. L. J. 519.
(3) (1904) 28 Bom. 125=5 Bom. 799.
(4) (1907) 34 Cal. 199=5 C.L. J. 294=11 C. W. N. 513.
(5) (1918) 40 All. 680=47 I.C. 947=16 A.L.J. 691.
(6) (1921) 43 All. 547=63 I.C. 264=19 A.L.J. 473.
(7) (1901) 25 Bom. 337=27 I. A. 216=5 C.W. N. 10=2 Bom. L. R. 927=10 M. L. J. 368=7 Sar. 739 (P. C.)

1924 ALLAHABAD 727.

PIGGOTT, J.

Udal and others.....Defendents—Appellants.

v.

Ch. Gulab Rai and another.....Plffs.—Respondents.

S. A. No. 438 of 1922 decided on 29th June, 1923 against the decree of the District Judge of Badaun, dated the 18th February, 1922.

Ejectment—Cause of action—Original possession permissive—Subsequent alterations of the premises cannot give rise to cause of action.

Where the facts found were that plaintiffs were the sole proprietors of a piece of land, that a stranger had occusied the premises on the land for 25 years, and that it could not be said that the plaintiffs has been ignorant of this and where the stranger's existence was useful to the community, *Held* that the inference was that the stranger's original possession was permissive and this being so his subsequent alteration of the premises would not afford the plaintiff a cause of action. 18 A. L. J. 781 Foll. [P. 728 Col. 2.].

Panna Lal for the Appellants.

S. N. Sen for the Respondents.

Judgment:—The plaintiffs in this suit are sole proprietors of a parcel of waste land situated in a village called Singauli Purbea. The contesting defendants have constructed a house upon the parcel of land in question. The plaintiffs came into court claiming the ejectment of the said defendants, with permission to the latter to remove the materials of their house before vacating the site if they should be inclined to do so. Facts were alleged in the plaint fully sufficient to warrant the plaintiffs in claiming the relief sought for. The difficulty about the case is that the lower appellate court has not found in favour of the plaintiffs on the questions of fact raised by the pleadings, nevertheless the learned District Judge came to the conclusion that, on the facts found by him, the plaintiffs are entitled to the relief claimed. It is contended in second appeal that the learned District Judge was in error in taking this view. It seems advisable to give the facts found in the very words of the judgment of the lower appellate court:—

"The evidence shows that one Chidu Bania purchased from Chidu Kahar a portion of the latter's house, consisting of a thatched room about 25 years ago. The purchaser removed the thatch and built a mud house in which he has since kept a shop. Two years ago he replaced the mud construction by a masonry house, without the consent of the zemindars."

Undoubtedly Chidu Kahar, as the District Judge remarks, had no transferable right in anything except the materials of his house. He could not even convey to Chidu Bania a right of residence on the site in question. He did however purport to convey such right of residence, and some 25 years prior to the institution of the suit Chidu Bania, who seems to have been previously residing in the same village, occupied a portion of the house transferred to him and made structural alterations fitting it for use as a shop. No exception was taken to his proceedings by the proprietors of the site. It can scarcely be presumed that they were in ignorance of what had been done. At any rate, there is no finding that they were in ignorance, or continued in ignorance, up to any specified date anterior to the institution of the suit. They did not allege that a cause of action accrued to them when they came to know of the transfer by Chidu Kahar to Chidu Bania: they alleged a different state of facts altogether. If it be taken that Chidu Bania occupied this site without any title and against the will of the proprietors of the same, and that he proceeded to adopt the buildings previously standing thereon to his own use ad occupied the same as a shop for more than 12 years, the inference in my oplnion would be that he had acquired title by adverse possession against the proprietors of this site. The more correct inference seems to be that Chidu Bania did not occupy the site against the will of the proprietors, but with their consent, and on an express or implied understanding with them that he might have the use of the site for the construction of a shop. I may presume that, although Chidu Bania was not an agricultural tenant, yet he was a member of the village community, and his keeping a shop in the village site may well have been a matter of convenience to the community as a whole. If it be presumed tbat his original possession was permissive, then his subsequent alteration of the premises constituting his shop, by converting the same into a masonry building, would not, in my opinion, afford the plaintiffs a cause of action. I refer on this point to the decision of a Bench of this Court in the case of *Ghorey* v. *Shib Lal* (1). No doubt the defendant in that suit was an agricultural tenant, to whom a site was granted for the building of a house; but it does not appear to me that any different principles would apply to the case of a village shop-keeper to whom a site had been granted for the purpose of keeping a shop. Other considerations might possibly have arisen if the plaintiffs had come into court with a true statement of the facts and had alleged that, under the existing circumstances, they were entitled to claim a small ground rent from the principal defendants; but that question does not arise. Accordingly I allow this appeal, set aside the decisions of both the courts below and dismiss the plaintiffs' suit, with costs throughout.

Appeal allowed.

(1) (1920) 18 A. L. J. 781=58 I. C. 410.

1924 ALLAHABAD 729.

DANIELS, J.

Mt. Jan Bibi and others.....Plaintiffs—Appellants.

v.

Mt. Batulan Bibi and another...Defendants—Respondents.

S. A. No. 473 of 1922 decided on 4th July, 1923 against the decree of the District Judge of Benares dated the 11th January, 1922.

(a) *Practice—Judgment—Ambiguity in judgment of lower court is a good ground, but ambiguity may be explained.*

Where the Judge in the lower court found in the earlier part of his judgment that M was undoubtedly in possession of the house, and further on he said:—"I have been shown no ruling which requires that the possession of the house on the part of the widow must be exclusive. All that appears to be necessary is to show that she is in actual possession and that there has been no division between her and any other person."

Held that this was not a clear finding and the sentence in question may mean one of two things. It may mean either that M and the other heirs of the family were in actual joint possession of the house, in which case the decree of the court below would be clearly incorrect; or it may merely mean that M was not in possession adversely to the other heirs. *Held* further that as M and her husband had given evidence that they were in exclusive possession of the house, as they were not cross-examined and as there was no evidence to the contrary and as the plaintiffs admitted they were out of possession at the time of the institution of the suit, the Judge could not have meant that M was not in sole possession of the house and his decree cannot be attacked on this ground. [P. 729 Col. 2.]

(b) *Muhammadan Law—Dower—Widow's lien—Widow in possession—Each separate heir cannot recover possession by paying proportionate part of dower.*

If a widow is in possession in lieu of dower she is not liable to piece-meal suits by every separate heir. She is entitled to retain the entire property until the entire dower is satisfied; the plea that the heirs should be each allowed to pay his proportionate share of the dower and recover possession piecemeal is bad. [P. 729 Col. 2.]

Mukhtar Ahmad for the Appellants.

Iqbal Ahmad for the Respondents.

Judgment:—This was a suit by the plaintiffs-appellants Musammat Jan Bibi and others for possession of their shares of a house by partition. The finding of the court below is that defendant Batulan Bibi is in lawful and peaceful possession of the house in lieu of her unpaid dower and that the plaintiffs cannot obtain possession without satisfying her dower. The main plea on which the plaintiffs attack this finding is based on an ambiguity in the judgment of the court below. The learned Judge of the court below finds in the earlier part of his judgment that Musammat Batulan Bibi is undoubtedly in possession of the house. Further on he says:—

"I have been shown no ruling which requires that the possession of the house on the part of the widow must be exclusive. All that appears to be necessary is to show that she is in actual possession and that there has been no division between her and any other person."

This is not a clear finding, and the sentence in question may mean one of two things. It may mean either that Musammat Batulan Bibi and the other heirs of the family were in actual joint possession of the house, in which case the decree of the court below would be clearly incorrect; or it may merely mean that Musammat Batulan is not in possession adversely to the other heirs. The former meaning would be to some extent inconsistent with what the learned Judge has said above and I have examined the evidence to find out what the learned Judge's finding meant. I find that Musammat Batulan and her husband gave clear evidence that they were in exclusive possession of the house. They were not cross-examined on the point and there is no evidence to the contrary to be found on the record. The plainttffs admitted in para 8 of their plaint that they were out of possession at the time when the suit was instituted. It is therefore clear that the learned Judge could not have meant that Musammat Batulan was not in sole possession of the house and his decree cannot be attacked on this ground.

The second and remaining plea which has been urged is that the plaintiffs should only have been required to pay up a proportionate share of the dower. No authority has been quoted in support of this proposition and so far as I know the authority of all the commentators is against it. If the widow is in possession in lieu of dower she is not liable to piece-meal suits by every separate heir. She is entitled to retain the entire property until the entire dower is satisfied. The decree of the court below is therefore correct and I dismiss the appeal with costs including in this court fees on the higher scale.

Appeal dismissed.

1924 ALLAHABAD 730 (1).

DANIELS, J.

Saheb Singh and another.....Defendants—Appellants.

v.

Indar Kumar and another.....Plffs.—Respdts.

S. A. No. 485 of 1922 decided on 17th July, 1923 against the decree of the District Judge of Azamgarh dated the 24th January, 1922.

Hindu Law—Joint family—Partition—Separation of one co-parcener raises no presumption that others remain united or separate inter se *or reunite.*

When the separation of one co-parcener is proved there is no presumption that the others remained united. There is in fact no presumption remaining either way and an agreement amongst the remaining co-parceners either to remain united or to reunite must be proved like any other fact; if separation of one member takes place it is not the necessary result in law that the other members must be taken to have separated *inter se*. 30 Cal. 725; 41 All. 361 Foll. [P. 730 Col. 1 & 2.]

S. D. Singh for the Appellants.

N. P. Asthana for the Respondents.

Judgment:—The following pedigree will explain the position of the parties :—

BABU RAM SINGH

Datta Singh	Saheb Singh	Gayadin Singh	Mahabir Singh	Pahlad Singh
	Dft. No. 2	Dft. No. 3		died childless
Sukhraj Singh			Indra Kuer	Somari Kuer
Dfdt. No. 1			daughter Plff.	Plff. daughter.

The plaintiffs are claiming the property of both their father Mahabir Singh and their uncle Pahlad Singh, the latter having died childless. The defendants are their surviving uncles and the sons of a deceased uncle. The facts found by the court below are that the defendants Nos. 2 and 3 and the father of the first defendant separated from Mahabir Singh and Pahlad Singh, but that the two latter remained joint. This is a finding of fact supported by evidence and on this finding the plaintiffs are entitled to the property. The only point pressed by the defendants in appeal is that when once it was found that the defendants had separated from the remaining two brothers Mahabir Singh and Pahlad Singh, it was necessary to prove a reunion on the part of the latter. This goes beyond the rulings of the Privy Council on the point, and is in definite conflict with the ruling of this court in *Parsotam Das* v. *Jagan Nath* (1). The principle laid down by the Privy Council in *Balabux* v. *Rukmabai* (2) and lately reaffirmed in *Mt. Jatti* v. *Banwari Lal* (3) is that when the separation of one co-parcener is proved there is no presumption that the others remained united. There is in fact no presumption remaining either way and an agreement amongst the remaining co-parceners either to remain united or to reunite (both alternatives) are given in the judgment of *Balabux* v. *Rukmabai* (2), must be proved like any other fact. This point was definitely ruled in *Parsotam Das* v. *Jagan Nath* (1) where it was held that if separation of one member takes place it is not the necessary result in law that the other members must be taken to have separated *inter se*. They may have separated or they may have remained united. In this case the evidence proves, and the court below has found, that they remained united. On this finding the appeal fails and it is accordingly dismissed with costs.

Appeal dismissed.

(1) (1919) 41 All. 361 = 50 I.C. 357 = 17 A.L.J. 347.
(2) (1903) 30 Cal. 725 = 30 I.A. 130 = 7 C.W.N. 642 = 5 Bom. L. R. 469 = 8 Sar. 470 (P. C.)
(3) 1923 P. C. 136 = 4 Lah. 350 = 50 I. A. 192 = 21 A. L. J. 582 = 18 M. L. W. 273 = 45 M. L. J. 355 = 25 Bom L. R. 1256 = 33 M. L. T. 283 = 1923 M. W. N. 687 = 4 L. R. P. C. 135 (P. C.)

---

* 1924 ALLAHABAD 730 (2).

DANIELS AND DALAL, JJ.

Narain Singh.....Defendant—Appellant

v.

Chiranji Lal.....Plaintiff—Respondent.

S. A No. 621 of 1922 decided on 18th March, 1924 from the decree of the District Judge of Agra dated the 1st Februnry, 1922.

(a) *Minor—Burden of proof.*

Where one of the defences to the suit was that the defendant was a minor on the date of the execution of the pronote by the minor, *Held* the onus to prove minority is on the defendant who asserts it. [P. 731 Cal. 1.]

(b) *Contract Act, S. 2—Definition.*

Money received during minority can form the consideration for a contract made by a person of full age and competent to contract. [P. 731 Cal. 2.]

K. N. Katju and M. A. Aziz for the Appellant.

S. N. Sen and L. M. Banerji for the Respondent.

Daniels, J.:—This is an appeal by the defendant against a decree for the amount of a bond executed by him in favour of the plaintiff on 22nd November, 1919. The bond was executed in lieu of a pronote previously executed by him on 14th December, 1916. One of the defences to the suit was that the defendant was a minor on the date of the execution of the pronote. The court below has held that this defence fails as the defendant has not established the fact of his being a minor on that date.

The appellant contends that the burden of proving that the defendant was not a minor lay on the plaintiff and has cited two cases of this court of the years 1909 and 1912 respectively in which that view was taken, *vide, Gaya Din* v. *Mt. Duapri*(1),*Kanhaiya Lal* v. *Girdhari Lal* (2). The matter appears to us to be concluded against the appellant by the judgment of the Privy Council in *Raja of Deo v. Abdulla* (3). In that case the plaintiff sued on a conveyance executed by Musammat Rajeshwari Kuar. One of the main defences to the suit was that Musammat Rajeshwari Kuar was a minor on the date of execution. The High Court at Calcutta laid the burden of proving this on her and holding that she had failed to establish it decreed the suit. With reference to this their Lordships say:—

> "Their Lordships agree with the High Court. The onus to prove minority is on the defendant who asserts it".

They remark in passing that the evidence tendered by the plaintiff is not open to any obvious objection but they do not decide the case on the plaintiff's evidence. They conclude by saying:—

> "It is enough to say that the matter being left in doubt the defendant fails to prove his assertion."

The appellant argues further that the finding against him on this issue does not dispose of the case because part of the consideration for the pronote of 1916 consisted of advances made while he was a minor. He suggests that we should now remit an issue as to what part of the consideration was so received and dismiss the suit with regard to it. We are unable to agree with this view. It is settled law that a contract made by a minor is void and unenforceable against him but we know of no law which lays down that money received during minority cannot form the consideration for a contract made by a person of full age and competent to contract. The definition of "consideration" in Section 2 (d) of the Contract Act includes services already rendered to the promisor. The appellant urges that by decreeing this claim we shall be defeating the provisions of Section 11 of the Contract Act with reference to minors. Nothing of the kind is true. If a minor accepts money except for necessaries he cannot be compelled to repay it and any contract to do so made by him as a minor is void against him, but if when of full age he takes it upon himself to repay there is no reason either in law or equity why his agreement should be deemed unlawful. Cases can be cited on both sides of the question but we prefer to decide the issue on the broad question of principle.

We accordingly dismiss the appeal with costs including in this court fees on the higher scale.

Appeal dismissed.

(1) (1909) 6 A. L. J. 693 = 2 I. C. 839.
(2) (1912) 9 A. L. J. 103 = 18 I. C. 956.
(3) (1918) 45 Cal. 909 = 45 I.A. 97 = 16 A.L.J. 576 = 5 Pat. L. W. 83 = 1918 M. W. N. 406 = 22 C. W. N. 891 = 8 L. W. 1163 = 45 I. C. 770 = 24 M. L. T. 62 = 28 C. L. J. 192 = 20 B. L. R. 851 = 35 M. L. J. 46 (P. C.)

1924 ALLAHABAD 731.

SULAIMAN AND MUKERJI, JJ.

Lakshmi Narain Misir and another.....
Plffs.—Appellants.

v.

Mt. Sumarni Kuar and others.....Defdts.—
Respondents.

S. A. No. 731 of 1922 decided on 6th March, 1924 from the decree of the District Judge of Moradabad dated 10th February, 1922.

(a) *Hindu Law—Gift—Construction.*

Where one of the legatee's wife was given an absolute estate and the two daughters of the testator also were given estates which were antagonistic to the interest of his wife the natural inference would be that the nature of the estate given to the wife was also the same. [P. 733 Cal. 1.]

(b) *Hindu Law—Female heirs——Woman's property got by succession from male and female is limited.*

Under the Hindu Law of the Benares School there is no distinction as to the nature of the estate taken, between property inherited by a woman from a male and property inherited by her from female. In both cases she takes it not absolutely as her *stridhan* but a qualified estate alienable only under the condition applicable to such an estate and with reverter after her death to the heirs of her predecessor-in-title. 1924 All. 15, Foll. [P. 738 Cal. 2 & P. 734 Cal. 1.]

P. L. Banerji for the Appellants.

N. P. Asthana and S. N. Sen for the Respondents.

Sulaiman, J.:—This is a plaintiffs' appeal arising out of a suit for recovery of possession. Both the courts below have dismissed the claim.

The property in dispute belonged originally to one Kesri Mal alias Kesri Singh, who admittedly died some time before the Mutiny. On his death he left a widow Mt. Chunno and two daughters Mt. Durga and Mt. Cheno and also a sister's son Baijnath. Before his death Kesri Mal is said to have executed a document dated the 28th of January, 1838, the genuineness of which was challenged by the plaintiffs in the courts below. Both the courts below however have found that this was a genuine document and that finding is a finding of fact.

The terms of this document are admittedly very vague and ambiguous. We have had the original read over to us and there can be no doubt that the language of this document is at places ungrammatical and not quite clear. On the whole, however, I do not find it possible to differ from the interpretation put on it by the courts below. What the lower appellate court has understood this document to mean is as follows:—The testator made a bequest of his property in favour of four persons, his widow, his two daughters and his nephew Baijnath in four equal shares. There was a provision that in case any of the daughters had a son born he would get the property (of the two daughters). In case of there being no son born to the daughters that property would go to the nephew Baijnath and his heirs.

It is not disputed that on the death of Kesri Mal his widow did not take possession over any definite portion of this property but the entire estate was divided in the ratio of one-third each between Baijnath and the two daughters. I may here mention that one of the arguments put forward before us was that it must be assumed that the widow Mt. Chunno had made a gift of her interest in favour of her daughters and Baijnath. As to this the learned Judge has remarked that there is no evidence in support of it and he has refrained from drawing this inference from the mere fact that there was no mutation of names in favour of Mt. Chunno. The case of a gift by Mt. Chunno not having been put forward in the pleadings we cannot make any such assumption in favour of the respondents. It may, therefore, be taken for granted that for some reason or other Mt. Chunno did not take possession of the one-fourth estate to which she was entitled under the will. Mt. Chunno died shortly after Kesri Mal and on her death two-third share remained in possession of her daughters Mt. Cheno and Mt. Durga while the other one-third share remained in possession of Baijnath. Mt. Durga died some 40 years ago. During the lifetime of the two daughters a son named Bhagwan Das was born to Mt. Cheno; and Harcharan Das whose widow Mt. Sumerti Kunwar is defendant No. 1, was the son of this Bhagwan Das. In 1907 Mt. Cheno's son Bhagwan Das died. After his death Mt. Cheno executed a deed of gift of the property which had remained in possession of herself and her deceased sister Mt. Durga, in favour of her grandson Harcharan Das. Mt. Chandan Kunwar the mother of Harcharan Das acting as his guardian then transferred this gifted property to Shib Charan Das defendant No. 3. On the other hand Baijnath's grandson Shib Charan and grand daughter Mt. Lareti are said to be in possession of the one-third share which he had got under the will.

The plaintiffs' case was that the estate held by Mt. Chunno and after her death by her two daughters Mt. Durga and Mt. Cheno was the estate of Hindu widows, which passed to the reversioners of Kesri Mal on the death of Mt. Cheno in 1907, and that the suit having been brought within 12 years of her death the claim was maintainable.

The plaintiffs, however, admitted that on the death of Mt. Chunno the two collaterals to whom succession opened were Sri Kishen and Mukh Ram. Sri Kishen has a daughter who is still alive. The property having been inherited by collateral succession it is clear that the plaintiffs cannot in any

case succeed to the half share inherited by Sri Kishen so long as his daugther is alive. They would be only entitled to the one half share which was inherited by Mukh Ram their father. We may also add that the lower appellate court has found that Sri Kishen and Salig Ram were not members of a joint Hindu family but were separate. In this view it is quite clear that the plaintiffs' claim with regard to the one-half of the estate which ought to go, if at all, to Sri Kishen's daughter, cannot succeed.

Under the will there can be no doubt that Baijnath got one-fourth of the estate. His grandson is now in possession of it. It is impossible to see how the plaintiffs can ever succeed with regard to this share.

As regards the estate taken by the two daughters there can be no doubt that before they died a son Bhagwan Das was born. Under the defeasance clause contained in the will the interest of Mt. Durga and Mt. Cheno came to an end and the estate became vested in Bhagwan Das. On the death of Bhagwan Das his son Harcharan Das would be the owner of this property. The plaintiffs are by no means the heirs of Bhagwan Das. The claim with regard to the two shares must therefore also fail.

There remains the half one-fourth share which ought to have gone to Mt. Chunno. The first point which we have to consider is the nature of the estate taken by Mt. Chunno. It has been contended before us that she got only a limited estate, that is to say, a Hindu widow's estate under the will and not an absolute estate. I am not prepared to accept this contention. When we find that Baijnath one of the legatees was given an absolute estate and that the two daughters also were given estates which were obviously antagonistic to the interest of Mt. Chunno, the natural inference would be that the nature of the estate given to Mt. Chunno was also the same. Having considered the language of the document I have come to the conclusion that the testator intended to confer an absolute estate on Mt. Chunno with respect to the one-fourth share in the estate.

This however does not dispose of the appeal. Assuming that Mt. Chunno got an absolute estate, this would be her *stridhan* which on her death would be inherited by her daughters Mt. Durga and Mt. Cheno. Although the daughters obtained possession during her lifetime yet it is clear that Mt. Chunno herself died within a few years of the death of her husband and even adverse possession against her had not been completed. The question we have then to consider is whether the estate taken by Mt. Durga and Mt. Cheno from Mt. Chunno was such *stridhan* estate as could be disposed of by them freely or whether it was a limited estate of a Hindu daughter which, though subject to alienation under certain circumstances, would revert to the heirs of their mother after their deaths.

Dr. Sen on behalf of the respondents has strongly urged that the estate taken by the two daughters was their absolute estate. He has argued that under the Hindu Law there is a clear distinction between succession to property acquired before or at the time of the marriage and property acquired by a woman after her marriage, and he has urged that so far as the latter kind of property is concerned it is inherited by sons and daughters jointly and they get the property as absolute owners and not only as limited owners. On the other hand Mr. Banerji has relied on two cases of their Lordships of the Privy Council and a case decided recently by a Division Bench of this Court, and contended that although the rule of succession may be different, nevertheless, the nature of the estate taken by a female is always the same whether she inherits it from a male or a female. In the case of *Sheo Shankar Lal* v. *Debi Sahai* (1) their Lordships of the Privy Council held that on the death of the daughter who had inherited certain property from her mother and which was her mother's *stridhan* the property ought to go to her son in preference to her daughter. In the case *Sheo Partap Bahadur Singh* v. *The Allahabad Bank* (2) their Lordships of the Privy Council remarked that' 'under the Hindu Law of the Benares School there is no distinction as to the nature of the estate taken, between property inherited by a woman from a male, and property inherited by her from a female. In both cases she takes it not absolutely as her *stridhan*, but for a qualified estate alienable only under the condition applicable to

(1) (1903) 25 All. 468 = 30 I. A. 202 = 13 M. L. J. 330 = 5 Bom. L. R. 828 = 7 C. W. N. 831 = 8 Sar. 465 (P. C.).

(2) (1903) 25 All. 476 = 30 I. A. 29 = 7 C. W. N. 840 = 13 M. L. J. 336 = 5 Bom. L. R. 833 (P. C.).

such an estate and with reverter after her death to the heirs of her predecessor-in-title.' The question has been recently considered by this court in the case of *Sham Behari Lal* v. *Ram Kali* (3). In that case a Hindu lady owned certain *stridhan* property which after her death descended on her daughter. After the daughter's death there was competition between her daughter and a grandson of the original female owner. This High Court relying on the observation of their Lordships of the Privy Council in the last mentioned case held that the estate held by the deceased daughter was a limited one which on her death would not go to her own heir but would go to the *stridhan* heir of her own deceased mother, who in that case was, the original female owner's grand-daughter, *i.e.*, the deceased daughter's daughter. The point having been so recently considered we must accept it as laying down the correct rule of succession.

It follows, therefore, that on the death of Mt. Chunno her two daughters Mt. Durga and Mt. Cheno got a limited interest in the estate and not absolute rights. When Mt. Durga died her half share again went to Mt. Cheno either as the surviving sister or as the heir of Mt. Cheno. Mt. Cheno again held the estate as a limited owner and the nature of that estate continued as such till the 6th of October, 1907, when she died. On her death Sri Kishun and Mukh Ram, being the nearest *sapindas* of the husband of Mt. Chunno, were the next heirs. There is no suggestion that any daughter's daughter or any other heir nearer than those *sapindas* was then alive. The deed of gift made by her in her lifetime could in no way affect the interest of the nearest reversioners to the estate. The present suit was brought within 12 years of Mt. Cheno's death. I am therefore of opinion that the plaintiffs' claim with regard to a half share in the estate inherited by Mt. Durga and Mt. Cheno from Mt. Chunno must succeed, that is to say, the plaintiffs' claim with regard to the one-eighth share of the entire estate should be decreed. I may note here that item No. 4 which was included in the list given in the plaint has been found by the courts below not to have belonged to Kesri Mal and not to have been covered by his will. The claim as regards this particular item will stand dismissed *in toto*.

---

(3) 1924 All. 15=45 All. 715=21 A. L. J. 656=4 L. R. A. Civ. 601.

Mukerji. J. :—This appeal relates to the property of one Kesri Mal *alias* Kasri Singh. He made a will and disposed of the property in favour of four persons namely his widow, two daughters and his sister's son Baijnath. The will has been found to be genuine. Its interpretation has caused some difficulty but agreeing with my learned brother I have come to the conclusion that it gave an absolute estate to all the four persons. There is a clause in the will which may be interpreted as meaning this: "On the death of any of the daughters without an issue her share would go to the remaining two persons, namely, the remaining daughter and the nephew or to the nephew and his descendants." As a matter of fact one of the daughters had a son Bhagwan Das. On his birth his mother's share would go to him. The other daughter died about 40 years ago and her share would go to her sister, and cousin Baijnath or to Baijnath's heirs. It follows that in respect of the estate of three persons namely the two daughters and the nephew Baijnath, the reversioners to the estate of Kesri Singh cannot have any claim,

There remains now to consider the case of the estate of the widow. It appears that, on the death of the last daughter there were two persons entitled to the property of Kesri Singh namely Sri Kishen and Mukh Ram. Sri Kishen's daughter is alive and is not one of the plaintiffs in this suit. The plaintiffs are Mukh Ram's sons. Thus the plaintiff can claim only one-half of such property as may be called the property of Kesri Singh. The property of the widow was inherited under the law by the two daughters. It appears that, although they got the property as a *stridhan* of their mother, they got only a life estate in the property. On the death of the last of the daughters the property would revert to the *stridhan* heirs of the widow and these would be the heirs of Kesri Singh himself. Thus one-half of the one-fourth share given to the widow would come to the plaintiffs. For these reasons I agree to the order which has been proposed by my learned brother.

By the Court.—We allow this appeal and modify the decree of the court below to this extent that we dismiss the plaintiffs' claim with regard to item No. 4, but we decree the claim for permission with regard to one-eighth share in the remaining properties as against the present defendants. The parties shall pay and receive

costs in proportion to their respective failure and success throughout including, in this court, fees on the higher scale.

As there has been no determination of the amount of the mesne profits to which the plaintiffs would be entitled, we direct an enquiry to be made by the court of first instance as to the exact amount of mesne profits to which the plaintiffs are entitled for a period of three years prior to the suit. The amount of mesne profits payable to the plaintiffs under Cl. (c) R. 12, O. 20 C.P.C. will also be determined. The case for this purpose is remanded to the court of first instance through the lower appellate court.

Appeal allowed.

1924 ALLAHABAD 735.

LINDSAY AND KANHAIYA LAL, JJ.

Mahabir Singh and another.....Plaintiffs—Appellants.

v.

Matabadal Singh and others...Defendants—Respodts.

S. A. No. 752 of 1922 decided on 11th March, 1924 from the decree of the District Judge of Benares dated the 14th January, 1922.

Pre-emption—Who can pre-empt—Mohtamims have a kind of proprietary interest and are entitled to pre-emption.

Where the *wajib-ul-arz* recording the custom of pre-emption, was verified by all the *mohtamims* and some of the superior proprietors; *Held*, these *mohtamims* held at any rate a kind of proprietary interest in the village and that the custom of pre-emption recorded in the *wajib-ul-arz* was applicable to them. [P. 737 Cal. 2.]

P. L. Banerji and N. Upadhiya for the Appellants.

Iqbal Ahmad for the Respondents.

Kanhaiya Lal, J.:—This appeal arises out of a suit for pre-emption, and the question for consideration is whether the plaintiffs are entitled to claim pre-emption in respect of the property in dispute. The property in question comprises a certain zemindari share in pargana Kariat Mendha in the district of Jaunpur and was sold by Gaya Din Singh, the defendant No. 12, in favour of the defendants Nos. 1, 5, 10 and 11 for Rs. 1,300 on the 25th February, 1919. The parganas, constituting the district of Jaunpur, were evidently recast sometime after the permanent settlement of 1795, and pargana Kariat Mendha is evidently identical with or included in pargana Karindah, referred to at pages 185 and 245 in the Duncan Records of 1795.

The allegation of the plaintiffs was that there was a custom of pre-emption prevailing in the village and that the real sale consideration was Rs. 1,025. The trial court found that there was a custom of pre-emption in the village as recorded in the *wajib-ul-arz* of 1883-84 but it was inapplicable to the property in question wherein the vendor possessed only the "rights of a *mohtamim*." With regard to the amount of sale consideration the finding of the trial court was that the amount mentioned in the sale deed was correct. The lower appellate court uphold that decree.

The main point for consideration in this appeal is whether the rights of a *mohtamim*, as recorded in the settlement of 1883-84 are transferable rights of a kind to which the custom of pre-emption, recorded in the *Wajib-ul-arz* can be made applicable.

It was admitted by the parties before the court of first instance that the *mohtamims* made collections of rents from the tenants, paid the government revenue and were in the habit of selling their shares and could get the same partitioned. In fact, the entire arrangement in connection with the collection of rents and the letting out of land appertaining to the village was in the hands of these *mohtamims* who only paid a certain amount of profits to the absent or sleeping proprietors. In the *khasra kistwar*, prepared in 1864 these *mohtamims* were recorded in the column of tenants; but at the time of the last settlement in 1884 two columns were prepared in the *khewat*, one for the names of the pattidars and the other for the names of *mohtamims*, *mustajirs* or *murtahins*. A *mustajir* was a farmer; a *mohtamim* actually meant a manager; and a *murtahim* meant a mortgagee. The existence of these columns indicated that there was at that time a certain class which was then generally known as *mohtamims*, possessing certain definite rights. The nature of the rights exercised by these *mohtamims* being now admitted, the point that arises for consideration is whether these rights were proprietary or under-proprietary rights so as to give rise to a right of pre-emption in case they were transferred.

A reference to the Settlement Report of 1883-84 shows that there were several kinds of proprietary tenures in the Jaunpur district and among those proprietary tenures were two classes of tenures one of which comprised *peshkashdari mahals* and the other, *pattidari mahals* in the possession of *sarbarahkars* or *mohtamims*.

At the time of the permanent settlement of 1795 it was found that these *pattidari mahals* contained such a multitude of small tenures that it was not easy for the government to make satisfactory arrangements for the collection of the land revenue from each and every one of the petty-holders separately. The Board of Revenue accordingly wrote to Duncan on the 19th September, 1794, suggesting that, in order to obviate the inconveniences of settling with the numerous *pattidars*, who possessed proprietary rigths, it might be advisable to appoint managers such as were provided for by Regulation 8 of 1793 for Bengal. Duncan wrote in reply on the 20th of October, 1794, that he had already concluded his settlement without any applications for managers being appointed except in one pargana named pargana Karindah and that it was unnecessary to make any change, as every *pattidar* could sue to have his own *pattidar* divided. On the 7th November, 1794, the Governor-General wrote to Duncan, approving of his view and telling him that it was inadvisable to appoint managers, as suggested by the Board, as it seemed better to permit and support, as far as could be done, the system of internal management with reference to the *pattidars* now in force on the principle of preserving a union among the different sections of large families, preferring occasional and individual claims to the courts of justice. The best account of what the system adopted by Duncan was will be found in Duncan's own words in the following extracts from the Benares Regulations, which will be found in the Settlement Report aforesaid at page 80:—

"The landholders in the zamindari of Benares consist for the most part of village zamindars, paying the revenue of their lands to government jointly with one or more *pattidars* or partners descended from the same common stock. Some of these *pattidars* have had their interior *pattis* or shares rendered distinct; whilst those of the major part still continue annexed to, and blended or in common with, the share or shares of the principal family, or of the headman amongst the brethren, being either one or more, whose names have been usually inserted in the *pattas*, *kabuliats* and other engagements for the public revenue. With the general consent of the inferior *pattidars*, this mode was adhered to in the aforesaid settlement, leaving an option to such *pattidars* as might then or afterwards think themselves aggrieved, or be desirous of separating from their brethren, to prosecute for that purpose in the *Adalat*. By this mode of procedure, they may obtain a separation of their family share of the estate, and procure a separate *patta*, subject to the payment of a proportionate part of the *jama* assessed on the joint estate; but, in the meantime, those of the brethren whose names stand inserted in the Government *patta*, are held and considered to be immediately responsible, through the *amils*, to Government for the whole of that *jama*. The only exception to this general rule exists in the *pargana* of Karandah, where the decennial settlement could only be concluded by a considerable number of these zamindars being admitted to enter into *kabuliats* in which they themselves agreed to the nomination of certain persons to act on their joint parts, under the description of *sarbarahkars* or managers. This expedient was acquiesced in, under the condition that the responsibility of the zamindars should remain undiminished, and that they might, whenever they pleased, dismiss these agents, after adjusting accounts with and satisfying them as to any balance that might be justly due to them."

Although Duncan said he did not want managers the system he aimed at was a *lambardari* one. That system appears to have been adopted in respect of *pargana* Karanda which then formed one of the *parganas* of the Jaunpur district.

Section 23 of Regulation 8 of 1793, which appears to have been followed in this *pargana* lays down:—

"Where more proprietors than one possess an undivided estate, and the whole of them be not within the description of disqualified landholders specified in Section 20, the settlement is to be made with them jointly, and they are to be required to elect a *sarbarahkar* or manager, who shall have the exclusive management of their lands during the continuance of his appointment. The determination of the majority of the proprietors, or of the majority of those present in the event of the absence of any, is to be binding on the remainder in the choice of a manager; and when the votes of the proprietors are equal, the election of the manager is to be determined by the greater interest of the proprietors in the property. If in any case the interest also be equal, the manager is to be appointed by the Board of Revenue."

A reference to the various provisions of that Regulation shows the necessity for the various titles assigned to the persons who were made responsible for the payment of the Government revenue in the revision of records of 1883-84. There was a column provided for *pattidars* or proprietors and there was another column provided for the entry of the names of farmers (*mustajirs*), managers (*mohtamims*) and mortgagees (*murtahins*) the liability of each of whom to pay the Government revenue was recognised by the Regulation.

The managers were clearly the representatives or agents of the entire proprietary body of the mahal and their powers were co-extensive with the powers of the proprietors whom they represented with the only difference that while all the proprietors continued jointly and severally liable to the Government for the payment of the revenue, the persons who were immediately responsible for the collection of the rents and for letting out the lands to the tenants and for the payment of the revenue were persons who were nominated by the co-sharers or appointed by the Board of Revenue as *mohtamims* or managers to represent the entire proprietary body.

The court of first instance refers to a decision of the District Judge of Benares in a suit filed by certain superior proprietors against some other persons for a declaration in the Civil Court that they were the zamindars and that the *mohtamims* were not entitled to claim a partition of the village. That suit was decreed by the first court but on appeal the then District Judge, Mr. Dalal, acting on the analogy of "*peshkashdars*" and "*farotars*" referred to in the settlement report of Mr. P. C. Wheeler came to the conclusion that the *mohtamims* were under-proprietors holding under what he called a *mohtamim* tenure and were entitled to sue for a partition of their share. A *peshkashdari* tenure is, however, different from a *mohtamim* tenure, for as stated in the old Gazetteer of the Jaunpur district compiled by Mr. (now Sir John) Hewett, the *peshkashdari mahals* received their name from the fact that their revenue was formerly assigned for the maintenance of the Jaunpur garrison and was collected by the *Bakshi* or the paymaster of the Army. The *mohtamims* were appointed in acoordance with Regulation 8 of 1793 and possessed proprietary rights. They were themselves co-sharers and possessed a power of management over the entire *mahal* on behalf of all the *pattidars* or co-sharers of the village.

The *wajib-ul-arz* recording the custom of pre-emption was verified by all the *mohtamims* and some of the superior proprietors; and we have no doubt that these *mohtamims* held at any rate a kind of proprietary interest in the village and that the custom of pre-emption recorded in the *wajib-ul-arz* was applicable to them. The plaintiffs are therefore entitled to claim pre-emption. The correctness of the finding of the trial court regarding the amount of sale consideration settled for the property in question is not here disputed. This appeal must, therefore, succeed and is accordingly allowed, the result being that the claim of the plaintiff will stand decreed for possession of the property in dispute subject to the payment of Rs. 1,300 into court to be paid over to the defendants-vendees within two months from this date. In case of payment the plaintiffs will get their costs here and hitherto from the defendants-vendees and in case of non-payment the defendants-vendees will get their costs here and hitherto from the plaintiffs. The costs in this court will include in either case fees on the higher scale.

Appeal allowed.

1924 ALLAHABAD 737.

DANIELS AND DALAL, JJ.

Tolai Misir and others.....Defdts.—Applts.

v.

Muneshar Koeri.....Plff.—Respondent.

S. A. No. 764 of 1922 decided on 18th March, 1924 from the decree of the District Judge of Azamgarh dated the 23rd February, 1922.

Sir *land—Ex-proprietary tenant.*

After the accrual of the ex-proprietary rights it is open to the ex-proprietary tenant to abandon them. [P. 738 Col. 1.]

S P. Sinha for the Appellants.

N. Upadhiya for the Respondent.

Daniels, J:—This was a suit for possession on the ground that the plaintiff was in possession of the lots in suit under a usufructuary mortgage and has been wrongfully dispossessed by the defendants. In the year 1914 the defendants executed a usufructuary mortgage in favour of the plaintiff of

certain *sir* and *hudkasht* plots. This transaction was not in itself illegal but upon its execution there arose in favour of the defendants, by operation of law, an ex-proprietary tenancy in the *sir* plots. The defendants did not, however, claim this tenancy. They allowed the plaintiff to take actual possession of the land without opposition and the plaintiff remained in possession for six years. In the year 1920 the defendants paid up a portion of the mortgage money and by agreement with the plaintiff took possession of so much of the land as corresponded to the amount paid up. They also, however, according to the allegations in the plaint which are not now disputed, dispossessed the plaintiff of the remaining portion of the land. The defendants-appellants contend that to allow this suit would be to defeat the policy of the law which forbids any covenant which has the effect of depriving the vendors of the benefit of ex-proprietary rights which arise in their favour. On the facts as they now stand this is not we think the correct way of looking at the matter. The ex-proprietary rights certainly arose in favour of the defendants, but it was open to them to abandon them. Under the circumstances set forth above they must be considered to have done so. The plaintiff is, therefore, entitled to be restored to possession and we dismiss this appeal with costs including in this court fees on the higher scale.

Appeal dismissed.

1924 ALLAHABAD 738.

DANIELS AND DALAL, JJ.

Baijnath and another.....Plffs.—Appellants.

v.

Ram Bilas and others..... Defdts.—Respondents.

S. A. Nos. 768 and 769 of 1922 decided on 24th March, 1924 from the decree of the District Judge of Gorakhpur dated the 1st April, 1922.

Trespasser—Tacking is allowed even in case of an invalid transfer by trespasser.

One trespasser succeeding another can taok his possession on to the former's even in case of an invalid transfer; especially so where the second trespasser stepped into the shoes of the first with the latter's consent. 31 All. 156 Dist.; 35 All. 380, Foll. [P. 739 Col. 1 & 2.]

(b) *Limitation Act, S. 7—Managing member.*

The managing member of a joint Hindu family can give good receipts on behalf of the family, which will bind the family. 34 All. 549; 38 Mad. 118; 45 Bom. 446, Foll. [P. 739 Col. 2.]

S. N. Mukerji and U. S. Bajpai for the Appellants.

Iqbal Ahmad and M. A. Aziz for the Respondents.

Dalal, J.:—In the court of first instance a suit was brought for the possession of a house hy three brothers, Munna Lal major, and Baijnath and Rang Lal minors, under the guardianship of Munna Lal. There were three sets of defendants, Rambilas, Gulab Rai and others and Ramjidas. The plaint allegations were that by collusion between Rambilas and the plaintiffs' cousin Ramjidas, Rambilas was placed in possession of the house, and that subsequently Gulab Rai and others took possession and refused to vacate on notice being issued to them. In 1909 Rambilas sued Ramjidas and the then minors Munna Lal, Baijnath and Rang Lal under the guardianship of the Hazir of the court of suit, for recovery of money due on *bahi khata* accounts. The defence of Ramjidas was that he had transferred a house worth Rs. 800 and odd to the plaintiff of that suit on condition of the price being set off against the money due. This defence was accepted and the court passed a decree giving to the defendants credit for that sum if they executed a sale-deed in favour of the plaintiff. No such deed was executed and the plaintiff applied for execution of the full amount of the decree. Ramjidas objected and on the litigation being carried up to this court, the order of this court was that Rambilas should file a draft sale-deed within two months of the date of the order, which was 1st November, 1912. No further action was taken by Rambilas in execution of his decree, which in consequence became inoperative by lapse of time.

The learned District Judge held that Rambilas entered into possession of the house in 1907, that his possession was adverse from that year, that it had perfected into good title when the present suit was instituted in 1920, and that the suit was time-barred because Munna Lal had attained majority more than three years prior to the institution of the suit.

The points argued before us were:—

1. That the possession of Rambilas did not become adverse till 1st November, 1912, the date of the order of this court referred to above.

2. That Gulab Rai was an independent trespasser and the period of his possession

cannot be tacked on to the period of possession of Rambilas ; and

3. That even if the suit be barred against Munna Lal, it was not barred against his two brothers who were still minors.

Only Baijnath and Rang Lal have appealed and it is not explained why Munna Lal did not appeal if there was any substance in the first two arguments advanced by the appellants' learned Counsel. It is not clear how the order of this court made any difference to Rambilas's possession and why it should become adverse on that date. It is found by the lower court as a fact that Rambilas entered into possession by right of ownership in 1907. The appellants' learned Counsel submitted that Rambilas would have said so at the time of his money suit if he had claimed to be owner of the house. In our opinion, he was not required to make such a declaration. He wanted to hold on to the house, recover the full amount due to him and give no set off for the price of the house. It was not to his interest to disclose the arrangement regarding the house of which he was in possession. The defence in that suit led the court to recognise the arrangement between Rambilas and Ramjidas. Ramjidas stated as his defence that he had made over possession of the house to Rambilas and was entitled to a reduction of the money claim by the price of that house. The appellants' learned Counsel argued that Ramjidas was colluding with Rambilas and that his clients did not recognize any act of Ramjidas, who was not acting in their behalf. If this is the attitude of the appellants, Rambilas's possession as owner against the wishes of the appellants was certainly adverse to the appellants at all events, from its very inception, whatever its nature may have been against Ramjidas. The learned Judge of the lower court was correct in holding that the possession of Rambilas was adverse from the year 1907.

Gulab Rai was not an independent trespasser. He derived his title from Rambilas to whom he paid the price of the house. The appellants' learned Counsel pointed out that there was no sale-deed and that the sale was not valid. This fact does not prevent Gulab Rai from being a successor in interest to Rambilas. When it was definitely put to the learned Counsel by one of us whether there was any authority for the proposition that one trespasser succeeding another can tack his possession on to the former's only in case of a valid transfer he was unable to cite one. Gulab Rai, according to the statements of both himself and Rambilas derived his title from Rambilas and did not commit trespass against both Rambilas and the appellants. Gulab Rai who stepped into the shoes of Rambilas with the latter's consent continued the trespass, which had commenced with the possession of Rambilas. The suit was, therefore, barred by 12 years' limitation.

The learned District Judge has held, though not in clear terms, that the three plaintiffs were members of a joint Hindu family with Munna Lal as manager and that Munna Lal having failed to bring the suit within three years of attaining majority, his brothers were barred from bringing the suit in accordance with the principles of Section 7 of the Limitation Act. It was justified in presuming that Munna Lal as the eldest brother and the sole adult member of the family became the manager from the date on which he attained majority. The appellants' learned Counsel quoted *Ganga Dayal* v. *Mani Ram* (1) as an authority against this proposition. In that case, however, the learned Judges did not find any evidence to support the suggestion made at the hearing of that appeal that plaintiff No. 1 of that suit was the manager of the family (see p. 160 of the Report). This ruling was distinguished in the later ruling of *Achhaibar Singh* v. *Ram Sarup Sahu* (2). It was held there on the authority of the Full Bench in *Hori Lal* v. *Munwan Kunwar* (3) that the managing member of a joint Hindu family can give good receipts on behalf of the family which will bind the family. These subsequent rulings of this court enunciate the same principles of law as have been laid down by the Madras and Bombay High Courts in *Doraisami Serumadan* v. *Nondisami Sahwan* (4) and *Bapu Tatya Desai* v. *Bala Raoji Desai* (5). The finding of the learned District Judge is therefore well-supported by the case law on the subject.

---

(1) (1909) 31 All. 156=1 I. C. 824=6 A.L.J. 62.

(2) (1913) 35 All. 380=19 I. C. 645=11 A. L. J. 463.

(3) (1912) 34 All. 549=15 I. C. 126=9 A. L. J. 819 (F. B.)

(4) (1915) 38 Mad. 118=25 M. L. J. 405=21 I. C. 410=14 M. L. T. 401.

(5) (1921) 45 Bom. 446=59 I. C. 759=22 Bom. L. R. 1383.

The appeal fails and we dismiss it with costs on the higher scale.

Appeal dismissed.

1924 ALLAHABAD 740 (1).

DANIELS AND DALAL, JJ.

Prag Narain.....Defdt.—Appellant.

v.

Mathura Prasad and others.....Plffs.—Respondents.

S. A. No. 774 of 1922 decided on 18th March, 1924 from the decree of the District Judge of Mainpur dated the 22nd February, 1922.

Hindu Law—Widow—Surrender-

A relinquishment by a widow in favour of one out of several reversioners during her life-time is not valid. [P. 740 Cal. 1]

M. L. Agarwala and Baleshwari Prasad for the Appellant.

N. P. Asthana for the Respondents.

Dalal, J.:—One Ram Bakhsh had four sons, three of whom were Lala Ram, Jagan Nath and Ajodhia Prasad. The two plaintiffs to the suit in the first court were sons of Lala Ram. Musammnt Sunder Kunwar, widow of Jagan Nath, executed a deed of relinquishment in favour of Prag Narayan son of Ajodhia Prasad. The sons of Lala Ram sued for a declaration that this deed would be null and void as far as their interests were concerned on the death of Musammat Sunder Kunwar. Both the subordinate courts have held that Jagan Nath was separate from his brothers. In that case, on the death of Musammat Sunder Kunwar, the next reversioners would be the plaintiffs and Prag Narayan. As stated by the learned counsel for the appellant the only question for decision here is whether a relinquishment by a widow in favour of one out of several reversioners during her life-time can be maintained. No authority was quoted in support of his contention that such a transfer was valid. The decree was correctly granted to the plaintiffs by the two lower courts and we dismiss this appeal with costs including in this court fees on the higher scale.

Appeal dismissed.

---

* 1924 ALLAHABAD 740 (2).

DANIELS AND NEAVE, JJ.

Kali Charan and others.....Plffs—Appellants.

v.

Mt. Peare alias Peari (and after the death Kali Charan) and others.....Defdts—Respodts.

S. A. No. 780 of 1922 decided on 14th May, 1924 from the decree of the District Judge, Mainpuri dated the 1st of May, 1922.

Hindu Law—Absolute or limited estate—Undivided brother's widow holding adversely can acquire full ownership.

A widow of undivided brother holding portion of joint property for over the statutory period can acquire full ownership of that portion by adverse possession and not only a widow's estate. 1924 P. C. 121, Dist.; 41 A. 729 Foll.; 32 C. 445, P. C. Ref. [P. 742 Col. 1.]

U. S. Pujari and P. L. Banerji for the Appellants.

S. N. Sen for the Respondent No. 1.

Daniels, J.:—The two suits which have given rise to these two connected appeals were instituted by Chokha Lal for cancellation of two deeds of gift dated 5th May, 1920, executed in favour of the defendant Brijbasi Lal by Mt. Ram Piyari and Mt. Ram Lalli respectively. Chokha Lal died during the litigation and was succeeded by his three sons the present appellants. A pedigree showing the relationship of the parties is given in the judgments of the courts below. Musammats Ram Piyari and Ram Lalli were the widows of two brothers who formed a joint family with a third brother Bhagwam Sahai. The family was joint. The husbands of the two Musammats died in their father's lifetime. Bhagwan Sahai alone survived his father and became in law the sole owner of the joint family property. The name of the father was Ramdin. On Ramdin's death the names of the two Musammats were entered in the revenue papers as proprietors along with Bhagwan Sahai. The plaintiffs' case was that their names were recorded merely for their consolation as they were entitled to maintenance, and that they were never in possession. The Subordinate Judge found this to be the case but the District Judge held that they were in actual proprietary and adverse possession. The date of Ramdin's death has not been found, but Bhagwan Sahai died sixteen or seventeen years before the suit. After his death the widows continued to be entered as proprietors in respect of one third of the property each. Bhagwan Sahai was succeeded by his son and on the death of the latter without issue in 1905 his

rights were inherited by his mother Mt. Mahadevi, the widow of Bhagwan Sahai. Mt. Mahadevi is still alive and was made a party to the suit as defendant. She has conveyed all her rights to Chokha Lal.

The seven pleas taken in the memorandum of appeal really boil down to two :—

1. That the court below has erred in law in holding the possession of the Musammats to have been adverse.

2. That an admission made by the widows on 30th June, 1907, has been wrongly excluded from evidence.

The second plea is merely subsidiary to the former. The wrong exclusion of evidence is only material in so far as it can be said to have affected the decision on the main issue. To these two pleas the appellants' Counsel has in argument added a third based on the recent decision of the Privy Council in *Lajwanti* v. *Safr Chand* (1) to the effect that even if the widows' possession was adverse, they acquired by adverse possession only a widow's estate in the property and therefore the deeds of gift are only valid for their respective lifetimes. Both widows were made parties to the suits though Mt. Ram Piyari is now dead and her heirs have been substituted in her place.

As regards the application of 30th June, 1907, which is relied on as an admission by the two Musammats, a reference to the record shows that its execution by them was duly proved and the respondents' Counsel is unable to dispute this fact. He contends, however, with much force that the mere fact that they put their mark on it is not enough and that there is no evidence to bring home knowledge of its contents to them in view of the fact that they were *pardanashin* ladies. The document in question is an application for partition of a patti put in by Mt. Mahadevi, Mt. Ram Piyari, Mt. Ram Lalli and two other persons. In that petition Musammats Ram Piyari and Ram Lalli admit that their names were merely entered for consolation and agree to the patti being divided between the other co-sharers. The evidence only goes this far that the document was drawn up in presence of the ladies and that they put their mark to it. There is no evidence to show that they understood it and were aware of its effect. The learned Subordinate Judge considered this point but held that as the document was executed in 1907 and was only now being challenged such evidence was unnecessary. If it were shown that the document was acted upon the rule laid down by the Privy Council in *Sadik Husain Khan* v. *Hashim Ali Khan* (2) would apply and such evidence would be unnecessary. Unfortunately the record has not come and there is nothing to show what took place. In the absence of such evidence it is impossible to say that the document, if received, would have or ought to have affected the conclusion at which the learned Judge arrived.

The appellants' main case on this issue is that there is no evidence to prove adverse possession during the lifetime of the last male holder Bhagwan Sahai. The whole of the evidence upon which the learned Judge has relied relates to the period after Bhagwan Sahai's death when his widow Mt. Mahadevi was in possession. Admitting this to be so the appellants' argument loses sight of the fact that on Bhagwan Sahai's death the estate passed to his minor son Anokhe Lal and not to his widow. There was certainly evidence on which the learned Judge was entitled to hold, if he accepted it, that adverse possession commenced on Bhagwan Sahai's death. If limitation began running when the estate was in the hands of the last male holder Anokhe Lal the subsequent death of Anokhe Lal would not interrupt it. The argument therefore cannot be accepted.

It remains to consider the argument based on *Lajwanti's* case (1). The learned Counsel for the appellants asks us to treat this case as establishing a new rule of universal application that wherever a widow is found in adverse possession of property she must be treated as being in adverse possession of a widow's estate only. There have been recent and conspicuous instances of the danger of applying Privy Council decisions to points which they did not decide but which, in the language of Lord Halsbury, may seem to flow from them. The facts of *Lajwanti's* case (1) are clearly distinguishable. In that case the widows in adverse possession were widows of Jawahir Mal, a separated Hindu, and though Jawahir Mal had a son born after his death, the widows

(1) 1924 P. C. 121=5 Lah. 192=22 A.L.J. 304=34 M.L.T. 87=6 L.R.P.C. 94 (P.C.)

(2) (1916) 38 All. 627=43 I. A. 212=31 M. L. J. 607=14 A. L. J. 1248=19 O. C. 192=18 Bom. L. R. 1037=21 C. W. N. 130=(1916) 2 M. W. N. 577=36 I.C.104=21 M.L.T. 40=1 Pat.L. W. 157=4 O. L. J. 22=25 C. L. J. 368=6 L. W. 378=10 Bur. L. T. 140 (P. C.)

took possession on their husband's death and never claimed to have anything more than the limited estate of a Hindu female. They were judicially declared to be holding for their lives in a decision which is quoted in the judgment of the Privy Council. Their Lordships were laying down no new principle in saying that a widow possessing as such does not acquire the property as her *stridhan* but makes it good to her husband's estate.

In this case the husbands of the two widows died as undivided members of a joint family. They had no separate estate which their widows could inherit or to which property acquired by the widows could accrue. In other cases such as *Satgur Prasad'* v. *Kishore Lal* (3) the Privy Council itself has held that a widow can by adverse possession acquire an estate in full ownership, and it is not to be supposed for a moment that in *Lajwanti's*(1)case they meant to lay down anything contrary to this. *Satgur Prasad's* case (3) is very similar to that before us. There also the widow of a deceased co-parcener took adverse possession of an estate of which the legal title has passed to the last survivor.

Uma Shankar v. *Mt. Aisha Khatun* (4) is a recent authority of this court on the same point. There also the widow of an undivided brother took possession of her husband's share and dealt with it as if it were her own property. The plea that her possession, if adverse at all, was only of the limited estate of a Hindu widow, was put forward and strongly pressed but the court held that in the absence of any evidence to show that her claim was limited to a widow's estate, she must be held to have acquired full title. Reference was made to the case of *Lachhan Kunwar* v. *Manorath Ram* (5) in which the question was as to the nature of the estate acquired adversely by Mt. Jit Kunwar, a Hindu widow. The Privy Council treated the claim that the rights of the reversioners were not extinguished as clearly untenable, "unless it were clearly shown that when Jit Kunwar took possession she professed to do so as claiming only the limited estate of a widow".

In *Lajwanti's* (1) case this was clearly shown; in the present case it is not shown. *Lajwanti's* case (1) cannot therefore be treated as altering the law laid down by their Lordships in a series of judgments of which 22 Cal. 445 is one.

For these reasons we dismiss the appeals with costs including in this court fees on the higher scale.

Appeals dismissed.

---

(3) (1920) 42All.152=46 I.A.197=38 M.L.J. 259=18 A. L. J. 235=11 L. W. 384=55 I. C. 486=1920 M.W.N. 3=27 M. L. T. 200=24 C,W.N. 394=22 Bom. L. R. 451 (P. C.)

(4) 1924 All. 86=45 All. 729.

(5) (1895) 22 Cal. 445=22 I. A. 25=5 M.L.J. 1=6 Sar. 523 (P. C.)

1924 ALLAHABAD 742.

DANIELS AND DALAL, JJ.

Sobhadhi Lal..... .....Defendant—Appellant.

v.

Gobind Singh (Plaintiff) *and Khannu Lal* (Defendant)—Respondents.

S. A. No. 795 of 1922 decided on 24th March, 1924 from the decree of the Subordinate Judge of Farrukhabad dated the 22nd February, 1922.

Hindu Law—Succession.

Hindu texts applicable to the disinheritance of ascetics do not apply to Sudras unless some usage or custom to the contrary is proved. 40 Cal. 545; 40 Mad. 846; 39 Bom. 168, Foll. [P. 743 Col. 1.]

K. N. Katju for the Appellant.

S. N. Sen for the Respondents.

Dalal, J.:—The plaintiff's suit for the psssession of a house against certain trespassers was decreed by the court of first instance, the Additional Munsiff of Farrukhabad, and the defendants' appeal was dismissed by the Subordinate Judge who heard the appeal. The plaintiff's case was that the house was originally owned by two persons Pitam Singh and Parmoda Singh and on their death the plaintiff's brother Gopal Das succeeded to the property. Gopal Das died about eight months prior to the institution of the suit and the plaintiff claimed to succeed his brother by right of survivorship. It was argued in this court that Gopal Das was an ascetic and had renounced the world; so neither could he succeed to the property nor could the plaintiff succeed to any property left by him. It was, therefore, submitted that the plaintiff had no cause of action and could not dispossess the defendants who were actually in possession. In reply the plaintiff-respondent's learned Counsel Dr. Sen quoted rulings where it was held that for a man to be a *sanyasi* he must belong to the three regenerate classes of Brahmin, Chhattri or Vaishya. The plaintiff and his brother were Sadhs and there was

evidence before the first court of witnesses produced on behalf of the defence that Sadh was not a Brahmin or a Chattri or a Vaishya. He must therefore belong to one of the unregenerate classes. In *Harish Chandra Roy* v. *Atir Mahmud* (1) a Bench of the Calcutta High Court held that Hindu texts applicable to the disinheritance of ascetics do not apply to Sudras unless some usage or custom to the contrary is proved. This case followed an earlier ruling of the Madras High Court. In 1916 this proposition of law was reaffirmed by the Madras High Court in a ruling reported in 40 Mad. 846. A Bench of the Madras High Court held that the texts of Hindu law of disinheritance applicable to *Yati* or *Sanyasi* do not apply to Sudra ascetics unless a usage to this effect is established. The same view has been taken in Bombay in *Sadhu Ramdas Gopaldas* v. *Baldevdasji* (2). At page 174 of the report the Judges gave it as their opinion that *Sanyasis* were confined to the members of the twice-born castes. The first court has pointed out in its judgment that no special custom was pleaded by the defence in the written statement and so the learned Munsiff did not permit any evidence to be produced to prove such a custom. In the absence of any custom to the contrary we hold that Gopal Das did inherit the house and that the plaintiff as his successor-in-interest is entitled to its possession.

The appeal is dismissed with costs including in this court fees on the higher scale.

Appeal dismissed.

(1) (1913) 40 Cal. 545=18 I. C. 474=17 C. W. N. 517.

(2) (1915) 39 Bom. 168=26 I. C. 607=16 B. L. R. 757.

---

* 1924 ALLAHABAD 743.

LINDSAY AND SULAIMAN, JJ.

Mt. Fatima Bibi..... ..Appellant.

v.

Abdul Ghaffar Khan and others.....Respondents.

S. A. No. 828 of 1922 decided on 4th January, 1924 from the decree of Judge S. C. C. as a Sub-Judge of Allahabad dated 3rd March, 1922.

(a) *T. P. Act, S. 58 (c)—Sale consideration being full value of property and agreement to reconvey being in favour of one of the vendors no mortgage by conditional sale is created.*

Where there was a deed of sale by two vendors and a mere agreement by the vendee in favour of one of the vendors only; *held* that the transaction was not one of mortgage by conditional sale., though both these documents were executed on one and the same date because the property which was transferred on that date was worth the sale consideration and the agreement to re-convey was in favour of one vendor only. [P. 744 Col. 1.]

(b) *Pre-emption—Subject matter.*

A mere option of re-purchase cannot be said to be immoveable property. [P. 744 Col. 1,]

K. Verma for the Appellant.

Zafar Mehdi for the Respondents.

Judgment :—This is a plaintiff's appeal arising out of a suit for pre-emption. On the 7th December, 1905, Muhammad Amin and Musammat Shakira Bibi executed a deed of transfer in favour of one Lala Gur Dayal for a sum of Rs. 700. Under this document two annas *zamindari* share of the lady and eight pice *zamindari* share of Muhammad Amin were transferred. On the same date a deed of agreement was executed by Lala Gur Dayal, the transferee, which recited that he had entered into a contract with Muhammad Amin, one of the two vendors, to the effect that in case a sum of Rs. 300 were paid by him within thirty years he would be entitled to get possession of his eight pies share and if a further sum of Rs. 750 were paid he would get back possession of the two annas share of Musammat Shakira Bibi also.

In 1919 the present defendant-vendee obtained a sale deed of a certain share in the same village from a number of other co-sharers. The present plaintiff instituted a suit to pre-empt this sale deed but while this suit was pending the defendant-vendee, namely, Abdul Ghaffar, obtained a document purporting to be a deed of gift from the said Muhammad Amin. On the strength of this deed he pleaded that he had become a co-sharer in the village and that therefore the suit for pre-emption was liable to be dismissed as against him. We have not been able to see the judgment which was pronounced in that case but we know this that that suit on some ground or other was actually decreed.

The plaintiff after that decree brought a second suit for pre-emption to recover the property covered by this ostensible deed of gift on the allegation that it really was a sale transaction.

The courts below have found that a custom of pre-emption exists in favour of the plaintiff but have dismissed the suit on the ground that although the sale was for consideration, nevertheless it was not liable to pre-emption

as the interest which it purported to pass could not be pre-empted.

The main question which arises in this appeal is whether the interest, if any acquired by the vendee is capable of being pre-empted. The answer to this question depends on the further question whether the two documents of the 7th December, 1905, taken together from the transaction of a mortgage by conditional sale or whether they represent two distinct and separate transactions, namely, one of a deed of sale by Muhammad Amin and Musammat Shakira Bibi and another a mere agreement by the vendee in favour of one of the vendors only. Both the courts below have held that the transaction was not one of mortgage by conditional sale. We agree with the view taken by them. It is true that both these documents were executed on one and the same date which may create a suspicion in one's mind that they formed one transaction, but the courts below have pointed out that it is not shown that the property which was transferred on that date was worth more than Rs. 700, which represented the sale consideration, and have also pointed out that agreement was with one of the vendors only, namely Muhammad Amin and in his favour only. No right to recover back the property was given to Musammat Shakira Bibi or her heirs. This is a very significant feature of the transaction. It is quite inconsistent with the transaction being merely a mortgage by conditional sale, for in that case both Muhammad Amin and Musammat Shakira Bibi would have been entitled to redeem, if not the whole, at least their shares of the properties. We therefore think that the view taken by the courts below on this point is correct.

This being so, no interest in the immoveable property has passed to the defendant vendee under the document. There was a mere option of re-purchase arising out of the contract between Muhammad Amin and Lala Gur Dayal, which cannot be said to be immoveable property. Whether the vendee has or has not acquired any right to exercise this option we are of opinion that that right cannot be pre-empted. The suit accordingly must fail. The result is that the appeal is dismissed with costs.

Appeal dismissed.

1924 ALLAHABAD 744.

DANIELS AND DALAL, JJ.

Kundan Lal.....Defdt.—Appellant.

v.

Parshadi and others .....Plffs.—Respodts.

S. A. No. 834 of 1922 decided on 24th March, 1924 from the decree of the District Judge of Pilibhit, dated the 4th March, 1922.

Agra Tenancy Act, S. 167—Revenue court's decision can't be touched even indirectly.

A plaintiff cannot by merely changing the form of his relief evade the provisions of Section 167. Where the plaintiff had been held by the revenue court as a tenant of the defendants and he then came to the civil courts for a declaration that he was not a tenant, but a grove-holder. *Held* that the civil court had no jurisdiction. [P. 745 Col. 1.]

S. N. Sen for the Appellant.

N. C. Vaish for the Respondents.

Daniels, J.:—The plaintiffs in this case had been ejected by the defendant by a suit under the Agra Tenancy Act from a certain plot of land as being non-occupancy tenants. The suit against them was decided *exparte*. They alleged that notice was not served on them and made an attempt in the revenue court to get the *exparte* decree set aside, but the finding was against them and their application was dismissed. They filed the suit out of which this appeal arises in the civil court alleging that the whole proceedings in the revenue court were tainted by fraud of the present defendant, who in collusion with the peon pretended to get notices served on them, whereas in fact no notices were served and the plaintiffs knew this. On this allegation he asked for a declaration that the revenue court decree should be cancelled and that it should be declared that the land in dispute was a grove and possessed by the plaintiffs as grove-holders. The revenue court decree was described as having been fraudulently obtained by the defendant, and on this allegation the case went to trial. The learned Judge of the court below found against the plaintiffs that there was no fraud on the part of the defendant. He has nevertheless granted the plaintiffs a declaration that they are grove-holders of the plot in suit because in his view the revenue court came to a wrong finding on the facts and the plots in dispute were not agricultural land. The learned Judge admits that he has no jurisdiction to cancel a decree for ejectment granted by the revenue court. He has however overlooked the fact that the effect of the decree granted by him, so far as it can

have any effect at all, is to do indirectiy what he admits he cannot do directly and to defeat the result of the decree regularly obtained in the revenue court in a matter which was within that court's juisdiction. The ejectment suit being before the revenue court that court had jurisdiction to decide whether the defendant in the civil court were agricultural tenants or not. It decided against them and its decision was under Section 167 of the Tenancy Act a bar to any civil suit on the same matter. It has been held more than once *e. g. Ajudhia Puri* v. *Brij Bhukhan* (1) that a plaintiff cannot by merely changing the form of his relief evade the provisions of Section 167. That case was in many ways similar to the one before us. The plaintiff had been held by the revenue court as a tenant of the defendants. He then came to the civil courts for a declaration that he was not a tenant, but a *muafidar*. It was held that the civil court had no jurisdiction. Substitute grove-holders for "*muafidar*" and the case is on all fours with the case before us.

In *Jagannath* v. *Balwant Singh* (2) this court went so far as to hold that a suit to question the legality of an adoption was not maintainable in the civil court where the sole object was to affect a question between tenant and landlord which was cognizable solely by the revenue court. In this view we consider that the decree of the court below is wrong and we accordingly allow the appeal and dismiss the suit with costs in all courts including this court on the higher scale.

Appeal allowed.

(1) (1919) 17 A. L. J. 922=5 I. C. 143.
(2) 1922 All. 372=44 All. 692=20 A. L. J. 570.

* 1924 ALLAHABAD 745.

DANIELS AND DALAL, JJ.

Chandrika Ram Tiwari and others..... Plffs.—Appellants.

v.

Narain Prasad Rai and others.....Defdts.—Respodts.

S. A. No. 848 of 1922 decided on 25th March, 1924 from the decree of the 2nd Additional District Judge of Gorakhpur, dated the 25th of January, 1922.

Hindu Law—Debts—Damages for breach of civil duty are not illegal or immoral debt.

Where the father had cut certain trees which did not belong to him and the rest of the damages he had to pay for breach of a civil duty in demolishing a house and the family had benefitted to a large extent by the action of the father. *Held* there is distinction between a debt which follows as the result of an offence under the original law and a debt for which one is made liable on the ground of a breach of civil duty. In the former case the debt incurred by the father would be immoral and illegal but not in the latter case. *Held*, further the damages were due in consequence of a breach of civil duty by the father. 32 Bom. 348 Dist.; 39 Cal. 862; 5 C. L. J. 80; 11 C. W. N. 163; 1923 Lah. 399, Foll. [P. 745 Col. 2 & P. 746 Col. 1.]

K. K. Verma for the Appellants.

Harnandan Prasad for the Respondents.

Dalal, J.:—The three plaintiffs are the sons of one Ram Nandan against whom a money decree was passed in execution of which an ancestral house and grove were sold. The house and grove were purchased by the defendant Narain Prasad Rai, who was also the decree-holder. The purchase was made for a sum of Rs. 86. The suit which gave rise to the decree was brought against Ram Nandan and his two brothers for damages in respect of cutting trees and for demolition of a building which was alleged to be an encroachment. The plaintiffs were not parties to the suit. The decree was executed in 1914 and the sale took place on 16th January 1916. On the defendant Narain Prasad Rai not being able to obtain possession he brought a suit for possession and obtained a decree in 1920. The plaintiff thereupon brought the present suit for a declaration that the sale of 16th January, 1916 and the subsequent decree for possession of 1920 to which they were no parties were not binding on them.

The defence was (1) that the debt of the father was not incurred for illegal or immoral purposes and that therefore the sons were bound under the decree, and (2) that the suit of the sons was timebarred. Both these defences were accepted by the two subordinate courts and the plaintiffs' suit was dismissed. This is a second appeal from the appellate decree of the learned District Judge of Gorakhpur.

We are of opinion that the learned Judge was correct in holding that the debt was not incurred for illegal or immoral purposes. The father had cut certain trees which did not belong to him and the value of those trees was assessed at Rs. 50. The rest of the damages he had to pay for breach of a civil duty in demolishing a house. It is apparent that the family had benefitted to a large extent by the action of the father. On

behalf of the appellants the authority of *Durbar Khachar* v. *Khachar Harsur* (1) was quoted. It was held there that the sons were not liable under the decree obtained against the father for a wrongful act and for a liability incurred for an illegal purpose when the estate that had come into the hands of the sons did not derive any benefit from the act of the father. As we have already pointed out the present case is distinguishble because the family estate did benefit by the act of the father. This ruling of the Bombay High Court was considered by the Calcutta High Court in *Chhakauri Mahton* v. *Ganga Prasad* (2). In that case the decree was passed against the father for damages caused to another person by the father closing a channel of water and thereby causing injury to the crops which used to be irrigated by that water. In that case it was held that the sons were liable to pay the money due under the decree as it could not be said that the decree obtained was due to an act of the judgment-debtor which was a wanton interference with the rights of the decree-holder and that the liability imposed thereby on the judgment-debtor was an illegal or immoral debt. At page 874 of the Report the Judges pointed out the distinction suggested by the Madras High Court between a debt which follows as the result of an offence under the criminal law and a debt for which one is made liable on the ground of a breach of civil duty. In the former case the debt incurred by the father would be immoral and illegal but not in the latter case. In the present case damages were due in consequence of a breach of civil duty by the father. At page 875 of the Report the Judges quoted with approval the observations of the Calcutta High Court in *Peary Lal Singh* v. *Chandi Charan Singh* (3).

"The son is not bound to do anything to relieve his father from the consequence of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, namely, to restore to those lawfully entitled money he had unlawfully retained. Upon any intelligible principle of morality, a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any."

We think that the law is correctly laid down here.

In *Gursaran Das* v. *Mohan Lal* (4) a Bench of the Lahore High Court held that it was incumbent on a Hindu son to discharge a debt of his father which consisted of money improperly retained by him when dealing with the property of a third person. A decree passed in such a case against the father to indemnify the person with whose property he had improperly interfered was held to create a debt for which the ancestral property in the hands of the sons may justly be held to be liable. We think that the view of law taken by the lower appellate court was correct.

When the debt is held by us to be legal and binding on the plaintiff sons it is not necessary to decide the question of limitation. We dismiss this appeal with costs including in this court fees on the higher scale.

Appeal dismissed.

(1) (1908) 32 Bom. 348=10 Bon. L. R. 297.
(2) (1912) 39 Cal. 862=16 C. W. N. 519=12 I. C. 609=15 C. L. J. 228.
(3) (1907) 5 C. L. J. 80=11 C. W. N. 163.
(4) 1923 Lah. 399=4 Lah. 93.

1924 ALLAHABAD 746.

KANHAIYA LAL, J.

Shaikh Mudi.....Appellant.

v.

Mohib Ali.....Respondent.

S. A. No. 867 of 1922 decided on 3rd December, 1923 from the decree of the 1st Addl. Judge Gorakhpur, dated 17th March, 1922.

Contract Act, S. 65—Co-tenant of a mortgagor can't get back possession from mortgagee without paying the mortgage amount though mortgage is void.

A mortgagor is estopped from denying the validity of the mortgage after having received the consideration thereof from the mortgagee. Similarly a joint occupancy tenant who wants to repudiate a mortgage made by his co-tenant can get back possession of his share, but cannot repudiate the mortgage made by his co-sharers without paying the mortgage money realised by the latter by virtue of the mortgage from the mortgagee. [P. 747 Col. 1.]

Hamid Hasan for the Appellant.

The Respondent was not represented.

Judgment:—The question for consideration in this appeal is whether in the case of a joint occupancy holding belonging to four brothers and mortgaged by some of them

with possession in favour of another person, one of the brothers, who was not a party to the mortgage, can get back possession of the entire holding without paying the mortgage money on the ground that such a mortgage was invalid. The court of first instance gave a decree for joint possession with the mortgagees; but the lower appellate court decreed the entire suit. In *Baharan Upadhya* v. *Uttamgir* (1) it was held that a mortgagor of an occupancy holding who had put the mortgagee in possession could not recover back possession upon the ground merely that the mortgage was void under the provisions of the N.W.P. Tenancy Act (II of 1901, without repaying to the mortgagee the money which he had received from him. In *Ramzan* v. *Bhukhal Rai* (2) it was similarly held that though a usufructuary mortgage of an occupancy holding was void under Section 20 of the N. W. P. Tenancy Act, the mortgagor could get back possession on his paying the mortgage money.

A mortgagor is estopped from denying the validity of the mortgage after having received the consideration thereof from the mortgagee. Similarly a joint occupancy tenant who wants to repudiate a mortgage made by his co-tenant can get back possession of his share, but cannot repudiate the mortgage made by his co-sharers without paying the mortgage money realised by the latter by virtue of the mortgage from the mortgagee. To allow him to do so would in effect amount indirectly to allowing his co-sharer to resile from the mortgage and getting back possession without repaying the money taken by him from the mortgagee under the cloak of the plaintiffs' joint right. The appeal is therefore allowed with costs here and in the lower appellate court and the decree of the lower appellate court amended in so far that the plaintiff will not be able to get possession of the three-fourth share of the mortgagors without the payment by him or the defendants Nos. 1 to 4 of the mortgage money due to the defendant Nos. 5 to 6. In other respects the decree of the lower appellate court will stand confirmed.

Appeal allowed; decree amended.

(1) (1911) 33 All. 779.
(2) (1918) 16 A. L. J. 747.

1924 ALLAHABAD 747.

DANIELS AND NEAVE, JJ.

Mohammad Abdul Gafoor Khan.....(Deft.)—Appellant.

v.

Syed Akram Hasan and another...(Plntiffs)—Respondents.

S. A. No. 888 of 1922 decided on 8th May, 1924. from a decree of the Additional District Judge of Cawnpore dated the 1st March, 1922.

Evidence Act, S. 114(e)—Due service of notice under O. 21 R. 54 (2) should be presumed when record of court on the point is not available—Civil P. C, O. 21 R. 54 (2).

Plff. purchased property after attachment and after a prohibitory order was served on judgment-debtors not to sell the same. In the court auction which followed, a part thereof was purchased by deft. In a suit by plff. three years after the attachment, the record of the court not being available, it was not proved that service of notice was effected in the other modes described in O. 21, R. 54 (2), Civil P. Code.

Held, that the court below should have applied the presumption that official acts were regularly performed and that in view of the fact that a material portion of the record is no longer in existence, the court was wrong in throwing on the defendant the burden of proving by definite evidence the due service of the notice. [P. 748 Col. 1 & 2.]

P. L. Banerji for the Appellant.

Iqbal Ahmad for the Respondents.

Daniels, J.:—The question in this appeal is whether a private sale in favour of the plaintiffs should prevail against an auction sale made under execution proceedings in which the property was attached prior to the sale to the plaintiffs. The trial court held that the sale to the plaintiffs was invalid. The lower appellate court has held that it was valid, on the ground that it is not proved that the prior attachment was carried out in accordance with the law. The defendant has filed this second appeal to this court. The sale to the plaintiffs took place on 20th June, 1916. Sometime previous to this one Mt. Parbati Kuar had obtained a decree against the owner of the property and on 25th April, 1916, she obtained an attachment of the property by means of a prohibitory order under Order 21 Rule 54 of the Civil Procedure Code. In continuation of that attachment the property was brought to sale and a six annas share was actually sold to the defendants on 22nd August, 1916, about two months after the sale to the plaintiffs. It is this 6 annas share which is now in suit.

It was found by the trial court on inspection of the record, and the finding is not dissented from by the lower appellate court, that the prohibitory order was duly served on all the judgment-debtors. The lower appellate court based its judgment on the fact that it is not proved that service was effected in the other modes described in Order 21 Rule 54 (2). It is however found that as the suit was brought considerably more than three years after the attachment took place, that portion of the record which contains the sale proclamation and the prohibitory order, and which would have enabled the court to determine definitely whether the prohibitory order was affixed in the prescribed manner, has been weeded out and is not available. The question is whether under these circumstances the court should throw on the defendant the burden of proving facts which the destruction of record renders it difficult, if not impossible, to prove. The court below relies on three rulings, namely, *Nur Ahmad* v. *Altaf Ali* (1), *Ganga Din* v. *Khushali* (2), *Satya Charan Mukherji* v. *Madhub Chunder Karmokar* (3).

All these were rulings either under Act VIII of 1895 or under Act XIV of 1882. The language of the corresponding section of these Acts was not identical with that of Order 21 Rule 54. In all three cases the suit was brought within three years of the attachment while the record was still in existence.

In all three cases it was definitely proved that the requirements of the law as to publication had not been carried out. The judgment in 2 All. 58 which is very brief says, indeed "it is not proved that a copy of the court order was posted in a conspicuous part of the court house." But a reference to the summary of the facts on the preceding page shows that the matter was not left in doubt, but that the proclamation was not so posted.

For these reasons the rulings relied upon by the court below are distinguishable. We think that the court below should have applied the presumption that official acts were regularly performed; and that in view of the fact that a material portion of the record is no longer in existence, the learned Judge was wrong in throwing on the defendant the burden of proving by definite evidence the due service of the notice. We accordingly allow the appeal and in setting aside the decree of the court below restore the decree of the court of first instance. The appellant will get his costs of this appeal on the higher scale. The remaining issue raised in the court below was not argued in this court.

Appeal allowed.

(1) (1878) 2 All. 58.
(2) (1885) 7 All. 702=1885 A. W. N. 179.
(3) (1905) 9 C. W. N. ...

1924 ALLAHABAD 748.

MUKERJI, J.

Mt. Sajid-un-nissa Bibi.....Defendant—Appellant.

v.

Sayed Hidayat Hussain and others.....Plffs.—Respondents

S. A. No. 889 of 1922 decided on 28th February, 1924 from the decree of the Judge, Small Cause Court, exercising the power of a Subordinate Judge of Allahabad, dated the 6th March, 1922.

(a) *Easements Act. S. 5—Rain water flow is continuous easement but not latrine water.*

Where the drain through which the water flows is a masonry drain it is an apparent easement within the meaning of Section 5 of the Easements Act. The drain is continuous easement in so far as the flow of rain water is concerned. For the flow of rain water no act of man is needed. But the flow of water from the latrine requires the act of man and to that extent the easement to flow such water is not continuous easement. [P. 749 Col. 1.]

(b) *Easements Act, S. 13 (f) (h)—(h) does not modify section.*

The wide language used in the illustration varies the rule of law enacted in the main section itself. But only such easements are allowed under clause (f) as are continuous. If the easements be not continuous within the meaning of clause (f), it is difficult to see how the benefit of all the gutters and drains mentioned in clause (h) of the illustration can be enjoyed in respect of matters which require an act of man for enjoyment. Therefore illustration (h) cannot be accepted to modify the law itself.

(c) *Interpretation of statutes—Illustration.*

If the meaning of the enactment itself is doubtful, a reference to the illustration in order to clear the meaning, would be justified. Doubtful section justifies reference to illustration which otherwise must give way to section. But, if there be any conflict between the illustration and the main enactment, the illustration must give way to the latter. [P. 749 Col. 2.]

K. N. Katju for the Appellant.

Iqbal Ahmad for the Respondents.

Judgment:—An issue was remanded by this court in the following language under the provisions of Order 41 Rule 25 C. P. C :—

" Whether the plaintiffs are entitled to any right of easement to flow water under the provisions of Clause (f) Section 13 of the Easements Act."

The facts of the case are stated in my judgment ordering the remand and need not be recapitulated. The learned Subordinate Judge has answered the issue in the affirmative and exception has been taken to this finding.

It will be remembered that the case, as at first instituted, was based on acquisition of the right of easement by prescription. This case was changed, later on, and the right of easement was claimed under the provisions of Section 13 Clause (f) of the Easements Act. So the definite question, which I have to answer before me is, " whether under the said provisions the plaintiffs are entitled to the easement ?" This easement involves the flow of water through a permanent drain. The water is of two kinds, namely, rain water and sullage water coming out of a latrine. The plan on the record will show that water from the court-yard of the plaintiffs and water from the latrine join and then flow into the drain which passes through the defendant No. 1's house. The drain through which the water flows is a masonary drain and is therefore an apparent one within the meaning of Section 5 of the Easements Act. The drain is continuous easement in so far as the flow of rain water is concerned. For the flow of rain water no act of man is needed. But so far as the flow of water from the latrine goes, it requires the act of man and to that extent the easement to flow such water is not a continuous easement. It would, therefore, follow that the plaintiffs have no right to flow of latrine water on foot of the provisions of Clause (f) Section 13 of the Easements Act.

The learned Subordinate Judge who heard the appeal first and the learned Judge who decided the remanded issue, both quoted the case *Bishumbar Nath* v. *Jagan Nath Prasad* (1). In that case a part of the house had been sold and the question arose as to flow of water. The learned Judges of this court held that the drain was necessary for the enjoyment of a house. Evidently they were dealing with Clause (e) of Section 13 and not with Clause (f). There is no discussion on the point to be found in the judgment as reported and I cannot take the case as an authority on the question now before me.

Reference has been made to Illustration (h), Section 13. There it is stated that the owner of the transferred house is entitled to the benefit of all the gutters and drains common to the two houses. If we accept the wide language used in the illustration we really vary the rule of law enacted in the main section itself. Only such easements are allowed under Clause (f) as are continuous. If the easements be not continuous within the meaning of Clause (f), it is difficult to see how the benefit of all the gutters and drains mentioned in Clause (h) of the illustration can be enjoyed in respect of matters which require an act of man for enioyment. I am therefore of opinion that illustration (h) cannot be accepted to modify the law itself. If the meaning of the enactment itself were doubtful, a reference to the illustration in order to clear the meaning, would have been justified. But, if there be any conflict between the illustration and the main enactment, the illustration must give way to the latter.

I hold that the plaintiffs have established their right to easement for the flow of rain water alone and not to the flow of any latrine water from their house.

I need not repeat that, the present case has not been fought on the ground that the easement was a necessary one and no evidence on that point was led by the parties. There is, however, a statement of opinion in the appellant judgment which would go to show that it is possible for the plaintiffs to open a drain to carry off the latrine water, though the process may involve some trouble and expense. But as I have said, this is a question which was not raised in any of the courts below and has not been raised before me.

The result is that the appeal is partly allowed. The plaintiffs-respondents' right to easement is hereby restricted only to the flow of rain water. Having regard to the partial success of the parties I order that they will bear their own costs throughout.

Appeal allowed in part.

(1) 29 I. C. 695.

* 1924 ALLAHABAD 750.

NEAVE, J.

Gauri Shankar.....Plaintiff—Appellant.

v.

Mithai.....Defendent—Respondent.

S. A. Nos. 908 and 909 of 1922 decided on 16th April, 1924, from the decree of the District Judge of Cawnpore, dated the 27th March, 1922.

Easements Act, S. 60—Kachcha thatched house may be a work of a permanent character.

A kachcha thatched house may be a work of a permanent character, where it has been used as a residence for a good many years and there is no evidence to indicate that it is only a temporary structure. [P. 750 Col. 2.]

K. Verma and A. Sanyal for the Appellant.

N. Upadhiya for the Respondent.

Judgment.:—These are two plaintiff's appeals arising out of suits for arrears of rent and recovery of possession of certain houses. The plaintiff-appellant is the same in both and the cases have been argued together. Both will be governed by this order.

The plaintiff-appellant is the owner of the compound in which the two houses in suit are situated. His case was that the defendants were tenants from year to year and liable to ejectment. He also alleged that they had not paid their rent, and sued for arrears. The defence was that the defendants were licensees who had obtained a license from the predecessor-in-interest of the appellant under which they had built the houses and were entitled to continue in possession of them. The first court allowed the plaintiff's claim and ordered the defendants to be ejected. The lower appellate court, however, accepted the defendants' plea and held that it was proved that the land was leased to the defendants for building purposes though no written lease was executed. The learned Judge relied on a ruling in *Sahooree Lal Sahoo* v. *H. Dear* (1) in which it was held that where land is given to a lessee for the purpose of building a house to live in without any term being fixed for his tenancy, the tenure of the house and land cannot be taken away from the lessee's heir or his assignees so long as he continues to pay the rent assessed on it.

(1) 28 W. R. 399.

In appeal it is contended that the learned Judge was not justified in finding that the land had been leased when the defendant pleaded that it had been given to him under a license, that in any case the plaintiff was not bound by the license under Section 59 of Act 5 of 1882 as he is the transferee of the person who is said originally to have granted the license, and that the license may in any case be revoked under Section 60 (b) Act V of 1882 as the work erected by the licensee is not of a permanent character, but only a *kachcha* thatched house.

It does not appear that in using the word lease the learned District Judge really meant to refer to something distinct from the license set up by the respondents. It has been held by this court in *Nasir-ul-Zaman Khan* v. *Azimullah* (2) that a *kachcha* thatched house may be a work of a permanent character and this appears to be true of the house referred to in the present case. It has evidently been used as a residence for a good many years and there is no evidence to indicate that it is only a temporary structure. It was held by this court in *Rash Behari Lal* v. *Akhoy Kumar* (3) that Section 59 of Easements Act means that when the grantor of a license transfers the property the transferee has no higher rights than those of his transferor. The buildings in suit being of a permanent character the appellant is not entitled to revoke the license granted. The appeals fail and are dismissed with costs including costs in this court on the higher scale.

A further question has arisen in this case. The appellant asks for permission to withdraw his appeal with leave to file a fresh suit. The original respondent Mithai is dead. So far as the appellant has been able to discover, his only heir is his sister, Mt. Mitania. She however is not living in the house which is occupied by one Allah Rakhu. Both this man and Mt. Mitania have been impleaded in place of Mithai. It is contended that Allah Rakhu is a mere trespasser, who has not shown that he has any right to possession of the house in suit

(2) (1906) 28 All. 741 = 3 A. L. J. 765 = 1906 A. W. N. 216.

(3) (1915) 37 All. 91 = 13 A. L. J. 1 = 26 I. C. 445.

and has no *locus standi* in the case. The appellant desires to make enquiries and find out whether there are any other heirs of Mithai and exactly by what title Allah Rakhu claims to remain in possession. This is no sufficient reason for granting leave to withdraw and bring a fresh suit. It appears that Mt. Mitania who is *prima facie* the heir of Mithai has at least acquiesced in Alla Rakhu's occupation of the house, and their respective rights *inter se* do not affect the present appeal. The application is rejected.

Appeals dismissed.

1924 ALLAHABAD 751.

DANIELS AND DALAL, JJ.

Chiranji Lal and another.....Defendants—Appellants.

v.

Syed Ilias Ali and others (Plaintiffs) *and Syed Intizam Ali and another*.. (Defendants)—Respondents.

S. A. No. 925 of 1922 decided on 27th March, 1924, from the decree of the Officiating District Judge of Agra, dated the 4th April, 1922.

Guardian & Wards Act, S. 30—Contravention.

Mortgage in contravention of order of District Judge is voidable by minor. Minor is not also affected by a decree on the mortgage against him with a guardian whose interest is adverse. Sanction for usufructuary mortgage does not include one for simple mortgage. [P. 751 Col. 2.]

S. K. Dar and N. P. Asthana for the Appellants.

Iqbal Ahmad for the Respondents.

Daniels, J.:—The suit out of which this appeal arises was brought for a declaration that a mortgage decree of 12th May, 1919, is not binding on the plaintiffs who are minors. The facts are not in dispute. The plaintiffs' father died in 1903 leaving seven sons. Most of these sons were minors and their eldest brother the defendant Niaz Ali was appointed their guardian by the District Judge. On 8th April, 1911, Niaz Ali as guardian made an application to the District Judge for permission to mortgage certain property belonging to the minors for a sum of Rs. 200 for payment of debts. The District Judge gave sanction for the execution of a usufructuary mortgage for a sum of Rs. 200. In contravention of this permission the guardian proceeded to execute a simple mortgage carrying interest for a sum of Rs. 400. The mortgagees subsequently brought a suit on this mortgage impleading the minors under the guardianship of Niaz Ali and obtained a decree. The plaintiffs have filed this suit for declaration that the mortgage is not binding on them on the ground that it was executed in contravention of the provisions of the Guardian and Wards Act and is consequently voidable at their instance. Section 30 of the Guardian and Wards Act is clear on the point, and there can be no question that the mortgage was voidable at the option of the minors under that section. The controversy before us has turned on the question whether the position is affected by the fact that a decree against the minors has been passed on the mortgage. This depends on the further question whether the minors were properly represented in the suit. On behalf of the appellants reliance is placed on O. 32. R 4 of the Code of Civil Procedure and it is urged that the court in the suit brought on the mortgage was bound to appoint Niaz Ali as guardian *ad litem* of the minors unless for special reasons to be recorded it considered that this would be contrary to the minors' welfare. The answer to this contention is that in this particular case the mortgagees must have been aware of the facts which rendered it improper that Niaz Ali should act as guardian *ad item*. The mortgage having been executed by Niaz Ali it was difficult for him to take the plea on behalf of the minors that the mortgage was invalid as having been executed contrary to the permission given by the District Judge. Even if he could take such a plea the effect of taking it would be to cast the whole burden of the mortgage on the share of Niaz Ali himself and of those of his brothers who had come of age. Niaz Ali had therefore under the circumstances an interest adverse to that of the minors and this was a fact of which the mortgagees, who were parties to the transaction must have been aware. It is now settled law that where a guardian *ad litem* has an interest adverse to the minors they are to be considered as not having been properly represented in the suit and the decree is not binding on them.

One further argument has been urged. It is said that even if the decree of the court below is otherwise upheld the plaintiffs should

be required to refund the mortgage money to the extent of Rs. 200, either on the equitable principle of restoring a benefit received or on the ground that to that extent the mortgage was in accordance with the permission granted. The first alternative is excluded by the finding of fact of both the courts below that there is no evidence that the minors benefited in any way by the mortgage money. The second is excluded by the fact that even to the extent of Rs. 200 the mortgage was not executed in accordance with the sanction given. The sanction was for a usufructuary mortgage. The mortgage actually executed was a simple mortgage. The difference is of great importance. If the guardian had executed a usufructuary mortgage as directed by the District Judge the liability on the estate would be limited to the principal money advanced. Under a simple mortgage there is the additional liability that interest may not be paid punctually and the mortgage money may mount up to such an extent as to lead to the sale of the entire property. We are therefore unable to accept this plea.

The result is that the appeal fails and we accordingly dismiss it with costs including in this court fees on the higher scale.

Appeal dismissed.

1924 ALLAHABAD 752.

DANIELS AND BOYS, JJ.

Lala Dwarka Dass.....Plaintiff—Appellant.

v.

Rai Bahadur Shah Durga Prasad.....Deft.—Respondent.

S. A. No. 938 of 1922 decided on 1st May, 1924 from the decree of the Officiating District Judge of Agra dated the 11th April, 1922.

Civil P. C., S. 47—Parties—Prior mortgagee impleaded in subsequent mortgagee's suit is a party.

A prior simple mortgagee in possession by purchase of equity of redemption, though dispossessed by subsequent simple mortgagee under an auction purchase under his mortgage decree, cannot sue for possession; his suit for possession is barred by S. 47. [P. 757 Col. 2.]

S. K. Dar for the Appellant.

N. P. Asthana for the Respondent.

Daniels, J.:—In 1906 two simple mortgages were executed over the property in suit one in favour of the plaintiff and the other in favour of one Bhagirath. The defendant acquired the right of Bhagirath and brought the property to sale under his mortgage. The plaintiff was made a party to the suit. It should be mentioned that the plaintiff had also acquired the equity of redemption from the original mortgagor and was in possession of the property in that capacity. The decree in the defendant's suit was for sale of the property subject to the prior lien of the plaintiff, though it is said that that lien was not entered in the final decree. On the property being brought to sale, the defendant purchased it himself. He thereupon obtained possession through the court as against the plaintiff. He also obtained mutation of names in the revenue papers. It is admitted in the plaint and has been admitted throughout the proceedings that the plaintiff has lost possession. He brings the present suit, not for recovery of his mortgage money under his prior lien, but to be restored to possession of the property.

His suit has been dismissed by both the courts below and it appears to us that it has been rightly dismissed both on the merits and as being barred by Section 47 of the Code of Civil Procedure. The plaintiff is not entitled to possession as mortgagee, because the mortgage in his favour was a simple mortgage. He is not entitled to possession as owner of the equity of redemption, because the equity of redemption has been sold and purchased by the defendant. His only right, if any, under the decree was to bring the property to sale for the enforcement of his prior lien. The suit is also barred under Section 47. The plaintiff was a party to the decree. He has been dispossessed under the terms of the decree and his remedy for recovery of possession was by application to the execution court. It is not possible now to treat this suit as an application under Section 47 because the defendant obtained possession in the year 1915 and the present suit was not brought till the year 1920.

We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

1924 Allahabad 753.

SULAIMAN AND KANHAIYA LAL, JJ.

Lalchand and another—Defendants-Appellants.

v.

Ram Chand and another—Plaintiffs-Respondents.

F. A. No. 85 of 1922, decided on 28th April, 1924 from the decree of the Offg. Subordinate Judge of Mainpure, dated 22nd of December, 1921.

(a) Wajib-ul-arz—*Is prima facie evidence of custom but may record contract about some matters—Incidents of custom may be proved by production of* Wajib-ul-arz *or external evidence—Custom-pre-emption.*

A *Wajib-ul-arz* is in the absence of intrinsic or extrinsic evidence to the contrary *prima facie* evidence of the custom it records. It may however record a custom about certain matters and a contract as regards others. If it records a custom the incidents of that custom and the occasion which would give an opportunity for its enforcement may be proved by its production or by external evidence or by both. (37 All. 129 (P. C.); 1924 All. 274, *Foll.*) [P. 754, C. 2.]

(b) Wajib-ul-arz—*Construction* — Wajib-ul-arz *recording custom of pre-emption can be intrepreted to confer right of pre-emption as between members of different categories of pre-emptors* interse *in the absence of limitation to the contrary.*

Where the wajib-ul-arz did not say that the right of pre-emption or a claim to enforce that right would only accrue where a co-sharer has transferred his share to a stranger or a person outside the co-parcenary body and it mentioned the different classes of persons who could enforce the right in their due order whenever a transfer was effected. *Held*, that in the absence of any terms of limitation the right of pre-emption could be enforced as far as it might be between the persons belonging to the different categories *inter se* and that each *wajib-ul-arz* required to be interpreted according to its own terms. Per *Sulaiman, J.* (contra) Such a *wajib-ul-arz* should be construed as creating a right of pre-emption only on a sale to a total stranger. The priority of the several categories refers to pre-emption from a stranger vendee and does not refer to any right accruing on sale to any of the co-sharers themselves. [P. 754, C. 2 and P. 755, C. 1.]

(c) *Pre-emption, incidents of.*

A claim to a right of pre-emption does not necessarily connote a suit; it may be enforced either by private treaty or by suit.

It implies an assertion of a right which may be asserted before a transfer is effected or after it is effected. It may be asserted out of Court or, if the vendee refuses to reconvey the property, by a suit. The right arises from a sale if the order of preference laid down by the wajib-ul-arz is disregarded by the vendor. [P. 755, C. 2.]

(d) *Pre-emption—There is no difference in principle between clause in* wajib-ul-arz *prescribing order of persons to whom vendor is to offer property and clause giving order of classes entitled pre-empt in case of sale.*

There is no difference in principle between a clause which casts a duty on co-sharer to sell the property to the different classes of persons mentioned in their order, and a clause which defines the classes of persons among whom the right of pre-emption would be enforceable whenever a sale was effected by a co-sharer in respect of his share. [P. 756, C. 1.]

(e) *Per-emption—The existence of common khata as joint property of all co sharers does not render a person belonging in other respects to one category joint co-sharer with another belonging to a different category as regards separate interest sold by latter person.*

Where all the lands belonging to the parent *kkatas* are held in severalty, the mere existence of a common *khata* containing certain barren uncultivated or abadi lands which usually remain the property of all the co-sharers of the village till a partition is formally effected, cannot make a person who belongs in other respects to one class or category a joint co-sharer with another who belongs to another class or category as regards any separate interest the latter may sell. No account is taken of the appurtenances in the *shamlat khatas* for the determination of his right of pre-emption. [P. 756, C. 1 and 2.]

(f) Wajib-ul-arz—*Inclusion of matters not possibly or properly the subject of custom renders clause invalid as record of custom in regard to any of the matters of which it forms part.*

The inclusion of extraneous matters in the same clause which could not possibly be the subject of a custom precludes the possibility of the clause being treated as a record of custom in regard to any of the matters of which that clause forms a part. Where a *wajib-ul-arz* contains matters which could not properly or possibly be the subject of a custom then the ordinary presumption that the *wajib-ul-arz* was a *prima facie* record of a custom is overturned by the internal evidence afforded by the other terms embodied therein though they might be separable from the rest. (1924 All. 52; 1924 All. 321 (F.B.)). [P. 756, C. 2.]

(g) *Pre-emption—In the U.P. there are two kinds of custom of pre-emption* :—*(1) Where it can be claimed even on sale to one of the co-sharers by a co-sharer of a nearer clauss (2) Where it can be claimed by the co-sharers in a certain order of priority in case of sale to stranger.*

Per *Sulaiman, J.*—In U.P. two kinds of custom of pre-emption generally prevail. The first is of a kind where it is the duty of every co-sharer before he sells his property to offer it to the other co-sharers in a certain prescribed order. The other kind of custom is that when property has gone out of the hands of the co-parcenary body by a sale to a stranger certain classes of pre-emptors have a right to pre-empt the sale in a certain order of priority. Under the second kind there is no right *inter se* that is to say, no right of pre-emption when a sale takes place in favour of any of the co-sharers but there is a priority of claim when rival suits of pre-emption are instituted against a stranger transferee. [P. 756, C. 2 and P. 757, C. 1.]

(b) *Pre-emption—Burden of proof is on plaintiff to establish not a general cutsom but particular entitling him to decree against defendant vendee.*

The burden of proving the custom lies on the plff. The plaintiff pre-emptor cannot succeed by merely proving that a custom of pre-emption exists in the village. He has to show that that particular custom exists which would entitle him to a decree against the defendant vendee. [P. 157, C. 1.]

(i) *Pre-emption—Evidence should not be ambiguous.*

If the only evidence which the plaintiff can produce is ambiguous that is to say is capable of two interpretations and if on one of such interpretations the suit cannot succeed then the suit must fail and it is not the duty of the Court to give it necessarily the other interpretation which would entitle the plaintiff to a decree. (1924 All. 541 ; 15 I. C. 54; 12 A.L.J. 19; 28 I.C. 306 *Foll.*) [P. 757, C. 1.]

N. P. Asthana—for the Appellants.

S. N. Sen and *Badra Narain*—for the Respondents.

Kanhaiya Lal, J.:—This appeal and the cross-objection arise out of a suit for pre-emption and the main question for consideration is whether the plaintiffs respondents are entitled to a preferential right of purchase as against the defendants vendees. The sale in question was effected by the defendants Nos. 3 to 13 in favour of the defendant No. 1 and the father of defendant No. 2 for a consideration of Rs. 22,000 on the 27th of May, 1919; and the property sold comprised a 3 biswas share in patti No. 14 with the rights appertaining thereto in shamilat pattis Nos. 17 and 18 in the *thok*, known by the name of *thok* 12 biswas in the village Kadipur. The allegation of the plaintiffs was that they were co-sharers in that *thok* and that the defendants vendees were strangers. The Court below found that the village Kadipur comprised 2 *thoks*, that the plaintiffs were co-sharers in the *thok* in which the property in suit was situated and that the defendants vendees were co-sharers in the other *thok*. It further found that the plaintiffs were entitled to a preferential right as against the defendants vendees and that the sale consideration actually paid was Rs. 22,000. It accordingly decreed the claim of the plaintiffs subject to the payment of the above amount.

Paragraph 14 of the *wajib-ul-arz* of the village Kadipur, dealing with the right of pre-emption states that in the case of a transfer of property by a sale or mortgage but not by a gift, the claim to the right of pre-emption (*dawa haq Shafa*) shall belong first to an own brother and nephew then to a paternal cousin, a partner in the property, then to the co-sharers in the *thok* and then to the co-sharers of the village. The contention here is that the right to claim pre-emption arises only when a sale or mortgage is effected in favour of a person outside these categories and that no right of preference is given by the *wajib-ul-arz* between the co-sharers of the different categories *inter-se*. In other words it is argued that the right of pre-emption is at best recognised only where a sale or mortgage is effected in favour of a stranger and not where it is effected in favour of a member of one or other of the categories above mentioned. It is further urged that the clause itself does not establish any custom of pre-emption in the village because it mentions what could hardly be the subject of a custom, namely that no gift could be made by a co-sharer except in favour of an own brother and nephew or a daughter's son or except for a charitable purpose. The last condition is clearly extraneous to the scope of the paragraph, which purports to deal with the right of pre-emption. But it is contended that if that entry could not be the record of a custom, the previous entry could hardly be treated as a record of a custom of pre-emption.

The questions raised present features of some difficulty. As pointed out in *Digambar Singh* v. *Ahmad Sayed Khan* (1) and *Sher Muhammad Khan* v. *Parbhulal*(2) a *wajib-ul-arz* is in the absence of intrinsic or extrinsic evidence to the contrary *prima facie* evidence of the custom it records. It may however record a custom about certain matters and a contract as regards others. If it records a custom, the incidents of that custom and the occasion which would give an opportunity for its enforcement may be proved by its production or by external evidence or by both.

The *wajib-ul-arz*, here produced does not say that the right of pre-emption or claim to enforce that right would only accrue where a co-sharer has transferred his share to a stranger or a person outside the

(1) (1915) 37 All. 129=42 I.A. 10=13 A.L.J. 236 =19 C.W.N. 393=17 M.L.T. 193=2 L.W. 303=21 C.L.J. 237=28 I.C. 34—28 M.L.J. 556=17 Bom. L.R. 393=(1915) M.W.N. 581 (P. C.)

(2) (1924) All. 274=46 All. 47=21 A.L.J. 801.

the co-parcenary body. It mentions the different classes of persons who can enforce that right in their due order whenever a transfer is effected. Such a transfer may, however, be effected in favour of a stranger or in favour of a person belonging to a remoter category to the prejudice of a person belonging to a nearer category. In the absence of any terms of limitation, the right of pre-emption can be enforced, as far as it may be between the persons belonging to the different categories *inter se*. Each *wajib-ul-arz* requires to be interpreted according to its own terms. While in some cases it has been held on the interpretation of the particular *wajib-ul-arz* produced that the co-sharers belonging to the different categories have preferential rights *inter se*, in other cases it has been held that such preferential rights only exist where a sale is effected in favour of a stranger.

The Court below, relying on the decisions in *Ram Lal* v. *Niadar* (3) and *Gurdial* v. *Mathura Singh* (4) has found that such a right of preference exists even where a co-sharer of one *thok* sells to a co-sharer of another *thok*. In the former case, the *wajib-ul-arz* provided that in the event of a sale a co-sharer should sell his property to his own brother or *ekjaddi* and after him to co-sharers in the *Patti* or *thok* and after them to other co-sharers, and further said that the person falling within the first category would have to give the same price as was offered by a stranger. The view taken by this Court was that a right of pre-emption was given to the successive categories of the pre-emptors *inter se*, that is one against the other and that such right did not arise only in the event of a sale to a stranger. In the latter case the custom recorded in the *wajib-ul-arz*, gave a right of pre-emption in the case of a sale or mortgage to a co-sharer in a *patti*, then to *pattidars* of the *mahal*, then to the owners of the other *mahals*, and in case of their refusal, to an outsider at the same price as a stranger would be willing to give. The view taken by this Court was that a right of pre-emption between the persons mentioned in the *wajib-ul-arz* was enforceable *inter se*.

The learned counsel for the defendants appellants has referred to the decisions in *Khatun Bibi* v. *Saiyida Bibi* (5) and *Mathura Singh* v. *Ram Lal Singh* (6) where under circumstances said to be similar to the present case, no right of pre-emption as between the co-sharers of different categories *inter se* was allowed.

Personally speaking it appears to me questionable how far we can import into the terms of a *wajib-ul-arz* a limitation or restriction, which does not there exist. The *wajib-ul-arz* does not in terms say that the right of pre-emtion would be available only where there is a sale to a stranger. It is wide enough in its terms to govern all cases where a sale is effected in favour of a person whether he is a stranger or belongs to one or other of the categories mentioned. It merely declares the order in which the right of preference is to be exercised as between the different classes of co-sharers or as against a stranger. For the purpose of enforcing the right of pre-emption, the village is practically divided into different concentric circles. One of those concentric circles is the *thok* and the other is the village unit. A person who belongs to an inner concentric circle is entitled to claim pre-emption as against a person who belongs to an outer concentric circle, because so far as the former is concerned the latter is virtually a stranger. A claim to a right of pre-emption does not necessarily connote a suit. It may be enforced either by private treaty or by suit. It implies an assertion of a right which may be asserted before a transfer is effected or after it is effected. It may be asserted out of Court or, if the vendee refuses to reconvey the property, by a suit. The right arises from a sale if the order of preference laid down by the *wajib-ul-arz* is disregarded by the vendor. If it had been intended to limit the exercise of the right to an occasion when a sale was made to a stranger, the *wajib-ul-arz* would have said so.

In *Sukhdeo Singh* v. *Bahadur Singh* (7) where a *wajib-ul-arz* provided that if a co-sharer wanted to sell his property he should do so for whatever price was obtained from others, first to a near co-sharer in the same *patti*, secondly to any other co-sharer in the same *patti*, thirdly to a near co-sharer

(3) (1907) 4 A.L.J. 352=1907 A.W.N. 95.
(4) (1910) 7 A.L.J. 610=6 I.C. 920.

(5) (1905) 27 All. 457=2 A.L.J. 689=1905 A.W.N. 45.
(6) (1921) 19 A.L.J. 903=64 I.C. 486.
(7) (1904) 26 All. 544=1 A.L.J. 272.

in another *patti*, fourthly to a co-sharer in the *mahal* and fifthly to an outsider, it was held that the right conferred was a right enforceable between the different classes of persons mentioned *inter se*.

In *Sukhdeo Singh* v. *Bahadur Singh* (7) where the pre-emptive clause described the right of pre-emption as existing in (1) a near co-sharer in the same *patti* (2), any other co-sharer in the *patti*, (3) a near co-sharer in another *patti*, and (4) a co-sharer in the *mahal* for whatever price was obtainable from another, the contention that the right of pre-emption arose only in case of a sale to a stranger was repelled.

In *Dhanraj Misir* v. *Rameshwar Misir* (8), no such restriction was read into the terms of the *wajib-ul-arz* as is now contended for.

It is urged in differentiation of those cases that where the pre-emptive clause of the *wazib-ul-arz* imposes no duty on a co-sharer to offer the property in the first instance to a person of the class first named and then to the persons mentioned in the other classes in their order, no cause of action can accrue to the co-sharers of the different clauses *inter se*, by a sale to a member of one of those classes. But there is no difference in principle between a clause which casts a duty on a co-sharer to sell the property to the different classes of persons mentioned in their order, and a clause which defines the classes of persons among whom the right of pre-emption would be enforceable whenever a sale was effected by a co-sharer in respect of his share. Obviously if a pre-emptive clause contains no restriction, limiting its operation *to a sale or transfer in favour of a stranger*, it will be doing violence to the spirit and intention of the framers of the *wajib-ul-arz* to import that limitation and preclude a person belonging to a superior category from enforcing it as against a person who, so far as his *thok* is concerned is as much a stranger as a complete outsider.

Where all the lands belonging to the parent *khatas* are held in severalty, the mere existence of a common *khata* containing certain barren, uncultivated or *abadi* lands, which usually remain the property of all the co-sharers of the village till a partition is formally effected, cannot make a person who belongs in other respects to one class or category, a joint co-sharer with another who belongs to another class or category, as regards any separate interest the latter may sell. No account is taken of the appurtenances in the *Shamlat Khatas* for the determination of his right of pre-emption.

Interpreted however in the light of the Full Bench decision in *Randhir Singh* v. *Rajkal Misir* (9) which follows a previous decision in *Balwant Singh* v. *Mare Singh*, (10), and is binding on us the inclusion of extraneous matters in the same clause which could not possibly be the subject of a custom, precludes the possibility of the clause being treated as a record of custom in regard to any of the matters of which that clause forms a part. It has been there pointed out that where a *wajib-ul-arz* contained matters which could not properly or possibly be the subject of a custom, then the ordinary presumption that the *wajib-ul-arz* was a *prima facie* record of a custom was overturned by the internal evidence afforded by the other terms embodied therein though they might be separable from the rest.

The claim of the plaintiffs must in these circumstances fail and it is hereby dismissed with costs. The cross-objection is not pressed and is also dismissed with costs. The costs in either case will include fees in this Court on the higher scale.

Sulaiman, J.:—It is notorious that before the year 1911 there were numerous cases on pre-emption, which were more or less irreconcilable. In that year a special Pre-emption Bench was therefore constituted with the professed object of laying down certain principles which should as far as possible be consistently followed. Ever since that year the principle of *stari decisis* has been rigorously attempted to be followed.

Now in these provinces two kinds of custom of pre-emption generally prevail. The first is of a kind where it is the duty of every co-sharer before he sells his property to offer it to the other co-sharers in a certain prescribed order. The other kind of custom is that when a property has gone out of the hands of the co-parcenary body by a sale to a

(8) (1924) All. 227=46 All. 170=21 A.L.J. 928=5 L.R. A. Civ. 14.

(9) (1924) All. 321=46 All. 478=22 A.L.J. 561=5 L.R. A. Civ. 151 (F.B.).

(10) (1924) All. 52=21 A.L.J. 542=4 L.R. A. Civ. 281.

stranger certain classes of pre-emptors have a right to pre-empt the sale in a certain order of priority. Under the second kind there is no right *inter se*, that is to say, no right of pre-emption, when a sale takes place in favour of any of the co-sharers, but there is a priority of claim when rival suits of pre-emption are instituted against a stranger transferee. That both these kinds of custom do exist in these provinces cannot for a moment be disputed.

Instances of the second kind of custom are to be found in cases like *Sheobalak Singh* v. *Lachmidhar*, (11) *Khatun Bibi* v. *Sayida Bibi*, (5) *Narain Saran Singh* v. *Sidh Narain Singh*, (12) as well as in a number of other cases to some of which I shall refer later on.

It has been well established that the burden of proving the custom lies on the plaintiff. The plaintiff pre-emptor cannot succeed by merely proving that a custom of pre-emption exists in the village. He has to show that that particular custom exists which would entitle him to a decree against the defendant vendee. The pre-emption Bench has always held that if the only evidence which the plaintiff can produce is ambiguous, that is to say, is capable of two interpretations, and if on one of such interpretations the suit cannot succeed, then the suit must fail, and it is not the duty of the Court to give it necessarily the other interpretation which would entitle the plaintiff to a decree *vide* the cases of *Bechu Singh* v. *Lachmi Narain Singh* (13), *Jahangir* v. *Amir Singh* (14), *Din Dayal* v. *Ramdhan* (15), and *Nageshar Prasad* v. *Ram Harakh Pande* (16).

In the present case the *wajib-ul-arz* contains a clause which when literally translated runs as follows: "The claim to (or suit for) a right of pre-emption in case of transfer of property by sale and mortgage, except a gift, shall be first, to own brother and nephew and then a paternal uncle's son, a partner in the property, then co-sharers in the *thok* and then co-sharers in the village. "(*Dawa haqqi shufa dar surat intiqal haqiat ba zaria bai wa rehan sewai heba awwal bhai bhatija haqiqi phir bhai chachazad sharik haqiat phir hissadaran thok phir hissadaran gaon ko hoga.*") With the other portion of the clause I am not concerned at this stage.

It is clear that the clause is not like the clauses which are found in many *wazib-ul-arzes* and which say that in case a co-sharer wishes to transfer his property he should offer it first to one class of co-sharers and then to another class. Obviously in such latter cases, if no offer is made to the first class of co-sharers, the condition is broken, which gives a co-sharer of the first class a right of pre-emption even if a sale takes place in favour of a co-sharer of the second class. In the present case the right comes in after the transfer has taken place. If the word transfer in the clause were given its wide meaning so as to include even a transfer to any of the clauses of pre-emptors mentioned therein, the clause as it stands cannot in its entirety be operative. For instance, let us substitute the words 'transfer to own brother' in place of the word 'transfer', the clause would then read. "In case of transfer to own brother of property by sale and mortgage except a gift, first own brother and nephew and then a paternal uncle's son, a partner in the property and then co-sharers in the thok and then co-sharers in the village shall claim right of pre-emption." Such a provision is of course absurd. Similarly if for the word 'transfer', we substitute 'transfer to any of the other classes of pre-emptors mentioned,' part of the clause would be meaningless, as no right of pre-emption can exist in favour of persons of that class or an inferior class.

The learned Counsel for the respondents is accordingly forced to admit that in such cases either the whole or a portion of the clause must be omitted as being inapplicable. It follows that if we give the word 'transfer' its general meaning so as to include transfers to persons mentioned in the various categories, then the whole clause as it stands may not be applicable. On the other hand, if no portion of this clause is to be omitted in any possible case, then the only meaning which can consistently be given to the word 'transfer' would be "a transfer to a person not coming within the categories mentioned."

No case has been brought to our notice which contains a clause similar to the one

(11) (1901) 23 All. 427=1901 A.W.N. 120.
(12) (1908) 5 A.L.J. 655=1908 A.W.N. 251.
(13) (1912) 15 I.C. 54.
(14) (1914) 12 A.L.J. 19=23 I.C. 245.
(15) (1915) 28 I.C. 806.
(16) 1924 All. 541=46 All. 870=22 A.L.J. 342=5 L.R.A. Civ. 189.

before us, and where it has been held that there is necessarily a right of preference *inter se*. The cases referred to by the Court below as well as the cases cited in argument on behalf of the respondents are all cases where the clause expressly provided that the vendor should offer or transfer his property first to one class of co-sharers and then to another class. In such cases if the transfer or the offer is not made to the first class of pre-emptors then the custom has not been complied with and the members of that class have a right to claim pre-emption even though the sale has been made to co-sharers in other categories. On the other hand there are at least three cases which support the view that a *wajib-ul-arz* of this kind is at least capable of an interpretation that the right was intended to be given only when a sale had taken place in favour of a person other than those coming within the categories mentioned therein. This would imply that at least one meaning of the *wajib-ul-arz* may be that when a transfer of property has taken place by sale or mortgage other than a gift then among the persons who will have the right to institute a suit would be first own brothers and nephews, then paternal uncle's sons, then co-sharers in the property, then co-sharers in the *thok* and lastly co-sharers in the village. The last mentioned co-sharers would not have been mentioned unless the transfer under contemplation was one in favour of a stranger.

This was the view clearly expressed in the case of *Mathura Singh Ram* v. *Lal Singh* (6). Tudball, J. (who had been a member of the pre-emption Bench from the very beginning of its constitution) joined in coming to the conclusion that a *wajib-ul-arz* of that kind was ambiguous and capable of two interpretations and that therefore the plaintiff pre-emptor could not succeed. This case was referred to subsequently by Lindsay, J. and myself in the case of *Dhanraj Misir* v. *Rameshwar Misir* (8) which, though different on facts, is certainly a case where the distinction sought to be drawn by the pre-emption. Bench was very prominently brought out, and the earlier case of *Mathura Singh* v. *Ram Lal Singh* (6) distinguished. I may note that the *wajib-ul-arz* in the case reported in 19 A.L.J. 903 was very much similar to the one before us. We have sent for the record of that case and the words of the *wajib-ul-arz* were as follows :—'In the case of transfer of property the claim to (or suit for) pre-emption shall be first to heirs descended from a near common ancestor, then to co-sharers in the *patti*, and after them to co-sharers in the village'. "*Bahalat intiqal haqiyat kisi hissadar ke dawa shafa pahle warisan ekjaddiqaribi zan bad hissadaran patti pas az shurkayan mauza ko paunchhega.*")

In the case of *Ganpat Rai and others* v. *Jamna Prasad* (17) the pre-emption Bench (Lindsay, J. and myself) had before it the *wajib-ul-arz* which was almost identical in its terms with the one in the present case. The words of the *wajib-ul-arz* in the latter case were as follows: "The claim to (or suit for) a right of pre-emption in the case of transfer of property by sale and mortgage, except a gift, shall be, first, to own brother and nephew, a paternal uncle's son, a partner in the property, then, co-sharers in the *thok* and then co-sharers in the village.' ("*Dawa haq shafa ka dar surat intiqal haqiyat bazaria bai wa rehan sewai heba ke awual bhai bhatija haqiqi aur phir bhai chachazad sharik haqiyat aur phir shurkayan patti zan bad hissedaran deh ko hoga.*")

It is apparent that with the exception of two or three synonymous words all the words were exactly identical with the words in the *wajib-ul-arz* before us. That case also came from the same district, Mainpuri. It was held therein that the terms were ambiguous and capable of two interpretations, and that the plaintiffs' suit must therefore fail.

I find it impossible therefore to distinguish the present case from the case reported in 19 A.L.J., 903 and S.A. No. 78 of 1924. It is also noteworthy that in all these three *wajib-ul-arzes* the word '*dawa*' is used which in ordinary parlance means a 'suit', and that word does not occur in any of the cases cited on behalf of the respondents.

Now that the Pre-emption Act has been passed and all subsequent cases would be governed by it, cases of the present kind have lost much of their importance. But as regards cases which are not yet governed by the new Act, I would consider it lamentable if this High Court is to accept two different interpretations of *wajib-ul-arzes*

(17) S. A. No. 78 of 1924, decided on 31st January, 1924.

of exactly the same language and prepared at the same settlement in the same district. And therefore even if I had entertained any doubt as to the correctness of the interpretation, which was adopted in the cases referred to by me, I would not have felt inclined to deviate from that interpretation. My conclusion is that the documentary evidence adduced by the plaintiffs in this case was capable of two interpretations according to one of which the plaintiffs' claim cannot be decreed. The evidence was therefore wholly insufficient to establish the claim against the defendants.

The suit also fails on another ground. After reciting the right of pre-emption, the same clause goes on to add "gift will be made in favour of an own brother and nephew or daughter's son or for a charitable purpose and not otherwise". This is a part of the same clause which records a right of pre-emption. It is intended to lay down that gift to persons other than those mentioned therein or for the purposes mentioned therein are altogether invalid. It is obvious that such a rule cannot be the result of the growth of a custom. It has been held in a number of cases (vide *Fazal Hussain* v. *Mohammad Sharif* (18), *Suraj Bali Singh* v. *Mohammad Nasir* (19) and *Balwant Singh* v. *Mare Singh* (10) as well as the recent Full Bench case of *Randhir Singh* v. *Bajpal Misir* (9) that if the clause of pre-emption contains matters which cannot *possibly* be a record of custom, then the ordinary presumption which arises that the entry is one of custom, is negatived. Here we have a part of the clause which cannot possibly be the result of the growth of a custom. It follows therefore that there is internal evidence to show that the entry in paragraph 14 cannot be a record of custom. It is also noteworthy that the word 'custom' itself is not mentioned in paragraph 14. The exact year when this *wajib-ul-arz* was prepared is not given in the copy, but it is noted therein that this is a record of the former settlement. The entry therefore, if it was a record of contract, cannot now be in force as that settlement has come to an end.

In my opinion therefore on both these grounds the appeal should be allowed and the plaintiffs' suit dismissed.

The respondents have filed certain cross-objections, but they are not pressed. In the view which I have taken they also could not have been allowed.

By the Court :—The appeal is allowed and the claim of the plaintiffs-respondents dismissed with costs here and hitherto including in this Court-fees on the higher scale. The cross-objection is dismissed with costs including in this Court-fees on the higher scale.

Appeal allowed.

(18) (1916) 36 All. 471 = 24 I.C. 464 = 12 A.L.J. 800.
(19) (1918) 16 A.L.J. 879 = 49 I.C. 220.

---

* 1924 Allahabad 759.

DANIELS, J.

Ram Naresh Singh—Applicant

v.

Jagar Nath Singh—Opposite Party.

Civ. Rev. No. 10 of 1924, decided on 9th April, 1924, against the order of the Munsif, exercising the powers of the Judge of the Court of Small Causes of Ballia.

Civ. Pro. Code, O. 47, r. 7—Non-compliance with the requirements of the rule does not justify granting review for other sufficient cause.

Where the new evidence alleged did not comply with the requirements of O. 47, r. 1 the review could not be admitted on the ground of other sufficient reason, [P. 761, C. 1.]

Uma Shankar Bajpai—for the Applicant.

Mukhtar Ahmad—for the Opposite Party.

Judgment :—This is an application for revision of an order granting a review in a Small Cause Court case. But for the suit having been tried by a Small Cause Court an appeal would have laid under Order 47, rule 7. The ground of revision is that the Court below had no jurisdiction to allow a review. The suit was one on a note-of-hand. The learned Munsif originally dismissed the suit on the ground that he was unfavourably impressed with the plaintiff's evidence and that the plaintiff's witness was a chance witness. The defendant in his evidence had asserted that he was illiterate but this fact is not referred to in the judgment. A month afterwards the plaintiffs produced a copy of a *vakalatnama* signed by the defendant and asked for a review on this ground. The learned Munsif admitted it and because he considered that the defendant had lied in saying that he was illiterate he proceeded to decree the claim and to accept the plaintiff's evidence which he had previously

disbelieved. The *vakalatnama* and another paper relied on were both filed in a suit to which the plaintiff was a party and there is absolutely nothing to show that this evidence could not with the exercise of due diligence have been within his knowledge or have been produced by him at the original trial. He did not at the trial even ask for an adjournment to test the defendant's statement. If the new evidence alleged did not comply with the requirements of Order 47, rule 1 the review certainly could not be admitted on the ground of other sufficient reason. In my opinion, the learned Munsif was not legally justified in granting the review.

I accordingly set aside his decree and restore the original decree dismissing the suit. Under the circumstances I make no order as to costs.

Appeal rejected.

1924 Allahabad 760.

NEAVE, J.

Bengal North-Western Railway—Deft. Applicant.

v.

Firm Munna Lal Bishambhar Nath—Plaintiff.

B. B. and C. I. Railway—Defendant—Opposite Party.

Civ. Rev. No. 29 of 1924, decided on 27th May, 1924, from an order of the Judge of the Court of Small Causes at Agra, dated the 2nd October, 1923.

Railways Act S. 72—Delay in transmission.

If risk note does not specially protect Railway against delay notwithstanding risk note, Railway is liable for unreasonable delay in transmission of goods which it cannot explain. [P. 760, C. 1.]

S. N. Sen—for the Applicant.

K.N. Katju and *Ladli Prasad Zutshi*—for the Opposite Party.

Judgment:—This is an application for the revision of an order of the Judge of the Court of Small Causes at Agra granting to the plaintiff-opposite party a decree for Rs. 357-8 as damages.

It has been found that the plaintiff booked a number of bags of chillies at Semaria Ghat station on the B. and N.W. Railway for despatch to Agra Fort Station on the East Indian Railway. The goods were despatched on the 5th May, 1922 and were not delivered till the 19th of June 1922, 45 days later. It has further been found on the evidence of the Railway Company's own witness that the normal time for the journey is from 11 to 16 days. There was therefore in this case a delay of a month, and during this interval the price of chillies dropped from Rs. 24-8 a maund to Rs. 21-8 a maund, a difference of Rs. 3 a maund.

On behalf of the defendant-applicant it is contended that as the goods were consigned to the Railway Company under a risk-note in Form A, the Company is exempted from all liability for loss occasioned to the consignor by the delay. This Risk-Note is employed in cases where goods tendered for carriage are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit, and in the particular risk-note which was signed by the consignor in the present case the consignment is described as contained in " bags old, torn and different sizes, contents liable to wastage, damage or shortage in weight in transit". The note goes on to say that the sender " agrees and undertakes to hold the Railway administration.....harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same".

The learned Munsif has held that this language clearly shows that the risk-note in form A has no concern whatever with the case of delay. In this view I concur. It is obvious that the special contract contained in this document is merely intended to protect the Railway from responsibility for any loss or damage which will result to the goods from defective packing and consequent leakage or wastage in transit. No evidence appears to have been given by the Company to explain or account for the unusual delay except that when the waggon containing the goods arrived at Gorakhpur on the 7th May it was found to be " panel torn " and the goods were therefore transhipped to another waggon on the following day. This explanation, however, fails to account for more than one day out of the month which was spent on the journey in excess of the usual time. It has been held in *East Indian Railway* v. *Indar Man* (1), that in the absence of any

---

(1) 1922 All. 63=20 A.L.J. 114.

risk-note a Railway Company is bound to deliver goods within a reasonable time, and is liable to pay compensation for loss caused by delay which it is unable to explain. It is true that in the present case there was a risk-note, but it was of a character which did not protect the Company against the consequences of delay. The learned counsel for the defendant-applicant has relied on *Ram Kishan Ram* v. *North-Western Railway Company* (2), and the *Secretary of State* v. *Jiwan* (3). These, however, were both cases in which a risk-note in form B was employed and the goods were taken at a reduced rate on conditions quite different to those contained in the contract which is embodied in form A. The case of the *East Indian Railway* v. *Gopi Krishna* (4), is similar in many respects to the present case, though in it also the risk-note was in form B. In that case unreasonable delay in transit which resulted in damage to the plaintiff quite independent of any deterioration or loss of the goods consigned was held to give a cause of action to the plaintiff.

In the first ground of appeal reference is made to paragraph 40 of the Goods Tariff Regulation. This regulation, however, was not produced; nor was this point argued.

The application is dismissed with costs including in this Court-fees on the higher scale.

Application dismissed.

(2) 1923 All. 122=20 A.L.J. 973=4 L.R. A. Civ. 20.
(3) 1923 All. 426=45 All. 380=21 A.L.J. 220=4 L.R.A. Civ. 166.
(4) (1924) All. 8=45 All. 534=21 A.L.J. 448=4 L.R.A. Civ. 242.

1924 Allahabad 761 (1).

DANIELS, J.

Ram Lal Singh—Plaintiff-Applicant

v.

Behari Singh—Defendant-Opposite Party.

Civ. Rev. No. 36 of 1924, decided on 9th April, 1924, against the order of the Additional Subordinate Judge of Gorakhpur.

Award—Revision—On objection that arbitrators had made secret enquiries—Court's decision apart from award is not revisable.

Where an award was attacked as vitiated by misconduct on the ground that the arbitrators had made secret enquiries and the Court thereupon took up the case and proceeded to dispose of it without reference to the arbitration.

Held no revision lay.

Sankar Saran—for the Applicant.

S. P. Sinha—for the Opposite Party.

Judgment:—In this case a preliminary objection is taken that no revision lies. That objection is in my opinion well founded. While the appeal was pending in the Court below the parties agreed to refer their dispute to certain arbitrators. These arbitrators made an award. The award was attacked as vitiated by misconduct on the ground that the arbitrators made secret enquiries. It appears to have been common ground that they had made secret enquiries. The learned Subordinate Judge held that this amounted to misconduct and therefore entertained and decided the appeal from the Munsif's decision without reference to the arbitration. It may be that I should have come to a different conclusion on the legal question, but it cannot be said that the learned Judge acted without jurisdiction or that he acted illegally or with material irregularity in deciding a point of law which arose before him for decision and which he had jurisdiction to decide. A similar view was taken in the case of *Ganga Sahai* v. *Beldeo Singh* (1) which is practically on all fours with the present case.

I therefore accept the preliminary objection and dismiss the application with costs.

Application dismissed.

(1) (1922) All. 64=20 A.L.J. 117.

1924 Allahabad 761 (2).

BOYS, J.

Megi Mal and another—Plaintiffs-Applicants.

v.

Hiralal and another—Defendants-Respondents.

Civ. Rev. No. 81 of 1924, decided on 2nd July, 1924, from an order of the Additional Subordinate Judge of Saharanpur, dated 12th March, 1924.

Bengal N. W. P. and A Civil Courts Act II of 1896, S. 9—Appeal to Sub-Judge—Civ. Pro. Code, S. 24.

Appeal lies from Hon: Munsif appointed under S. 9 of Act II of 1896 to Sub-Judge, though the

case may have been transferred to the Munsif from a Court of Small Causes. [P. 762, C. 1.]

St. C. Thompson—for the Applicants.

P. L. Banerji—for the Opposite Parties.

Judgment:—The only ground urged in this revision is the 4th ground which was added by a subsequent application. It is suggested that because this case was transferred from the Court of a Judge of Small Cause to the Court of a Honorary Munsif therefore the Honorary Munsif for the purpose of hearing the case became a Small Cause Court Judge and no appeal lay from his decision to the Subordinate Judge. This is to assume that the transfer was under section 24 of the Code of Civil Procedure, and to ignore the effect of section 9 of Act II of 1896 under which the Honorary Munsif is appointed. He is declared by that section to be a Civil Court under the Bengal North-Western Provinces and Assam Civil Courts Act (Act XII of 1887) and under that Act an appeal lies from his decision to the Subordinate Judge. It is only necessary to add that the case was transferred to the Court of the Honorary Munsif under the provisions of section 8, clause 2 of Act II of 1896 and not under the provisions of section 24 of the Civil Procedure Code. The application is dismissed.

Application dismissed.

---

* 1924 Allahabad 762.

BOYS, J.

Govind Ram—Applicant

v.

Naubat and others—Opposite Parties.

Cr. Rev. No. 142 of 1924, decided on 19th May, 1924, from an order of the District Magistrate of Muttra, dated 25th January, 1924.

(a) *Penal Code, S. 447—Plea of not having given up actual possession though legally ejected and though formal possession was given, is no defence.*

The bare defence "I have not given up and I will not give up actual possession though I have been legally ejected" is tantamount to and should be treated as a plea of guilty when the complaint is one of trespass. [P. 762, C. 2.]

(b) *Crim. Pro. Code, S. 522—Vagueness of finding.*

Vagueness of finding as to trespass being committed on the day mentioned by complainant vitiates application for possession. [P. 763, C. 1.]

N. P. Asthana—for the Applicant.

G. Agarwala—for the Opposite Parties.

Judgment:—This is a case of three accused, a father and his son and a joint tenant of the father against whom the present applicant asks for an order under section 522 of the Code of Criminal Procedure. It is an admitted fact that they were ejected from a certain holding for failure to pay arrears of rent and that on the 16th of April 1923, formal possession was given to the landlord. One of the landlord's *karinda* Shamlal filed a complaint under sections 352 and 447 of the Indian Penal Code, in which he alleged that when he had gone to plough the holding on the 8th of July, 1923, he was resisted and an assault was committed upon him by these three accused. The main accused Naubat set up a defence which is frequently set up in these cases, but which I find it difficult to understand any Court listening to or allowing to be set up. Naubat's defence was "though formal possession was given to the landlord. I, as a matter of fact, have never given up actual possession." This is a state of affairs which, within my own experience, I have known to lead, time after time, to riots and murders. To my mind the bare defence "I have not given up and I will not give up actual possession though I have been legally ejected" is tantamount to and should be treated as a plea of guilty when the complaint is one of trespass. It is on defence at all. I have asked Mr. Girdhari Lal Agarwala who appears for Naubat and he tells me that all that can be said for Naubat is that he has some plea that proceedings in the Revenue Court were in one particular detail or another kept from his knowledge. Be that as it may there is no denial that Naubat knew that he had been ejected by process of law.

On the hearing of this complaint the Tahsildar after hearing the evidence came to a finding of conviction not under section 352 but under section 447. I find it difficult to read into that finding a conviction of criminal trespass on the particular day on which Shamlal is said to have been resisted. It simply amounts to a finding, that on some day or other a patwari saw Naubat etc. cultivating this holding from which he had been legally ejected. Does that amount to a trespass?

It is perfectly true that it does. But it does not appear to be a finding as to a criminal trespass committed on the occasion which was the subject-matter of Shamlal's complaint. However on this Shamlal, the *karinda*, of the landlord applied for an order under section 522 restoring his master or himself on behalf of his master to possession. The Tahsildar who was the trial Court and the District Magistrate in revision refused to give him that order. If the Tahsildar's order had been a definite finding that criminal trespass had been committed on that day, as Shamlal with certain exaggerations complained, then I should have been prepared to hold that Shamlal being in possession as alleged in his complaint was resisted with a show of force and I would readily have given him the order for which he asks. But in view of the vague nature of the finding of the trial Court I cannot even say that he has held that the criminal trespass was committed on the day when Shamlal says it was committed. There is one matter which I think I should make clear for the benefit of complainant and that is that while it is admitted here that Naubat Ram has been ejected by process of law from that holding, even though it was only a formal possession that was given to the landlord, Naubat Ram's maintenance or attempted maintenance of his physical possession of the land is wholly illegal until such time, if any, that he may get himself restored by process of law. The application is rejected.

Application rejected.

1924 Allahabad 763.

BOYS, J.

Ganga Sahai—Applicant

v.

The King-Emperor—Opposite Party.

Cr. Rev. No. 155 of 1924, decided on 14th May, 1924, against the order of the Sessions Judge of Meerut, dated the 8th of March, 1924.

(a) *Crim. Pro. Code, S. 342—Omission to examine accused.*

Omission to examine accused at end of trial is only irregularity not amounting to illegality vitiating trial unless accused was prejudiced thereby. [P. 768, C. 2.]

(b) *Criminal trial—Rule against minimising offences applies only where the object is to gain jurisdiction where originality there is none—Accused cant object to trial under S. 182 where offence falls under. S. 211.*

The rule against minimising offences is only intended to cover cases where a Court secures a jurisdiction thereby which it would otherwise not have and thereby prejudices the accused.

Where the accused was tried and convicted under Penal Code, S. 182 he could not object that his case really fell under S. 211. [P. 764, C. 1.]

K. N. Katju—for the Applicant.

The Assistant Government Advocate—for the Crown.

Judgment :—In this case three persons a father, a son and the son's wife were convicted under section 182 of the Indian Penal Code of having given false information to the District Magistrate in that they complained to him that the son's wife had been raped by a certain Sub-Inspector. They made between them two complaints, one on the 8th of September and the other on the 6th of November, 1923; while the offence was alleged to have been committed on as long before as July the 25th 1923. The complaints were dismissed by the District Magistrate under section 203 of the Criminal Procedure Code. The three accused were prosecuted to conviction under section 182, I.P.C. The father, the present applicant before me, Ganga Sahai, is sentenced to 4 months' rigorous imprisonment and the son and his wife to fines of Rs. 25 each. Ganga Sahai went up in appeal to the Sessions Judge and has now come up here in revision. On his behalf three points are taken. (1) That he had no guilty knowledge that the complaints were false. The learned Judge has given reasons for holding that he had guilty knowledge and his conclusion being clearly a finding of fact, this Court would not, except under very exceptional circumstances enter into it. Those exceptional circumstances do not exist here. (2) The second objection is that the accused was not examined at the end of the trial as he should have been in accordance with the provisions of section 342 of the Cr. P. C. This was certainly an irregularity but in the absence of any decision of this Court that such an irregularity necessarily amounts to an illegality vitiating the whole trial, I am certainly not going to so hold. It was an irregularity and in some cases such an irregularity might very gravely prejudice the accused. Nothing has been shown to me here to cause

me to believe nor do I believe that the irregularity in this case was the cause of any prejudice whatever. There is not even a suggestion that the pleader for the accused did not argue the case, and defence witnesses were called showing that the accused was under no sort of misapprehension. I hold that there is no force in this objection. (3) The third ground is that the act of the accused in making the complaint which he did to the District Magistrate and in abetting the complaint made by his son and his son's wife was doing an act which if it could be prosecuted at all should have been prosecuted as an offence under section 211, I.P.C. He was, in fact, prosecuted under section 182 I.P.C. It is suggested that this is an illegality. If it is, I can only suggest that it is an illegality by which the accused has very considerably benefited. If I were to accept this objection and set aside the conviction I should have to order his retrial under section 211, I.P.C. and he would if convicted get a more serious sentence. The objection has not been pressed. The prosecution which was sanctioned was a prosecution for giving false information and the accused was tried for giving false information. Under those circumstances the last thing he can possibly suggest is that he was prejudiced by not being tried under section 211, I P.C. and the rule against minimising offences is only intended to cover cases where a Court secures a jurisdiction thereby which it would otherwise not have and thereby prejudices the accused. There is no force in this revision. It is dismissed.

Application dismissed.

1924 Allahabad 764.

BOYS, J.

Manni and others—Applicants

v.

The King-Emperor—Opposite Party.

Cr. Rev. No. 168 of 1924, decided on 16th April, 1924, from an order of the Sessions Judge of Agra, dated the 27th February, 1924.

(a) *Criminal trial—In cases involving question of intention, if the facts are such as would cause a man of ordinary prudence and ability to infer a guilty intent the accused should rebut such inference.*

Case which involves a question of intention really rests upon the facts which are found. If those facts are such that a person of ordinary prudence and ability would come to the conclusion that they point to a guilty intent on the part of the accused it is for the accused to rebut that guilty intention; and if he does not so rebut it, the guilty intent is as much found against him as his physical acts. (37 All. 395, *Foll.*) [P. 764, C. 2.]

(b) *Penal Code, S. 456—Non-production of house owner.*

The mere non-production of the owner or person in actual possession of house does not vitiate conviction under S. 456 (12 A.L.J. 151 *Dist.*) [P. 764, C. 2.]

Gopinath Kunzru—for the Applicants.

The Assistant Government Advocate—for the Crown.

Judgment:—This is an application in revision of a conviction and sentence of six months' rigorous imprisonment under section 456 of the Indian Penal Code. It is quite unnecessary to repeat the facts in detail. The accused were found in the middle of the night in the house of another person. They set up the defence that they were bolting to escape from a gambling raid in a neighbouring house. That has been disbelieved. As to the question of how far an intent to commit an offence or to intimidate, insult or annoy can be inferred from the other facts, where there is no direct evidence, and from the silence or the false statement of the accused, I need say nothing further than that I am entirely in agreement with the view expressed by Sir George Knox in *King-Emperor* v. *Mulla* (1), that "Cases of this kind really rest upon the facts which are found. If those facts are such that a person of ordinary prudence and ability would come to the conclusion that they point to a guilty intent on the part of the accused it is for the accused to rebut that guilty intention and if he does not so rebut it the guilty intent is as much found against him as his entry into or upon the property."

The next point taken is that the actual owner or possessor of the house in this connection was not produced, and reliance was placed on the case of *Kunji Lal* v. *King-Emperor* (2). That case is clearly distinguishable in that the person who was in possession had no objection whatever to the alleged trespass.

---

(1) (1915) 37 All. 395 = 13 A.L.J. 625 = 29 I.C. 67 = 16 Cr. L. J. 435.

(2) (1913) 12 A. L. J. 151 = 21 I. C. 681 = 14 Cr. L. J. 633.

Lastly, I am asked to consider the question of sentence. It does not seem to have transpired very satisfactorily what the real ultimate object of the accused was. It is for this reason that they have been convicted only under section 441. If the offence which was their ultimate objective was not a serious offence, a sentence of 6 months appears to be excessive. On the other hand, if their intention was to commit a serious offence, it seems to me likely that the prosecution might have been able to prove that intention if something had not been concealed by the prosecution witnesses.

Under circumstances, I think that a sentence of three month's imprisonment will meet the case. To this extent I allow the application for revision. For the rest it is dismissed. Of the five accused in the case only two actually applied in revision, but I have been through the record and there is nothing to distinguish the case of one from another. My order, therefore, will apply to the case of all the five.

Application party allowed.

1924 Allahabad 765.

BOYS, J.

Hira Lal—Applicant.

v.

The King-Emperor—Opposite Party.

Cr. Rev. No. 181 of 1924, decided on 21st May, 1924, against the order of the Additional Sessions Judge of Cawnpore, dated the 14th March, 1924.

Crim. Pro. Code, S. 414—Appeal to Sessions Judge—Crim. Pro. Code, S. 562.

Appeal lies to the Sessions Judge from the order of a Magistrate under S. 562. [P. 766, C. 2.]

K. N. Katju—for the Applicant.

Assistant Government Advocate—for the Crown.

Judgment.—This is an application in revision against an order of the Sessions Judge refusing to hear the appeal of one Hira Lal against whom an order in a summary trial has been passed under section 562 of the Criminal Procedure Code the refusal being based on section 414 of the Criminal Procedure Code which he held barred the right of appeal.

Section 408 gives an appeal from the order of a Magistrate of the first class to the Sessions Judge. Section 410 gives an appeal from the Sessions Judge to the High Court. If these two sections are uncontrolled there can be no question that an appeal lies under them from orders under section 562 by a Magistrate or by the Sessions Judge respectively.

The case for the Crown here is that as there was a summary trial an appeal is barred by section 414; the argument being that as there is no sentence at all it must be held to be a sentence less than the maximum which is referred to in section 414.

To support the exclusion of a right of appeal, it will have to be argued that "no sentence" is "a sentence of less than a certain maximum". I find it impossible to hold that this is a permissible meaning to give to the language used. It is only necessary to read section 414 to realise instantly on coming to the words "passes a sentence" that here there was no "sentence". It has not been suggested here that an order under section 562 amounts to a sentence. It clearly does not do so and in this connection reference may be made to the words in section 380 "pass such sentence or make such order". This to my mind is really sufficient to conclude the question. The learned Sessions Judge says "Section 414 provides that notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in any case tried summarily, in which a Magistrate empowered to act under section 260, passes a sentence of fine not exceeding 200 rupees only". This is perfectly correct statement of what section 414 provides, namely that there shall be no appeal in certain cases. It does not say anything at all about whether there shall or shall not be an appeal in other cases but the learned Judge continues "By this section an appeal is allowed only in cases in which the Magistrate empowered to act under section 260 Criminal Procedure Code, imposes a fine exceeding 200 rupees or passes a sentence of imprisonment". It is on this latter paraphrase of the section that he has misdirected himself. The section says in what cases there shall be no appeal. It does *not* say in what cases there shall be an appeal and it is by paraphrasing it in this way that he suggests the inference that there shall be no appeal in other cases and

in this way has led himself to the conclusion that the section says what it does not say that there shall be no appeal where there is no sentence at all.

There are one or two further points that I may mention. It is asked why should the legislature have taken away any right of appeal when there is a definite sentence certainly a fine and possibly a sentence of imprisonment and yet have alloved a right of appeal when no sentence was passed. An explanation readily suggests itself. It is quite conceivable that many persons would regard an order of release under section 562 of the Code of Criminal Procedure coupled with having to enter into a bond to keep the peace and to be of good behaviour for any period up to three years as something very much more serious than a substantive sentence of fine of, perhaps, Rs. 10 or even Rs. 200. In this connection one may notice that an appeal always has been given to the District Magistrate against an order of a Magistrate demanding security for good behaviour and now the right to appeal against an order for security for good behaviour and also an order for security for keeping the peace has been still further extended. There is therefore nothing whatever unnatural or unreasonable in giving a right of appeal to a person who under section 562 has to file a bond both for good behaviour and for keeping the peace. Again there can be no particular significance in the fact that this was a summary trial. If there is anything in this argument for the exclusion of the right of appeal that exclusion will be effected just as surely by section 413 whether the trial was summary or not, as by anything in section 414 and we may therefore take it that anything which is authority for the proposition that section 414 excludes a right of appeal is equally authority in reference to section 413.

Again, if the argument for the Crown be accepted that a right of appeal is excluded by sections 413 and 414 then the whole right of appeal given by sections 408 and 410 under ordinary circumstances goes clean out of the Statute Book. If that be so then what is the meaning of the words in section 562, clause (3) "the High Court may, on appeal when there is a right of appeal to such Court". To suggest that there never is a right of appeal is to make nonsense of that clause. Section 562, clause (3) only happens to make mention of a right of appeal because it is considered desirable to give the High Court a power of what practically amounts to an enhancement when hearing the appeal. But in whatever connection the mention may be made of a right of appeal it is a certain indication that such a right must exist. If then there is a right of appeal to the High Court from an order under section 562 made by a Sessions Court, there is no logic in suggesting that there is not a similar right of appeal to the Sessions Court from an order of a Magistrate.

The order of the Court is that the order of the Sessions Judge, dated the 14th of March, 1924, dismissing the appeal is set aside and he is directed to readmit it and hear it in accordance with law.

Order set aside.

1924 Allahabad 766.

BOYS, J.

Cheda Singh—Appellant.

v.

The King-Emperor.

Cr. Appeal No. 198 of 1924, decided on 6th June, 1924, from an order of the Additional Sessions Judge of Meerut, dated 1st March, 1924.

(a) *Crim. Pro. Code, S. 237—Alteration of charge.*

Where the accused was specifically charged that he "caused such bodily injury to R as resulted in the man's death and thereby committed an offence punishable under S. 325, I.P.C."

Held, that in appeal the charge could not be altered to another one for which the evidence is ample. [P. 767, C. 2.]

(b) *Criminal trial—Remanding after acquittal.*

It would be undesirable to remit a case for retrial on an amended charge after acquitting the accused on the original charge owing to the Court holding the prosecution evidence to be false because it would mean the re-entertaining of the evidence of the same witnesses by the lower Court. [P. 767, C. 2.]

N. C. Vaish—for the Appellant.

The Government Pleader—for the Crown.

Judgment:—In this case two men Randhira and Sital have been already in a prior case convicted and sentenced to three years' rigorous imprisonment each under section 325 of the Indian Penal Code. The present appellant Chidda Singh was absconding. Six witnesses now in the Sessions

Court state that the present appellant was one of the three men, the other two being Randhira and Sital who struck Ram Sarup under a mango tree to which he had retreated at the instance of his son from the threshing floor where the fight began. Five of these six witnesses never named Chidda Singh as striking Ram Sarup under the mango tree in their statements which were recorded under section 164 of the Criminal Procedure Code nor in their statements at the first trial of the other two accused. Begraj mentions him at the first trial but did not mention him in his statement under section 164, Criminal Procedure Code. The learned Sessions Judge has not relied on these five witnesses but has considered himself justified in relying on Begraj supported by the fact that the Chidda Singh absconded and as he says that Chidda Singh was named in the first report. The fact of his absconding can be of very little value. As to the first report it is a purely general statement that such and such people beat such and such people and it is made by one Sagar Mal who saw nothing himself and was merely giving a general description of what he had heard from others and even that general description does not attribute to Chidda Singh the particular beating of Ram Surup, still less the particular beating which took place under the mango tree at which place it is certain the grievous hurt must have been caused which is the subject of the charge. Under these circumstances after hearing both sides at length I am quite certain that I find myself unable to uphold the conviction of Chidda Singh on the belief that he himself struck Ram Sarup the blow (there was only one blow on the head) which eventually proved fatal under the mango tree. It then becomes necessary to consider the charge. Chidda Singh the appellant was specifically charged that he "caused such bodily injury to Ram Sarup which resulted in the man's death and thereby committed an offence punishable under section 325, I.P.C." Finding that I cannot uphold the conviction on the ground that Chidda Singh himself caused the injury the question is whether at this stage I can alter the charge.

It is urged on behalf of the Crown that there was a common intention on the part of the several accused to beat the several members of the other party and that therefore a conviction could properly be arrived at with the aid of section 34 of the Indian Penal Code. This course appears to involve the following difficulties:—

Firstly, I cannot alter a charge except under the authority given by some section of the Criminal Procedure Code. The sections which would have to be considered are Ss. 236, 237 and 238. It is not urged and cannot be urged that sections 236 and 238 are applicable to a case of this description and as regards section 237 the provision in that is prefaced by the words "in the case mentioned in section 236." It is clear to me, therefore, that there is no section which will justify me in altering the charge and proceeding now to a conviction on that charge. It would really mean convicting the accused by bringing in two new facts which he was never asked in any way at all to meet in the lower Court. Those two new facts being

(1) not that he himself but somebody else of his companions struck the accused;

(2) that blow was struck in pursuance of a common intention.

I might be inclined to hold that the evidence on the record certainly indicates that those two points might be held to be established; but that would not justify me in altering the charge and proceeding here to a conviction without giving the accused a definite opportunity of meeting them. The last question then is, ought I to set aside the conviction and send the case back for a retrial on an amended charge of section 325, I.P.C. in reference to the blow inflicted by Sital and Randhira read with section 34. It appears to me that I ought not to do this. In the first place the accused has stood his trial once. That is, however, not a conclusive reason for not sending the case back. The conclusive reason is that I am acquitting him here on the charge of section 325, I.P.C. based on the allegation that he inflicted the blow himself and am acquitting him on that charge not on any technical ground but because I hold that the witnesses now attributing to him a personal part have clearly deliberately interpolated his name. To send the case back would mean inviting the Court below to believe on the amended charge the very witnesses whom I have held here to have in effect committed deliberate perjury. This would be very undesirable.

For the above reasons I allow the appeal of Chidda Singh, set aside his conviction and sentence and direct that he be forthwith released.

Appeal allowed.

---

* 1924 Allahabad 768.

BOYS, J.

Tulshi Das—Applicant.

v.

King-Emperor—Opposite Party.

Crim. Rev. No. 210 of 1924, decided on 19th May, 1924, from an order of the Additional Sessions Judge of Agra at Muttra, dated 9th April, 1924.

Public Gambling Act (III of 1867), amended by U.P. Act I of 1917) S. 13—Public place includes place where public are invited to gamble though owned by private individual.

The words "in a public place" in S, 13 as amended are capable equally of including in their ordinary reasonable and proper meaning "a place the title to which is vested in the public" "and a place to which however owned the public is allowed in effect unrestricted access." It is not the question of title to the place nor the nature of its metes and bounds which are the decisive factors but the use to which the place is put. (1922 All. 542, *Rel. on.*) [P. 769, C. 1 and 2,]

C. Ross Alston—for the Applicant.

The Assistant Government Advocate—for the Crown.

Judgment:—This criminal revision No. 210, and the other criminal revisions Nos. 205, 206, 209 and 211, deal with two incidents of *Satta* gambling. The cases Nos. 206, 209, 210 and 211 are the cases of Tulshi Das, Lachmi Narain, Budha, Thakar Das and Nahal Chand. The case No. 205 is that of Ghisa, pershadi Manohar and Kallu.

To deal now with the case No. 210, this man, Tulshi Das, was charged with a number of others with gambling in the *satta* form, *i.e.*, with betting or taking bets on opium price figures in a public place—an offence under section 13 of the Gambling Act III of 1867, as amended by the U. P. Act I of 1917. The section, as amended, reads:—"any person found gaming in any public street, place or thoroughfare" and by the same Acts "gaming" includes "wagering". The nine men, whose cases are before me were in their respective two groups charged in effect with being book makers, *i.e.*, with keeping premises for the purposes of betting and themselves taking bets therein. They have been sentenced to a month's imprisonment each. A number of those who went there merely for the purpose of making bets were sentenced to various fines. These others have not applied to this Court in revision.

The principal accused avowedly (*vide* the terms of their lease) took a lease of the premises concerned for the express purpose of carrying on the business which forms the subject of the charge. The "place," in question consists of an enclosure within a larger enclosure, and the public street runs along one side of the larger enclosure, and the "place" if used in the ordinary way as a place of residence, would undoubtedly be a "private" place. I mention these facts, because reliance has been placed on them by the defence, but in the view that I take the construction of the place is wholly immaterial. The only question here is "Did the accused by their action convert this" place into 'a public place' within the meaning of the Gambling Act?"

The term "public place" or a cognate expression is used in many Acts of the Legislature, but I am not aware of any statutory definition, which can have bearing on the present case. It may well have different meanings for the purpose of different Acts. Where it is not specifically defined, its value must be reasonably determined by the context and the circumstances in which it has been used. It is not defined in the Gambling Act. I have, therefore, to fall back on the consideration of what is the reasonable and proper scope to be given to the term for the purpose of Act III of 1867.

Two considerations present themselves. Is the act, which is forbidden, so forbidden because it violates a public title or because it violates moral standards publicly?

Now it is clear that the Legislature in such Acts as forbid encroachment on public property has in view the protection of public title. It is equally clear that in enacting the Gambling Act the Legislature had in view the prevention of public injury to moral standards and cannot be conceived of as having been even remotely concerned with the protection of public title to any particular property.

In what ways then can the standard of morality be publicly injured by gaming? It it possible to gamble:

(*a*) in a private house, entry to which is not permitted to any but friends, a select few coming by special invitation or special permission, and where the gaming can be neither seen nor heard by the public. This whether gaming be or be not morally desirable, can clearly constitute in no sense a public injury to moral standards.

(*b*) under similar conditions but where the gaming can be seen by the public without the public infringing the private rights of the owner of the place. Here there is a public injury to moral standards. Whether the circumstances of the gaming in a house, which is private in the very sense of the term, being visible to the public or members thereof will suffice to constitute it, gaming "in a public place" is a point which I have not got to decide in this case. I content myself with noting that in view of the case *Thallman* (1), anybody who so acts will at least run a risk of meeting with an adverse decision.

(*c*) in a place the title to which is vested in the public. Here there can be no suggestion that an offence is not committed.

(*d*) in a place the title to which is vested in a private individual but into which that individual, either avowedly or by implication, invites the public to come whether to gamble or as spectators. Here again is that public injury to moral standards in an equally virulent form, as in the case (*c*) above, where the gambling is on land of which the title is vested in the public. The Legislature has used words "in a public place" capable equally of including in their ordinary reasonable and proper meaning "a place the title to which is vested in the public" and "a place to which, however owned, the public is allowed in effect unrestricted access." The public injury to moral standards to be prevented is equally grave in the two cases, is equally obvious in the two cases, and the language used reasonably covers the two cases. It would be unreasonable to hold that both cases are not covered.

In the case before me it is not disputed that the accused invited to enter all and sundry who might wish to bet, but the case would in my opinion have been no different if the invitation had been to a class of "the public" or if there had been a merely colourable restriction on the right of entry.

My attention has been invited to a number of rulings and statutes English and Indian. But holding, as I have, that the matter must be decided on the language and purpose of Act III of 1867 and on that alone, I do not think it necessary further to refer to them, beyond saying that the view I have taken in effect accords with that of Mr. Justice Stuart in *Sukhnandun Singh* v. *Emperor* (2) in which he relied on *Wellard* (3). The latter case has, I find, been followed also in *Hari* v. *Jadunandan* (4), *Crown* v. *Govindarajulu* (5). and *Public Prosecutor* v. *Sakharam* (6).

I am of opinion that it is not the question of title to the place nor the nature of its metes and bounds, which are the decisive factors, but the use to which the place is put.

I hold that the accused were gaming in a public place.

There remains only the question of sentence. The accused plead that they did not know that they were breaking the law. I have held that they were breaking the law, and it appears to me that it had really been quite clear ever since the ruling of Mr. Justice Stuart in *Sukhnandan Singh* v. *Emperor* (2), decided on December 16, 1921, which though it referred to gambling of a different type specifically dealt with the phrase "in a public place." Apart from what may have been the law, it is clear that the accused at least knew that they were doing something, which the law had intended to forbid; and, being badly advised that there was a loop-hole, deliberately tried to take advantage of it. It is clear that they have done a very great deal of mischief; and, if the case rested there, I would maintain the sentence as it stands; but it also seems that some, at least, of that mischief would have been prevented if the police had taken action sooner. While, therefore, I think that a fine of Rs. 50 is adequate in the case of the men who merely took advantage of the facilities provided by these accused and went to bet, I think it would be wholly inadequate in the case of the men who, for their own profit,

(1) (1863) 33 L.J.M.C. 58.

(2) 1922 All. 542=44 All. 265=20 A.L.J. 80=23 Cr. L.J. 467.
(3) 14 Q. B. D. 63.
(4) (1903) 31 Cal. 542=8 C.W.N. 458.
(5) (1915) 39 Mad. 886=(1915) M.W.N. 841=30 I.C. 752=2 L.W. 997=16 Cr. L.J. 704.
(6) (1916) 40 Mad. 556=31 M.L.J. 285=(1916) M W.N. 196=36 I.C. 889=18 Cr. L.J. 7=4 L.W. 503.

deliberately provided those facilities. I reduce the sentence in the case of each of these nine men to a period of two weeks' simple imprisonment. Some, if not all, of the applicants have already served several days. They will surrender to their bail and serve the remainder.

Sentence reduced.

1924 Allahabad 770.

BOYS, J.

King-Emperor—Appellant.

v.

Baldeo Prasad and another—Opposite Party.

Cr. Ref. No. 213 of 1924, decided on 28th May, 1924, made by the District Judge of Cawnpore.

(a) *Crim. Pro. Code, S. 195—Delay.*

Delay may under certain circumstances be almost a sufficient ground in itself but in other cases it may not be a ground at all for setting aside order for prosecution. [P. 770, C. 2.]

(b) *Criminal trial—Successor in Court is same Court as his predecessor.*

A successor in a Court is the same Court as his predecessor in that Court. It therefore necessarily follows that the predecessor who has departed to another Court can no longer be held to be a presiding officer of the first Court. [P. 772, C. 1.]

(c) *Crim. Pro. Code, S. 476—Jurisdiction.*

The offence must be one which appears to have been committed in or in relation to a proceeding in the Court which passes the order under S. 476.

(d) *Crim Pro. Code. S. 435—District Magistrate must not refer directly.*

The High Court will not ordinarily accept a reference direct from the District Magistrate. [P. 772, C. 1.]

R. Malcomson (*Assistant Government Advocate*)—for the Crown.

J. M. Banerji—for the Opposite Parties.

Judgment:—In this case one Haidar Husain, an agent of two persons, Baldeo Prasad and Lachman Prasad, lodged a complaint under section 409 of the Indian Penal Code against one Nand Kishore, on the 10th of April, 1923. That case was enquired into and dismissed under section 203 of the Criminal Procedure Code on the 20th of April 1923. The subsequent proceedings deal with the question of whether Haidar Husain and Baldeo Prasad and Lachman Prasad should or should not be prosecuted under section 211 of the Indian Penal Code for having lodged or abetted the lodging of a false complaint against Nand Kishore. In view of these subsequent proceedings and the delay that had occurred in taking action against Baldeo Prasad and Lachman it is important to note that no new facts are alleged to have come to light since the 20th of April, 1923, when the case against Nand Kishore was dismissed. This is important because there has been a tendency to lay down a hard and fast rule that delay is a ground for setting aside an order for prosecution. It may under certain circumstances be almost a sufficient ground in itself but in other cases it may be no ground at all. It is possible to imagine a case in which the commission of an alleged offence may not have actually come to light for many months or even years after it had been committed. In the present case it is clear that all the facts which justified, if they do justify, the prosecution of these men were known on or before the 20th of April, 1923, when the case was dismissed.

The next step was an application on the 23rd of April, 1923, by Nand Kishore to Mr. Christie, then City Magistrate, who had tried the original case, for sanction to prosecute Haider Husain under section 211 of the Indian Penal Code. No attempt was then made to obtain sanction to prosecute Haidar Husain's employers Baldeo Prasad and Lachman Prasad. The sanction was granted on the 6th of July, 1923. Eventually owing to the passing of Act XVIII of 1923 which came into force on the 1st of September, 1923, it was thought necessary and steps were taken to alter the sanction granted by Mr. Christie to a complaint under section 476 of the Criminal Procedure Code. This apparently, so far as I am informed, brought the matter to the notice of the Prosecuting Inspector who then applied on the 30th of October to Babu Prem Chand Seth who had succeeded. Mr. Christie as City Magistrate, for an order under section 476 of the Criminal Procedure Code against Baldeo Prasad and Lachman Prasad, the employers of Haidar Husain. It will be noticed then that no steps whatever were taken against Baldeo Prasad and Lachman Prasad from the 20th of April when the original case was dismissed to the 30th of October 1923. The learned District Magistrate in referring the case speaks of "the obstructive tactics of the accused." It is true that Haidar Hussain was taking the matter of his own

prosecution from Court to Court. It is probably true that that involved the record going from the Court of the City Magistrate to the Sessions Court and to the High Court, but I cannot see even if that is so, that it accounts in any way whatever for Nand Kishore not having applied to prosecute Baldeo Prasad and Lachman Prasad at the same time that he applied against Haidar Husain when all the materials that he was ever going to get were already in his possession and in that of the Court. Nor do I think that the Prosecuting Inspector was justified in making an application against Baldeo Prasad and Lachman Prasad so many months afterwards. It is quite likely, and I am certainly ready to accept, that he was in no way to blame for an application in regard to these two men not having been made before. But I do think that after a lapse of nearly six months he should have declined to take any action. It is not necessary for me to determine whether this delay would or would not be sufficient in itself for setting aside the order for prosecution as there are other points which will have to be dealt with and one of which will appear by itself sufficiently strong to make it inevitable that the reference of the District Magistrate be returned and the order of the Assistant Sessions Judge quashing the complaint under section 476 of the Criminal Procedure Code against Baldeo Prasad and Lachman Prasad be maintained.

To make the next point clear it is necessary to add one or two further facts. On the 30th of October, 1923, as I have already stated, the Prosecuting Inspector applied to prosecute Baldeo Prasad and Lachman Prasad in the Court of Babu Prem Chand Seth who had now become City Magistrate. On the 21st of January, 1924, the Prosecuting Inspector applied again to Mr. Christie, now no longer in charge of the City for an order under section 476 of the Criminal Procedure Code against Baldeo Prasad and Lachman Prasad. It is not very clear how he came to make a second application, whether it was of his own initiative because he thought it better to apply to the Magistrate who had already granted a similar order against Haidar Husain or whether it was due to some objection raised by Baldeo Prasad and Lachman Prasad in the Court of Babu Prem Chand Seth. Both suggestions are made but it is not very material to determine exactly what motives led to the filing of the second application. It was, in fact, filed and Mr. Christie on the 8th of February, 1924, passed an order under section 476 of the Criminal Procedure Code against Baldeo Prasad and Lachman Prasad. That order was appealed to the learned Assistant Sessions Judge, Mr. Ram Chander Saksena, who set it aside on the 14th of March, 1924. He has referred to the delay that took place but the real point on which he based his order setting it aside is that Mr. Christie had no jurisdiction to pass the order under section 476 of the Criminal Procedure Code when he had ceased to be acting in the capacity of City Magistrate in which capacity he had decided the original case. The learned Assistant Sessions Judge refers to the cases in 1 Allahabad Law Journal, pages 315 and 318. He remarks that authority to the contrary has been shown to him but he does not say what authority. The learned District Magistrate in referring the case says "my object in making this application is to obtain a clear ruling of the Hon'ble Court with reference to proceedings under section 476, Criminal Procedure Code, in the case of a Magistrate who has been transferred to another Court before such proceedings are taken. The learned District Magistrate remarks "there appears to be a support for both the views expressing (sic) in the rulings of the Hon'ble High Court". He does not tell this Court wherein he finds the conflict. It appears to me beyond the shadow of a doubt that Mr. Christie had no jurisdiction whatever. It has been clearly pointed out in the case of *Muhammad Ibrahim* v. *King-Emperor* (1) and *In the matter of the petition of Nawal Singh* (2) that a successor in a Court is the same Court as his predecessor in that Court. The corollary to this is perfectly clear that the predecessor who has departed to another Court can no longer be held to be a presiding officer of the first Court. There have been some doubts expressed by other High Courts, but they have since mostly, if not all come to this view. In any case the view of this Court has long since been clear. Mr. J. M. Banerji for the accused also rightly relies on the fact that the wording of

(1) (1915) 12 A.L.J. 1003=37 I.C. 145=16 Cr. L.J. 97.

(2) (1912) 34 All. 393=14 I.C. 766=9 A.L.J. 481 =13 Cr. L.J. 302.

section 476 of the Criminal Procedure Code is now different to that under the old Code, making the matter still more clear. He points out that now the offence must be one which appears to have been committed in or in relation to a proceeding in that court. In the present case that cannot by any stretch of imagination mean anything but the Court of the City Magistrate and that it is only that Court that can pass the order under section 476 of the Criminal Procedure Code.

The last point that I have to notice is that the District Magistrate himself referred this case to the High Court through the the Sessions Judge instead of through the Legal Remembrancer. Had I noticed this, when the reference was first put up, it would undoubtedly have been my duty to refuse to accept the reference and to return it to be produced before this Court through the proper channel. As to what that proper channel is, a reference to the cases of *Ram Bakhsh* v. *Durjan* (3), *King-Emperor* v. *Jamna Bai* (4) and *King-Emperor* v. *Ganga* (5) will make clear. So far as this Court is concerned it is for the District Magistrate to act either through the Government Advocate or through the Legal Remembrancer as he may be advised to be the proper course. I understand from the Assistant Government Advocate that he should act through the Legal Remembrancer but that is not for me to determine. It is sufficient for me to say that this Court will not ordinarily accept a reference direct. When the matter was brought to my attention I thought as the case was now before the Court it was best to deal with it. The object of the rule, I have stated, is sufficiently clear, for it only carries out the principle underlying section 435, clause (4) namely that there should be no judicial action by an inferior Court by way of criticism of its superior Court.

For the reasons I have already given the order of the Assistant Sessions Judge is maintained and the reference returned.

Reference answered.

(3) (1887) 9 All. 392 = (1887) A.W.N. 65.
(4) (1905) 28 All. 91 = 2 A.L.J. 589 = (1905) A.W.N. 198 = 2 Cr. L.J. 515.
(5) (1914) 36 All. 378 = 12 A.L.J. 519 = 15 C.L.J. 407 = 23 I.C. 1007.

** **1924 Allahabad 772.**

WALSH, A.C.J. AND RYVES, J.

H. Hunter—Petitioner.

v.

Damodhar Das and others—Opposite Parties.

Mis. Case No. 225 of 1924, decided on 12th May, 1924.

(a) *Companies Act, S. 156 (4)—Share-holders holding fully paid up shares at the time of liquidation are not contributories.*

No contribution is required from any member exceeding the face value of his holding; in other words, the holder of shares whose shares are fully paid at the time of the commencement of the liquidation, is not a contributory and therefore any act committed by such shareholders as shareholders, is wholly void and inoperative. [P. 774, C. 2.]

(b) *T. P. Act, S. 54—Deed acted upon but not registered is binding on parties acting up to it—Part Performance—Registration Act, S. 49.*

Transactions which do not purport to comply with statutory requirements, *e.g.*, the formality of Registration law, although in every other way the object to be achieved by the transfer or exchange has been executed can be recognized in law or rather at equity, so as to bind the parties by their conduct so irrevocably as to make it impossible for them to reopen the transactions or retrace their steps. (42 C. 801 P.C. and 40 A. 187, *Foll.*) [P. 775, C. 1.]

O'Connor and *Ram Nama Prasad*—for the Applicant.

Surendro Nath Sen—for the Opposite-Parties.

Walsh, A.C.J.—This is an application, dated the 22nd April 1924, by Mr. Hunter, the liquidator of the Bank of Upper India, Ld., to restrain certain respondents named Damodar Das and P.N.S. Aiyar from acting as liquidators of the Bank of Upper India, Ld., and to restrain the two said persons and four others, namely, Piare Lal, F. W. Roberts, N. N. Das and Khan Bahadur Wahid-ud-din Saheb from pretending to be a committee of shareholders or contributories.

The matter came before a member of this Bench on the 22nd of April. Being obviously a matter of urgency and importance an interim injunction was then granted, and notice was given to the respondents to appear on the 9th of May to show cause why the injunction should not be continued. Appear they did in person, with one exception, by showing themselves in Court, but they remained concealed behind their counsel Dr. Sen, who showed cause by advancing certain legal arguments.

The matter, although urgent and important is a simple one. The only thing that causes me any surprise or cause for observation is that persons of this kind, professing themselves to be men of business and holding shares in other companies, and some actually having been directors of such companies, should be so lost to all sense of decency and business acumen as to launch an attack of this kind after seven years upon a liquidator, by the issue of circulars and the holding of meetings, all of which purported to be done according to law, without a shadow of grievance as far as one can see, or without a shadow of a title in law or equity behind them and should be content to do so in cold blood, and then to come up to the High Court and make piteous appeals through counsel, (1) for an adjournment, and (2) for the decision of fancy points of law. As to what the real object of these mysterious proceedings may be and what they hoped to gain, the Court is left entirely in the dark. One can only say that their conduct is that of individuals apparently actuated by a vindictive desire to proceed against some concern or company which they wish to injure. There is some suggestion, which we have not gone into, that they have already taken active measures to injure, or defeat, or delay steps that the liquidator is taking in accordance with law against some defaulters. Amongst the matters dealt with in the preliminary order, was the question of these gentlemen's pecuniary responsibility for their conduct to the liquidator if their conduct proved wrongful, and if any real loss had been suffered. It has been agreed by Mr. O'Conor on behalf of the liquidator, Dr. Sen on behalf of Mr. Damodar Das and Mr. Piare Lal, and Saiyid Muhammad Husain on behalf of Dr. N. N. Das, K. B. Wahid-ud-din and Mr. Roberts, that the matter of their pecuniary responsibility should stand over for the present to be dealt with, either on a original motion before me, or by a suit at law by Mr. Hunter as he may be advised.

The history which gives rise to the contest, if it can be designated by that name, which certainly has occupied a totally disproportionate amount of the time of this Court, though important, begins with the voluntary liquidation of the Bank of Upper India Ld., in 1917, when by a resolution of the shareholders in June of that year Mr. Hunter and his colleague Mr. Stuart the Secretary of the Alliance Bank of Simla, Ld., were appointed joint Liquidators. In order to remove any misunderstanding we may point out that the provisions of the Companies Act are adequate to enable any one, or any body of shareholders or contributories, if they are dissatisfied with any conduct on the part of one or both of the liquidators, to bring the matter before the Judge in winding up. So if there be any controversy, it can be decided, and the liquidator, if necessary, removed, or directed to conduct himself properly. In the event of a liquidator dying or resigning, provision is made for the members of the company to appoint a successor. Nothing of this kind happened until February 1924, and therefore it must be taken that the present respondents were perfectly satisfied with the conduct of Mr. Hunter and with his joint liquidator Mr. Stuart who retired in July 1923, and that matters so continued from June 1917 until February 1924. Indeed, one of these persons, Damodar Das, has been joint liquidator with Mr. Hunter in the Trust of India, Ld. By an arrangement which was entered into in writing, which Mr. Hunter called an agreement for sale, namely, the document Exhibit HH 4, of July 1917, the Trust of India, Ld., which seems to have been a sort of roving financial genius exercising apparent control over the Alliance Bank and other companies, took over the assets of the Bank of Upper India. Now the assets of the Bank of Upper India were largely in the form of mortgages of immoveable property, assets which in this country, however healthy they look, undoubtedly take a very long time to realize and to produce satisfactory results, involving for their realization much persistant litigation, the obtaining of decrees, and applications in execution, the length and complexity of which are so familiar and so attractive to the legal profession; and it may be assumed that anybody in possession of 65 lakhs worth of that kind of asset, such as the liquidator of the Bank of Upper India, Ld., had to realize, might consider himself fortunate if in the course of ten years he realized 50 per cent.

The most patient and long-suffering shareholder is apt to get despondent of his chances of getting anything out of liquidation, which depends on this kind of business, and it is not at all remarkable

that the agreement which provided for the share-holders in the Bank of Upper India being compensated by preference shares which were at that time saleable on the market in the Trust of India and the Alliance Bank of Simla should have proved an acceptable arrangement. So far as it is material to this enquiry it is only necessary to state that the 5 per cent. preference share-holders in the Bank of Upper India took 6 per cent. preference shares in the Alliance Bank of Simla, and that the ordinary share-holders in the Bank of Upper India took half of their holding in 6 per cent. preference shares in the Alliance Bank and half in 6 per cent. preference shares in the Trust of India. Though the share-holders included the present respondents, the evidence with regard to this matter and its history stands on the uncontradicted sworn testimony of Mr. Hunter himself. In substance he was giving us an account of what he knew; but as regards details he was only able to state being himself a manager with a large staff, what he believed had been carried out by his staff in detail. With regard to these particular shares and the execution of the agreement by the share-holders he stated in the presence of the respondents with the exception of Mr. Aiyar, who was absent, and he was not contradicted that the transaction was carried through not precisely as it was contemplated by the original provisions in the deed which was drawn up by the lawyers, but that the share-holders in the Bank of Upper India surrendered their shares or scrip and applied through the liquidator to the Trust of India and Alliance Bank of Simla, as the case might be, for the issue to them of the preference shares to which they were entitled, and the records of these transactions were kept temporarily by Mr. Lover under the instructions of Mr. Hunter, and are duly recorded in the books, which, if they were wanted, could be found at Simla. Nobody asked to see the books here before us, and Dr. Sen very properly on the instructions of his clients accepted this statement as correct. The result is that the respondents who held this meeting and issued circulars were, from the moment they gave up their shares and took the preference shares in the other companies, no longer share-holders or members of the Bank of Upper India, and had no footing, or authority of any kind either for the election of the liquidator or for any other purpose whatsoever, and unless they knew that, they must be profoundly ignorant of company business and company law. They seemed in the document which they drew up describing their own character to be conscious of the uncertainty which surrounded their own position, because they sometimes described themselves as share-holders, and sometimes described themselves as contributories. If the comparison were of any value, it would be difficult to say which description was the more inaccurate. Mr. O'Conor gave the final blow to the contributory argument by quoting sub-section (4) of section 156, which provides that no contribution is required from any member exceeding the face value of his holding; in other words, the holder of shares, whose shares are fully paid at the time of the commencement of the liquidation, is not a contributory, and, indeed, he would have a grievance against the liquidator if he were put on the list of contributories. It is, therefore, sufficient for the purpose of this case to hold, what is undoubtedly the fact, that these gentlemen, at the time when they took these proceedings in February, 1924, were not, and had not been for a very considerable time, either share-holders or contributories in the Bank of Upper India. The result is that their proceedings had no legal foundation and were totally misconceived. It is due to their clerical ability, based on the only study of company law, of which they have shown signs in these proceedings, to say that the proceedings at the meeting assuming that the meeting had any legal character or validity, are quite stainless in character and unimpeachable. It would be difficult to find proceedings so utterly without foundation carried out in such perfect order and propriety. We examined the Minute Book, and it is due to them to say that they did their best in a hopeless state of things to make their position secure from attack.

Out of respect for the vigorous argument of Dr. Sen we have to take notice of his contention that, as a matter of fact, in the legal sense of the word, we are back in the year 1917, and that when these gentlemen exchanged their shares, and even took proceedings or raised objections as preference share-holders in the Trust of India, Ld., they were living in a fool's paradise, and were really all the time share-holders

in the Bank of Upper India and had no concern whatever with either the Trust of India, Ld. or the Alliance Bank of Simla. All this is based upon the contention that there was no transfer of property in the terms of section 54 of the Transfer of Property Act, and that the agreement of sale (Ex. HH-4) had no validity or legal effect, in spite of its having been carried out so far as these gentlemen are concerned in every particular. By way of parenthesis one may say that there is a small residue of share-holders who have not been heard of during the liquidation, and are never likely to be seen again, who have been unable to accept or repudiate the provisions of this deed, because the liquidator was unable to find them; and to that extent the agreement for sale is unexecuted, but so far as these respondents are concerned it has been duly executed and performed. The argument of Dr. Sen raises a question which is much debated in the Courts of India, as to how far transactions which do not purport to comply with statutory requirements, although in every other way the object to be achieved by the transfer or exchange has been executed, can be recognized in law or rather at equity, so as to bind the parties by their conduct so irrevocably as to make it impossible for them to re-open the transactions or retrace their steps. I doubt whether this question really arises, but as Dr. Sen has argued it, it is only right that it should be dealt with. I am content to answer it in the same way that I answered it in my judgment in the case reported in I.L.R., 40 All., 187, obeying what I believe to be the positive direction given to the Courts in India by the Privy Council in the case in 42 Cal. 801. That is to say, that apart from any action under the Companies Act, the rights which have arisen out of the execution of this deed of July 1917, are as binding on the parties holding the benefits which they have taken thereunder, as if it had been decided to effect the transaction by a formal transfer that is to say, a registered deed, as required by section 54 of the Transfer Property Act. My reason for holding that section 54 has no application is that there was no transfer. The Trust of India had power to ask for one and the Bank of Upper India undertook to execute one. If the Trust of India did not demand one, as, in fact, it never did, the question does not arise. The exchange have been made; the matters have passed into history and the legal rights of the parties have been settled without the necessity of a formal document.

The result of this decision is that the whole of the proceedings of the 3rd of February, 1924 were void and inoperative, and we so declare them. The effect of this is that as regards Mr. Aiyar, the absent respondent, his so called appointment as joint liquidator with Damodar Das is a nullity; and he will take any proceedings, or profess himself to be the joint liquidator of the company, at his peril. But inasmuch as we were compelled to direct service upon him in Lahore outside our own jurisdiction, we are not satisfied that he has been served in accordance with law in the sense that enables us to make a final order against him in the way in which we are doing as against the other respondents. But that will in no way prevent him from coming here, on due notice to Mr. O'Conor and Mr. Hunter, at such time and date as the Court may find convenient to fix to hear him, in order to repair the omission caused by his absence to-day; and even, if he should desire, to set a good example to his colleagues by going into the box and submitting himself on oath to cross-examination. We, therefore, continue against him the *ex parte* interim injunction granted on Mr. Hunter's application, which is to continue until further order with liberty to him after due notice to the other side to come up and show cause why it should be set aside.

Ryves, J.:—I agree with the order of my learned colleague. I base my decision on one short point. All the respondents were share-holders in the Bank of Upper India, Ld. The shares were fully paid up. After that the Bank went into liquidation: they surrendered their shares to the Trust of India, Ld. and in lieu thereof received preference shares in the Trust of India, Ld., and in the Alliance Bank of Simla, Ld. From that moment it seems to me that they ceased to be members of the Bank of Upper India, Ld., and therefore they had no authority on the 3rd of February 1924 to hold the meeting which they called as share-holders or contributories of the Bank of Upper India, Ld., and that the resolutions which they passed at that meeting were consequently altogether invalid and inoperative. On the

serious question of law which was argued I prefer to give no opinion. It may be that the parties *inter se* are estopped from disputing the transfer, although in law no valid transfer has taken place so far as immoveable properties or securities on such immoveable properties of over Rs. 100 in value are concerned. To illustrate what I mean, if Mr. Hunter as liquidator of the Trust of India were to sue to recover mortgage money as an assignee of the Bank of Upper India, Ld., it might be held that he could not do so because there was no assignment valid in law according to section 54 of the Transfer of Property Act. But what he did was to sue on behalf of the Bank of Upper India, Ld., the mortgagee, as liquidator, and having got a decree and realized the money, paid that money over to the Trust of India, Ld.

By the Court:—The order of the Court is that we make the interim injunction granted on April the 22nd against the five respondents other than Mr. P. S. N. Aiyar permanent. We declare that the meeting of the 3rd of February, 1924, was null and void and of no effect; and that the appointments of Mr. Damodar Das and Mr. Aiyar as joint liquidators were illegal; as also the appointment of Messrs. N. N. Das, Piare Lal, Roberts and K. B. Wahiduddin as a Committee to control the actions of Mr. Hunter.

The five respondents who appear jointly and severally must pay the certified costs of Mr. O'Conor's client.

Injunction ordered.

1924 Allahabad 776.

BOYS, J.

Ganesh and another—Applicants

v.

King-Emperor—Opposite Party.

Cr. Rev. No. 230 of 1924, decided on 4th June, 1924, from an order of the Sessions Judge of Agra, dated 15th April, 1924.

Criminal trial—Possession.

Where cocaine was found in certain pots containing grain in a Bania's shop where the accused who were brothers were serving habitually in the shop.

***Held* that they must have been daily handling the pots in question and that therefore the finding that both of them must have been aware of the existence of the cocaine in the pot is justifiable.** (20 A.L.J. 162; 77 I.C. 447. *Dist.*) [P. 776, C. 2]

J. M. Banerjee—for the Applicants.

The Assistant Government Advocate—for the Crown.

Boys, J.:—This is an application in revision of an order of the Sessions Judge of Agra upholding a conviction under section 60 (*a*) of Act IV of 1910 and a sentence of one year's rigorous imprisonment and a fine of Rs. 50, the conviction and sentence being in regard to the joint possession by the two applicants of cocaine. The only point that has been or can be seriously pressed apart from the question of sentence is the question whether the finding that both the applicants were in possession of the cocaine is justifiable in law. I have been referred to the case of *Khushi Ram* v. *Emperor* (1) and *Alia* v. *Emperor* (2) a case of the Lahore High Court: in the former case a man was acquitted against whom the only evidence was that certain stolen property had been found in a box of which his wife kept the key and the man was not in the house at the time. This is clearly distinguishable. In the Lahore case it was held that two persons living in the same house could not be convicted of the possession of a Chavi found somewhere in the joint house unless possession was brought home to either one or other or both of them; that case again is clearly distinguishable. In the present case the cocaine was found in certain pots containing grain in a Bania's shop. It is proved that both the applicants, who are brothers were serving habitually in the shop and the Magistrate concludes from this that they must have been daily handling the pots in question and that therefore the finding that both of them must have been aware of the existence of the cocaine there is justifiable. Every one of these cases must depend upon its own facts. Here it seems to me an obvious argument in support of the finding of the Magistrate that both of these men had guilty knowledge that if either of them was keeping the cocaine secretly intending to conceal and concealing the fact from his brother, it is inconceivable that he would keep it in a place in which sooner or

(1) 1923 All. 83=20 A.L.J. 162=23 Cr. L.J. 386.
(2) 1923 Lah 513.

later and most probably sooner his brother would be certain to find it. I think therefore the conclusion that both the men knew of the presence of the cocaine there is justifiable. Under the Amending Act IV of 1919 the maximum sentence of imprisonment is one year. It does not seem to me that it is necessary, grave though the offence, is to give that maximum in the case of the first offence. I reduce the sentence of one year to six months. In other respects the conviction and sentence will stand.

Sentence reduced.

1924 Allahabad 777.

BOYS, J.

Mt. Ram Sri— Applicant.

v.

Sri Kishun and others—Opposite Parties.

Cr. Rev. No. 239 of 1924, decided on 4th June, 1924, from an order of the Magistrate, 1st Class, Etawah, dated 17th April, 1924.

(a) *Crim. Pro. Code, S. 17—Application for revision—Crim. Pro. Code, S. 561 (a).*

On application for revision against order of Asst. Collector instead of against that of Collector who was responsible for that of the Asst. Collector, High Court's inherent power could be exercised under S. 561 (*a*). [P. 778, C. 1.]

(b) *Crim. Pro. Code, S. 146—Order of Revenue Court.*

Order of Revenue Court in mutation proceedings is order of competent court determining the person entitled to possession. [P. 778, C. 1.]

Baleshwari Parshad, Kumuda Prasad and *Ambika Prasad*—for the Applicant.

M. Wali Ullah—for the Opposite Party.

The Assistant Government Advocate—for the Crown.

Judgment:—In this case one Jado Rai died on May the 9th, 1923. There were three claimants to his property. Firstly, the present applicant, his widow, secondly, some collaterals and thirdly, Sri Thakurji through Sheo Manohar. With the third of these we are not concerned. A civil suit was filed on behalf of Sri Thakurji but Sheo Manohar expressed his inability to pursue it and it was dismissed. The remaining two parties, the widow applicant and the collaterals have been contending before the Magistrates under Chapter XII of the Code of Criminal Procedure and in muation proceedings before the Revenue Courts. At the request of the parties on the 10th of August 1923, the District Magistrate attached the property under section 146 of the Criminal Procedure Code. In the mutation proceedings mutation was ordered on the 20th of February 1924 in favour of the widow practically on the basis of title. No emphasis, however, need be laid particularly on this last point because whether the mutation court finds a party entitled on the basis of possession, supported by evidence of title or on title alone, it declares that person's possession and if necessary orders that he be put into possession. In this case the order would necessarily be one that the applicant widow be put into possession as she could not be in possession already, the property being under attachment. In pursuance of this order in favour of the present applicant widow, the Assistant Collector on the 26th of February ordered the receiver to "hand over" the property to the widow. One day before this, the Collector had, on the application of the opposite party without notice to the present applicant, passed an order staying the delivery of the property to the applicant by the receiver. Of this order the Assistant Collector had been unaware. On the 28th of February the Collector refused till the hearing of mutation appeal an application by the widow that the property be given to her. This appeal was dismissed on the 7th of April and on the 8th of April the Collector again refused the widow's application for possession until the period of limitation for a second appeal had expired or if a second appeal was filed till that appeal was decided. The applicant widow, next on the 7th of April 1924 tried to get the Assistant Collector to order the execution of his order of the 26th of February. This he naturally refused to do in view of the fact that his superior court (that of the Collector) had already refused to allow the property to be handed over. At the end of all these proceedings, the applicant has come up in revision against the order of the Assistant Collector, dated the 17th of April and has made no application against the order of the Collector dated the 8th of April. If however, it appears to me that the Collector was not justified in refusing to hand over possession, I think, I in turn should not be justified in refusing to give the applicant

here an order merely because she has applied in revision against the order of the Assistant Collector instead of that of the Collector. It would obviously be desirable in the plain interests of justice to pass such an order as I could properly pass under section 561 (*a*) if not otherwise. In one sense the applicant is not wholly to blame for coming up against the wrong order, for originally it was the Collector himself who made a mistake on the 25th of February, 1924, in passing his order without notice. It was this that led to alternative cross applications in his Court and that of the Assistant Collector. The point now that I have to consider is whether the order of the Revenue Court in favour of the applicant widow was an order such as contemplated by section 146, clause (1) of the Code of Criminal Procedure, *i.e.*, an order of a competent Court determining the person entitled to possession. Two questions arise in this connection:—Firstly, Do the words "competent Court" mean "a competent Civil Court". I think that it is really clear that they are not so limited. In the first place where the intention is to confine the power to a Civil Court we find it so stated and secondly the Code of 1882 actually had the phrase "a competent Civil Court" and the word "civil" was deliberately dropped in the Code of 1898. The next question is whether the Revenue Court's order under section 40 determined the person entitled to possession. I think this also is hardly open to doubt. Section 40, clause (2) says that the Court, if unable to satisfy itself as to which party is in possession "it shall ascertain by summary enquiry who is the person best entitled to the property and shall put such person in possession." It therefore appears clear that a competent Court has now determined the right of the widow-applicant here to possession. I may note here that the Collector has not supported his refusal to allow the widow to have possession by any argument that her right to possession has not been determined by a competent Court but merely apparently has been guided by his idea of its being likely to prove convenient to wait further till the matter had been conclusively determined in favour of the widow or the other party. Possession in this view might have to remain with the receiver until the matter had been decided, some ten years hence, possibly more, by the Privy Council.

The application is therefore allowed and I order the Collector to take action under section 146 of the Code of Criminal Procedure to release the property from attachment and to order the receiver to hand it over to the applicant Mussammat Ram Sree.

Application allowed.

1924 Allahabad 778.

BOYS, J.

Harbans and others—Applicants.

v.

King-Emperor—Opposite Party.

Cr. Rev. No. 245 of 1924, decided on 11th June, 1924, from an order of the District Magistrate of Moradabad, dated the 25th April, 1924.

(a) *Criminal Trial—Agency—Crim. Pro. Code, S. 345.*

Court can acquit accused on the representation of an agent, who had filed complaint on another's behalf, that he desired to compound the offence, without enquiring into the agent's authority to compound. [P. 779, C. 1.]

(b) *Crim. Pro. Code, S. 439—Order of acquittal.*

Ordinarily the High Court will not interfere in revision against an order of acquittal. [P. 779, C. 1.]

(c) *Crim. Pro. Code, S. 403—Acquittal due to fraud.*

Acquittal of accused brought about by fraud established against third person in proceedings to which the accused were not parties is valid unless set aside by independent proceedings. [P. 779, C. 2.]

St. C. Thompson—for the Applicants.

U. S. Bajpai—for the Opposite Party.

Judgment:—The facts of this case are set out in my order of the 23rd of May 1924. On the 23rd of February, 1924 the trial Magistrate acquitted the present applicants of a charge under section 427 of the Indian Penal Code on the case being compounded between them and Amar Singh the complainant. So far there cannot be really any serious doubt that the Magistrate was acting perfectly properly and within his jurisdiction. It was alleged however very shortly afterwards by Raghuber Saran, the master of the complainant and Amar Singh that though, as a matter of fact, Amar Singh had filed the complaint under his (Raghuber Saran's) authority, he had no authority to compound the complaint without his (Raghuber Saran's) sanction which had not been given. However the situation may lie

between Raghuber Saran, the master and Amar Singh the employee I feel no hesitation in saying that if Raghuber Saran sent Amar Singh to Court to represent him in filing the complaint the Court was perfectly justified in accepting Amar Singh's statement that he desired to compound the offence with the assumption that he was authorised by his master to compound it and that under the circumstances it was not incumbent on the Court before allowing the case to be compounded and acquitting the accused to make any enquiry into Amar Singh's authority. So far then there is plainly an acquittal of the accused of the offence under section 427 and under ordinary circumstances they could not possibly be prosecuted at the instance of anybody else until that acquittal has been set aside. The proper method of setting aside an acquittal is to move the District Magistrate to move the Local Government to appeal under section 417 of the Code of Criminal Procedure. If the Magistrate in the proper exercise of his discretion or even merely because he is really not interested in a private dispute or a private injury refuses to do so, the private party can move the High Court in revision. Ordinarily the High Court will not interfere in revision against an order of acquittal. But it has frequently done so in suitable cases. Here no attempt whatever has been made to get the acquittal set aside. The idea underlying the order of the trial Magistrate and apparently also underlying that of the District Magistrate and the argument that has been pressed here by Mr. Bajapai on behalf of the opposite party is that where an acquittal has been obtained by fraud the acquittal is without force and cannot be held to be an acquittal which under section 403, Criminal Procedure Code bars further proceedings until set aside. This argument is based on the fact that after the accused were acquitted the master, Raghubir Saran, as I am informed, prosecuted his servant Amar Singh on a charge of cheating and secured his conviction on the ground that he had without any authority assented to the compounding of the case. It would have been interesting to consider whether the doctrine that the order of acquittal was obtained by fraud would have been applicable to render null and void an acquittal within the terms of section 403 of the Criminal Procedure Code without any further proceedings being taken to set aside the acquittal. But the point does not really arise in this case, for no fraud of any sort or description has been established as against the present applicants. They were no parties to the prosecution of Amar Singh and any finding arrived at by the Court in that proceeding can in no way be binding. I hold therefore that the order of acquittal passed in the original criminal proceedings was so far as the accused, the applicants here are concerned, a valid order of acquittal passed with jurisdiction and that until that order of acquittal has been set aside in one of the ways I have indicated, the accused cannot be further prosecuted for the offence of which they have once been acquitted. I therefore quash the proceedings now pending against the accused in the Court of Rai Saheb Dharam Singh, Magistrate second class, of Kanth and direct that no further proceedings for the prosecution of the applicants in regard to the same offence be taken in that or in any other Court until the acquittal has been set aside by some competent Court. *Application allowed.*

---

* * **1924 Allahabad 779.**

WALSH, A.C.J. and RYVES, J.

Kashi Ram and others—Applicants

v.

King-Emperor through Miyan Jan—Opposite Party.

Cr. Ref. No. 276 of 1924, decided on 18th June, 1924, from the Sessions Judge of Saharanpur, dated the 24th April, 1924.

(a) *Penal Code, S 211—Charge dropped against complainant.*

Accused is guilty notwithstanding complaint was omitted from charge though complaint was made against him. (34 All. 522, *Overruled.*)

(b) *Penal Code, S. 211—Meaning of "charge",*

Merely stating facts and suspicious is not "charge" but alleging belief in guilt of particular person and desiring he should be proceeded against is charge. [P. 780, C. 2.]

(c) *Penal Code, S. 211—Charge.*

Causing police search to be made and indentifying property as being unlawfully in complainant's possession and indicating to the police that the complainant was guilty amounts to charge within the meaning of S. 211. [P. 781, C. 1.]

Nehal Chand—for the Applicants.

Mushtaq Ahmad—for the Opposite Party.

Judgment:—This is, (if it were not for the referring order of Mr. Justice Boys in which he seems rightly, in our opinion, to think that further consideration is required of one authority to which we will refer in a moment), a matter of no importance to anybody except the parties, none of whom seems to be very attractive persons, or to be worth the time which has been already spent upon them by a large number of judicial authorities. Somehow or other Kashi Ram the present applicant got it into his head that he had been robbed by two prostitutes and their brother, or one other of them. Ultimately criminal proceedings were taken against these persons, or rather against the two women, their brother being omitted from the charge. The two women were acquitted, and now the brother, who was only verbally charged and never put upon his trial, wants to vindicate the law and clear himself by taking proceedings against Kashi Ram and his associates who made the charge. The Magistrate, who was originally seized with the matter in Saharanpur, rightly according to our view, held that the offence omitted by Kashi Ram and his two associates was an offence under section 211, and no preliminary sanction was necessary. In revision the matter came before the Sessions Judge who held the contrary and referred to the authority which we have already mentioned, namely, *Hardwar Pal* v. *Emperor* (1). He then, in the ordinary course, referred the matter to the High Court, thinking the Magistrate was wrong, and also submitted the matter to the Magistrate again for his explanation. The Magistrate was converted by the authority which the Sessions Judge quoted and being bound by a two Judge decision of this Court, naturally came to the conclusion that his previous opinion was wrong, saying that he was not aware of the authority when he decided the case. The matter thereupon came before Mr. Justice Boys on a reference from the Sessions Judge, and Mr. Justice Boys, not agreeing with the view laid down in the case in 34 All. referred the matter to a Bench, and it now comes before us with a view to clearing the ground, if possible. In our view there is a fallacy underlying the decision in 34 All. which Mr. Justice Boys has rightly pointed out. The mere fact that subsequent proceedings in Court are taken either against the person originally charged, or against somebody else, cannot affect what was done when the original charge was made, if it was a charge. In 34 All. a charge was made against several people including one S, but S was never charged in Court, S, was not put upon his trial and no proceedings were taken against him. The other people were, and the *ratio decidendi* in 34 All. is that the charge against S, amounted to a charge in Court because Court proceedings were taken against somebody else. In this respect we are unable to agree with 34 All. It so happens as regards the question, what amounts to a charge under section 211 and what is a mere report which comes within section 182, that I myself on a previous occasion sitting alone, happen to have been compelled to express my opinion. Possibly an English lawyer is tempted to take a broader view, inasmuch as in England the meaning of "charge" is clearly defined, and the step involved in making a charge is identified, because every Station Officer has charge-sheet, and if the complainant makes a report desiring that criminal proceedings shall be brought, he is asked if he is prepared to sign the charge-sheet, and if he does so he identifies himself as the person making the charge. If he says no, it is left to the Station Officer to decide whether he, as Station Officer, will continue the matter by making the charge himself. But in substance there ought not to be any real difficulty in deciding the question where a report stops and a charge begins, and my brother and I, agreeing in substance with the view which I took in the case which I decided, reported in *Mathura Prasad* v. *Emperor* (2) have agreed upon the following formula which in our view in substance, not necessarily in every term or expression, correctly states the dividing line between the two classes of acts:—

> "If the complainant confines himself to reporting what he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the police, or leaving the police to take such course as they think right in the performance of their duty, he may be making a report, but he is not making a charge. But if he takes the further step, without waiting for any official investigation, of definitely alleging his belief in the guilt of a specified person, and his desire that the specified

(1) (1912) 34 All. 522=10 A.L.J. 61=16 I.C. 510 =13 Cr. L.J. 702.

(2) (1917) 39 All. 715=15 A.L.J. 767=42 I.C. 761=18 Cr.L.J. 1017.

person be proceeded against in Court, that act of his, whether verbal or written, if made to an officer of the law authorised to initiate proceedings based upon the complainant's statement, whether amounting to an expression of the complainant's belief in the guilt of the specified person, or his desire that court proceedings be taken against him, amounts to making a charge".

Applying that to the facts of this case what happened was, that these three people, having apparently reason to suspect the other three of theft, approached the police and desired that a search be made. Up to that time they had made no charge. Search was made in their presence, and an attractive article of clothing was identified by Kashi Ram as being unlawfully in the box of Miyan Jan the present complainant. He identified it and indicated to the police officer that Miyan Jan was guilty, either of having stolen, or wrongfully received it knowing it to have been stolen. That in our view amounted to a charge. The Magistrate was right on the complaint of Miyan Jan, in formulating a charge against Kashi Ram of having made that charge, assuming it to have been false to Kashi Ram's knowledge. With regard to the other two persons, Shikri Prasad and Dip Chand, all that we know about them is that they were present, and may fairly be presumed to have demonstrated a sympathetic approval of the conduct of Kashi Ram. Whether this amounts, as a matter of special pleading, to aiding and abetting Kashi Ram in making the charge, is a matter of no importance. We think that justice will be done by sending back the record with a direction to the Magistrate to proceed with the case against Kashi Ram. The charge against the other two persons is not pressed, and therefore, the case against them must not be proceeded with. It should be added that the precise question of formal sanction is no longer relevant because of the amendment of the Criminal Procedure Code, and that under section 195 (1) (*b*) of the Code of Criminal Procedure a complaint by the Court was not necessary because the charge was not in a Court.

Reference answered.

1924 Allahabad 781.

WALSH, A.C.J. and RYVES, J.

Khanjan and others—Appellants.

v.

King-Emperor—Respondent.

Cr. Appeal No. 375 of 1924, decided on 25th June, 1924, from an order of the Sessions Judge of Badaun, dated 11th April, 1924.

(a) *Penal Code, S. 304—Accused's ignorance of consequence.*

Where the accused were not likely to know that the deceased or any one was within a *chaupal* to which they set fire in a riot.

Held a conviction under S. 304 was wrong. [P. 782, C. 1.]

(b) *Penal Code, S. 436—Proof that the building destroyed came within one of the classes mentioned in the section is necessary.*

It is absolutely necessary in order to convict an accused under S. 436 to prove that the building which he destroyed came within one of the classes mentioned in the section and the words "ordinarily used" do not mean that other buildings are from time to time used for such purposes but they mean that that particular building is itself used. [P. 782, C. 2.]

(c) *Criminal trial — Disproportionate punishment—Penal Code, S. 436.*

A sentence of ten years' imprisonment is wholly disproportionate to any possible aspect of the crime from a moral point of view provided that that part of their misconduct namely the setting of fire is reasonably included in and taken to aggravate the general lawless conduct of which the accused have been convicted under S. 147 and 325. [P. 782, C. 2.]

(d) *Criminal trial—Setting fire.*

Setting fire to a thatch must be seriously viewed. [P. 782, C. 2.]

G. W. Dillon—for the Appellants.

The Assistant Government Advocate—for the Crown.

Walsh, A. C. J.:—This is an appeal against a conviction of eight people for a variety of offences which may be compendiously described as an unjustifiable and lawless attack enforced upon some low caste inhabitants of the village over a grievance, or a fancied grievance, resulting in serious injury, including the fracture of an arm to two men, the unfortunate death of a little child who was deserted by the chamars who fled from the spot, the destruction of a chaupal of small value, but which no doubt cost money to these chamars, and a general riot. It is probably idle to protest against the multiplication of the sections which the lower Courts persist

in making in order to cover every conceivable offence that the facts may possible establish in the course of a trial. It is not as a rule a convenient practice and this is a good example of the serious consequences which may arise from surplusage. With all repect to the learned Judge who tried this case, he has overlooked certain legal difficulties. How this child got into the chaupal no one knows precisely. It is not alleged that the accused knew that the child was inside; it would be difficult, and even wrong, to assume against them that they knew, or ought to have known, that it was likely to get inside. The natural conduct of a father or anyone else, at a disturbance of this kind, with a child in his arms, is not to leave it behind, and the natural conduct of a child is not to slip from a comfortable seat in the arms of a man on to the ground, and it is impossible to resist the conclusion that this child was deliberatly left behind when its life might have been saved by the man who had the charge of it. But none of this speculation can be fairly brought within a measurable distance of the inference that the accused persons were likely to know that the child was within the zone of danger. If on the other hand, as my brother pointed out in argument, it were proved against them that they knew that the child was there at the time they set fire to this inflammable erection, it is not a case under section 304; it would be a case under section 302, and the only fair inference to draw as regards the conviction under section 304 is, that the Judge did not have the case presented to him in such a way as to give him an opportunity of working it out. It is unreasonable to drag in 304 which has no application, and in that respect the appeal must be allowed and the convictions quashed. Much the same must be said about 436. Here again the mistake the Judge has made is probably due to the multiplicity of offences and to his failure really to study the section in the light of the facts with which he had to deal. Whatever the reason of the legislature may have been, the fact remains that the section is narrowly confined to the destruction of any building (the word "any" in that sense meaning, a certain building, or a particular building) which is ordinarily used as a place of worship, as a human dwelling, or as a place for the custody of property. It is absolutely necessary, in order to convict an accused under this section, to prove that the building which he destroyed came within one of those classes, and the words "ordinarily used" do not mean that other buildings are from time to time used for such purposes, but they mean that that particular building is itself used. Of course, if there were evidence that this chaupal had been used as a human dwelling, it would be brought within the section, but in the absence of evidence of that kind, no offence under section 436 is established, and it is really a startling thing to find two people sentenced to ten (10) years' imprisonment under a section which has no application whatever to the offence charged. Looking through the sections which are germane to this matter, we come to the conclusion that really section 426, the mere commission of mischief, happens to be the only one which is applicable. It does not really matter, as the learned Judge has said that the worst part of this case is the lawlessness the rioting and the injury done to the person, and in our opinion even if this chaupal had been ordinarily used so as to come within section 436, a sentence of ten years' imprisonment is wholly disproportionate to any possible aspect of the crime from a moral point of view, provided that that part of their misconduct, namely, the setting of fire, is reasonably included in, and taken to aggravate, the general lawless conduct of which they have been convicted under sections 147 and 325. We think, we ought to differentiate between the degrees of guilt in this case. It is obvious that Mul Chand and Khanjan were the ring-leaders. Indeed they were the persons interested in the complaint against these chamars. We think the punishment ought to be severe on the ground stated by the learned Judge, namely, the necessity for a deterrent punishment with a view to putting a stop to this type of lawlessness. It need hardly be said that none of our observations on the legal aspects of the case ought to be taken as in the least discounting the very serious risk of setting fire to any thatch or any building or erection in an Indian village where the climate is excessively dry. In a high wind terrible devastation and possible loss of life may follow. The result is that we agree with the learned Judge in taking the serious view which he

did of the offence. We allow the appeal and quash the convictions under sections 304 and 436. We confirm the convictions under sections 147 and 325 and vary the sentences by sentencing Khanjan and Mul Chand to five years' rigorous imprisonment each in the aggregate. It may be distributed in any way they like between the two sections. Probably the lawful would be two years under section 147, and three yaers under section 325 to run consecutively, but that is of no consequence, they get five years each in the aggregate, and the rest of them three years each in the aggregate.

Ryves, J.:—I agree in the proposed order. It seems to me that the charge under section 304 on the facts of the case is quite impossible. To bring a case under section 304 it is necessary to apply section 299: "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." The offence of culpable homicide may be murder or culpable homicide not amounting to murder. In this case the charge is not of murder, that is to say, the accused are not charged with having intended to cause the death of the child. Therefore the case against them must come under the second clause of that section, or the third clause. Did they when they set fire to the chaupal intend causing such bodily injury as was likely to cause death? The answer on the finding must be, no, because they did not know that the child was there and therefore they could not have intended to cause any bodily injury to it. Lastly, they must have known that they were likely by such act to cause death, namely, that by setting fire to this chaupal they were likely to cause the death of the child or of some other person. On the finding again, it seems impossible to hold that there was any likelihood in their minds that setting fire to this chaupal would do anything more than consume the materials with which it was built. A chaupal is not ordinarily a place of dwelling, it may be used as such no doubt, but there is no evidence in this case that it was so used. When the chamars ran out of the chaupal these accused could not possibly have any reason whatever to think that they had left behind a child inside. It seems to me that the death of this unfortunate child was a pure accident, and the person really responsible for it was the father who left it behind when he ran away. I agree also that section 436, on the evidence in this case, is not applicable.

Appeal partly allowed.

1924 Allahabad 783.

WALSH, A.C.J. and RYVES, J.

King-Emperor—Petitioner.

v.

Mukhtara—Accused.

Cr. Appeal No. 450 of 1924, decided on 25th June, 1924, from an order of the First Additional Sessions Judge of Saharanpur, dated the 10th March, 1924.

Penal Code, S. 215—Failure to take and to apprehend thief.

Where a bullock was stolen and the accused took money in order to bring back the animal which he knew to be stolen and where he took no steps to bring the thieves to justice.

Held he was guilty though he might be himself the thief. (23 A. 81. *Overruled*) [P. 784, Cs. 1 and 2.]

The Government Advocate—for the Crown.

S. P. Sinha—for the Accused.

Ryves, J.:—This is an appeal by the Local Government from an order of acquittal passed by the learned First Additional Sessions Judge of Saharanpur. Mukhtara a *Jat* was convicted by a Magistrate of the first class under section 215 of the Indian Penal Code, and sentenced to one year's rigorous imprisonment. It appears that on the 6th of December, 1923, two bullocks, out of a number which had been sent by Narpat to graze in the jungle, failed to return. Later on the same night one of these bullocks returned with a broken rope tied round its neck. The other one did not return. It was suspected that both the bullocks had been stolen. A *panchayet* was held, and Mukhtara was certainly suspected of being, if not the thief, at any rate cognizant of who the thieves were. He promised to recover the bullock on payment of Rs. 30. He received the money, and three days afterwards produced the bullock. On the 9th of December Narpat made a report of the circumstance at the police station, and he said significantly that he had come to make a report because

"the people had made it their business." Mukhtara's defence was a total denial of everything. He said the whole of the prosecution evidence was false from beginning to end. The trying Magistrate found that there was reliable evidence on which he could hold that the bullock had been stolen. He found it proved that Mukhtara received the Rs. 30 on the understanding that he would bring back the bullock. He found that Mukhtara must have known who the actual thieves were, and that he took no effort to get them apprehended. The fact that he was able to get hold of the bullock and bring it back shows that he knew where the bullock could be found. The inference is irresistible that he knew who the thieves were. There is a considerable amount of suspicion (to say the least of it) that Mukhtara himself was the thief or one of the thieves. But the Magistrate did not take that point into consideration holding that according to the case of *Queen Empress* v. *Muhammad Ali* (1), the thief himself could not be convicted under section 215.

On appeal the learned Additional Judge found that there was no evidence on the record to show that theft had been committed in respect of these bullocks, and held that it was possible that Mukhtara took the money not knowing where the bullock was to be found and after due search was lucky enough to find the missing animal. In our opinion the learned Judge is not correct in saying that there is no evidence to show that theft was committed. We agree with the trial Court that the theft of the bullock is proved. We agree with him that Mukhtara took Rs. 30 in order to bring back the bullock which he knew was stolen, and that he obviously took no steps to bring the thieves to justice. He was rightly convicted under section 215. We doubt whether the case reported in 23 Allahabad was rightly decided. We allow the appeal, set aside the order of acquittal, and restore the order of the trial Court. Any term of imprisonment which Mukhtara has already served, will be deducted from the one year's imprisonment which he has been awarded.

Walsh, A.C.J. :—I agree. I think the inference is irresistible that the bullocks were stolen, and that the thief was the present accused. Mr. Sinha has said everything that can be said for him, which is not much. I agree as to the decision in 23 Allahabad. I am definitely of opinion that it is not good law and ought not to be followed. The learned Judge who decided it was probably embarrassed by the fact that there had been a conviction against the thief for both offences. But what he appears to have overlooked is this. Take the ordinary case of a man against whom suspicion is strongly entertained as in this case. The complainant may be in doubt as to whether he is the guilty person, or whether he is not, but he does not mind, so long as the person he suspects agrees to return the animal for a consideration. Can it be seriously suggested that when the charge under section 215 comes into Court, and the complainant confines his allegation as regards the theft to mere suspicion the accused can be heard to say; the complainant is wrong to confine his allegation to mere suspicion. I am the thief. I have always been in a position to confess the theft and if it suited my purpose, to provide the complainant with means for proving my guilt. But the High Court has decided that this section does not apply to thief, and I being the thief it does not apply to me, and I am entitled to an acquittal. It seems to me that this is a *reductio ad absurdum* of that decision. It cannot be a defence to the charge of accepting money for returning stolen property, that the person who takes the money is himself the thief.

Appeal allowed.

(1) (1900) 23 All. 81 = 1900 A.W.N. 205.

1924 Allahabad 784.

BOYS, J.

Rajpatti—Applicant.

v.

King-Emperor, through Mt. Deoli—Opposite Party.

Cr. Ref. No. 266 of 1924, decided on 4th June, 1924, from the Sessions Judge of Benares, dated the 29th April, 1924.

Crim. Pro. Code, S. 488—Weight of decree varies with circumstances.

Weight to be attached to a decree must depend upon the particular circumstanees of the case and no hard and fast rule can be laid down that a decree of a Civil Court is for ever binding on the Magistrate or that his discretion is neve fettered.
[P. 785, C. 1.]

Where the husband had obtained decree for restitution of conjugal rights but was ill-treating wife:

Held Magistrate could ignore decree and permit wife to live apart, while granting her maintenance under S. 488, Crim. Pro. Code.

Maintenance can be granted to wife with permission to live separate from husband, notwithstanding decree for restitution of conjugal rights, if wife is ill-treated.

The Applicant—was not represented.

Kumuda Prasad and *Ambika Prasad*—for the Opposite Party.

Judgment:—This is a reference by the Sessions Judge of Benares recommending this Court to quash the order of the Joint Magistrate of Benares ordering the accused in the case Rajpatti to pay a monthly allowance of Rs. 8 to Musammat Deoli, the applicant in a case under section 488 of the Code of Criminal Procedure. It appears that on the 15th of November 1922 the husband got a decree against the wife for restitution of conjugal rights. The Magistrate in this case was asked by the wife to give her an order for maintenance unrestricted by any condition that she should live with him. The order actually passed by the Magistrate does not expressly free her from any condition. But it was clearly intended so to do, in that the Magistrate says that he thinks "she is quite justified in refusing to live with him" and then goes on to give her an order. That order he was entitled to make under the proviso to clause (3) of section 488 of the Criminal Procedure Code under ordinary circumstances. The learned Sessions Judge remarks that he would consider the Magistrate's order justified if the matter were *res integra*. But he considers that the decree passed on the 15th of November 1922 was binding on the Magistrate. It seems to me that the weight to be attached to a decree must depend upon the particular circumstances of the case and that no hard and fast rule can be laid down that a decree of a Civil Court is for ever and aye binding on the Magistrate or that his discretion is never fettered. It is clear that if the decree had only been passed the day before it would require something very strong indeed to justify a Magistrate in ignoring it. It is equally clear that if it had been passed 20 years before and the woman had yearly endeavoured to get her husband to allow him to live with her and he had driven her out with blows, the Magistrate could not possibly be expected to hold himself bound in any way by the terms of that decree. Now in this case the decree was passed some 13 months before. She made her application on the 11th of January 1924. It is equally clear from her own evidence which I have had read to me that after the decree she was taken to her husband's house and was driven out from there with blows. In other words she was so ill-treated, when there that she had to go. The truth of this evidence is confirmed by Damri the Chaudhri of the caste who says that he and others had to go to the husband's house at the request of the husband's mother in order to bring the applicant Musammat Deoli away because there were constant rows and she was being ill-treated. Under the circumstances it appears to me that the Magistrate was justified in exercising his discretion in favour of the woman and in favour of absolving her from the condition that she must live with her husband. In fact, any other order would simply amount to this that the husband can first get a decree for restitution of conjugal rights and then turn his wife out without an allowance at all. Let the reference be returned.

Reference answered.

1924 Allahabad 785.

WALSH, A.C.J. and SULAIMAN, J.

Mt. Rajroop Kuar—Plaintiff-Appellant.

v.

Kandhya and another—Defendants-Respondents.

L. P. A. No. 1 of 1923, decided on 1st July, 1924, from judgment dated 22nd November, 1922.

Ejectment—Suit for—No separate suit for declaration that defendants title is void is necessary even in revenue Court.

The institution of a suit for possession is sufficient to show the plaintiff's election to treat the alienation as a nullity and therefore a separate suit is unnecessary and even a separate suit for a declaration is inoperative; this rule applies even if the ejectment is sought in a revenue Court. (34 Cal. 329; 37 All. 251 Foll. [P. 786, Cs. 1 and 2.]

P. L. Banerji—for the Appellant.

K. K. Varma—for the Respondents.

Walsh, A.C.J.—This is one of those really difficult cases where this constant conflict between the jurisdiction of the

Revenue Court and the jurisdiction of the Civil Court indirectly arises. I say indirectly arises, because no objection was taken to the jurisdiction of the Revenue Court, and until this case reached the High Court, and my brother Stuart allowed the learned vakil to argue a point which was not open to him, the difficulty was never present in the case at all. It is hoped that the approaching legislation about the Tenancy Act, or the new Act, if we ever get one, will finally get rid of this perenial difficulty. The facts of the case are quite simple as appears from my brother Stuart's judgment. It is true that a prepetual lease having been granted by a Hindu widow with a Hindu widow's estate, such questions as legal necessity, and determining her right to grant it, so as to make it operative after her death, are involved. The plaintiff sued in ejectment under section 57 of the Tenancy Act alleging or assuming it matters not which that the plots were agricultural land. No point was raised either of fact or law on this point, namely, as to the nature of the land and the character of the tenancy, either in the pleadings or in the issues framed by the Assistant Collector and both the lower courts decreed ejectment the second court slightly modifying the first court's judgment. When the matter came before this Court in second appeal, a new point of law was taken, which the learned Judge has accepted. It was said that the suit was premature, and that the plaintiff reversioner, if he wanted to recover on the revenue side in ejectment, must first get the lease, or alienation which the widow had made, formally set aside, or declared to be void in a Civil Court. The learned Judge accepted this view. He has not said on what authority he based himself. It is a view inconsistent with the weight of authority, at any rate of this Court. If there were only one court possessed of jurisdiction, so that two such suits would have to be brought in that court, there is no question that the view is erroneous. The Privy Council have made that perfectly clear in the case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1), where they laid down generally that the institution of a suit for possession is sufficient to show the plaintiff's election to treat the alienation as a nullity, and that therefore a separate suit is unnecessary, and even a separate suit for a declaration is inoperative. Putting it into plain English, the mere bringing of a suit for ejectment challenges the right of the defendant to be in possession, and as Mr. Justice Piggott pointed out in the next case which is a clear authority for this case, and which really was binding on Mr. Justice Stuart, if his attention had been drawn to it "the defendant is forced to set up in justification of his possession the lease under which he sits, and then it is that the plaintiff can say that such lease was invalid and not binding upon him". The passage in the judgment which I have just quoted occurs at page 260 in the case of *Sher Khan* v. *Debi Prasad* (2), and is a sufficient authority for this case, and if it had been cited to the learned Judge, I have no doubt that he would have followed it.

Sulaiman, J.:—I agree. The plaintiff instituted a suit in the Revenue Court for the ejectment of the defendants, treating them as non-occupancy tenants. It was alleged that they had planted trees on the land, and also made some constructions, and were therefore liable to ejectment under section 57, sub-clause (*b*) of the Agra Tenancy Act. The plaintiff treated the land as agricultural land, and sought relief in the Revenue Court. Defendant No. 1 set up a perpetual lease executed by the deceased widow of the last male owner, to whom he said he had succeeded as a reversioner. Defendant No. 2 claimed to be a transferee from defendant No. 1. In neither of the written statements filed in the Court below was the point specifically raised that the land in question was not agricultural land at all. Nor was any plea raised that the Revenue Court had no jurisdiction to entertain the suit. Only four issues were framed by the trial Court, and none of these issues referred to the two points above mentioned. The Court of first instance decreed the claim. The defendants went up in appeal to the lower appellate Court, and in their grounds of appeal they did not raise either of the two points mentioned. The decree of the first court was affirmed with a slight modification. A second appeal was filed in this Court, and although it was not suggested in the grounds of appeal that

(1) (1907) 34 Cal. 329=34 I.A. 87=11 C.W.N. 424=5 C.L.J. 334=9 Bom. L.R. 602=2 M.L.T. 133=17 M.L.J. 154=4 A.L.J. 329 (P.C.)

(2) (1915) 37 All. 254=28 I.C. 552=13 A.L.J. 364.

the land really was not agricultural land, or that the lease was not for agricultural purposes, a plea was at the time of the admission of the appeal added to the effect that the lease not having been set aside by a competent Court in a proper suit brought by a person entitled to question it, it was binding on the zamindar for the time being. The learned Judge of this Court has allowed the appeal, and has come to the conclusion, to quote his own words: "that it was necessary for the plaintiff respondent to set aside the alienation which the lady had made in favour of Gopal as a precedent to instituting a suit for the ejectment of the defendants appellants through the Revenue Courts". He has however assumed that the plots in question are agricultural land.

It was laid down by Their Lordships of the Privy Council in the case of *Bijoy Gopal Mukerji* v. *Krishna Mahisi Debi* (1).

"That a Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation, and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not therefore absolutely void, but it is *prima facie* voidable at the election of the reversionary heir He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property".

It is quite clear therefore that it is not incumbent on a reversioner to obtain a declaratory decree to set aside the lease executed by the deceased widow before seeking his substantial relief. If the land were either let or held for agricultural purposes, the Revenue Court alone could order the ejectment of the defendants. A Hindu widow can certainly grant a lease to tenants or lessees, and such tenants or lessees can be ejected through the Revenue Court alone. The plaintiff reversioner, therefore, could only go to the Revenue Court for ejectment, and the defendants were entitled to set up the lease as a lease binding upon her; if they set up its validity, it would be for the Revenue Court to decide whether it had or had not been executed for legal necessity. The question of legal necessity was never raised in the Courts below, and has not been decided in favour of the defendants.

The view of the learned Judge that the plaintiff ought to go to the Civil Court in the first instance to obtain a declaration and then sue in the Revenue Court for ejectment, is contrary to the opinion expressed by Chamier and Piggott, JJ. in the case of *Sher Khan* v. *Debi Prasad* (2) following an earlier case in the same volume at page 41.

I am therefore of opinion that it was not necessary for the plaintiff to obtain a declaratory decree from a Civil Court before instituting a suit for ejectment in the Revenue Court.

The learned Vakil for the respondents has tried to support the decree of the learned Judge of this Court, by urging that as a matter of fact the lease in question is not one for agricultural purposes. As I have already stated this point was never raised at the trial, and has been assumed in favour of the plaintiff all along. It may be that according to the terms of the lease, it is not a lease solely for agricultural purposes. All the same it may well be that the land has been held for agricultural purposes. This new point therefore cannot be allowed to be raised at this stage.

BY THE COURT:—We therefore allow the appeal and restore the order of the District Judge, but under the circumstances having regard to the fact that the present appellant ought never to have allowed this point to be taken without objection, and that he failed to cite the authorities bearing upon the point, we deprive him of all costs in this Court. That is to say, he will only get the costs in the first Court and in the District Judge's Court.

Appeal allowed.

---

*1924 Allahabad 787.

WALSH, A.C.J. AND SULAIMAN, J.

Gaya Pande—Defendant-Appellant.

v.

Amar Deo Pande—Plaintiff-Respondent.

L.P.A. No. 18 of 1923, decided on 2nd July, 1924, from a judgment dated 20th December, 1922.

(a) *Transfer of Property Act. S. 58—Joint mortgagor—Provincial Small Cause Courts Act, Art. 42.*

Mere signing mortgage deed as joint executant does not make one a joint—mortgagor where only one mortgaged his property and other mortgaged none. [P. 788, C. 1.]

(b) *Evidence Act, S. 115—No estoppel arises in favour of one who knew all the facts of the case.*

There is no estoppel in favour of a man who knew all the facts of the case, so a co-signatory to a mortgage deed is not estopped in a suit for contribution by the other executant to deny that the

latter alone mortgaged his property and that he (the defendant) mortgaged none. [P. 788, C. 1.]

Balleshwari Prasad—for the Appellant.

A. Sanyal—for the respondent.

Walsh, A.C.J.:—We are of opinion that this appeal must succeed. We do not say that the defence is without merits for a reason which will appear in a moment but we are quite clear that our brother ought not to have interfered with the decision of the lower court, because he had no jurisdiction to hear the appeal. It is possible that he felt that the plaintiff was entitled to sympathy, and that he stretched a point in his favour. He certainly does not give any strong reason why he overruled the preliminary objection. The point is really quite simple. The plaintiff and the defendant joined in a document, which was a mortgage, whereby certain property was hypothecated in consideration of a loan, and they described themselves as mortgagors. *Prima facie* they were joint mortgagors, or co-mortgagors. But a description of that sort which may be due either to the man who writes the document, or to carelessness of the lawyer, who does not think it necessary to go into detail cannot alter the fact, and in this particular case in fact only one of them mortgaged his property, and the other transferred, hypothecated and mortgaged none, and therefore he did not became a mortgagor in any sense of the word, or within the definition of section 58 of the Transfer of Property Act. He might in certain cases be prevented from denying it, which is what the law calls estoppel, so that for certain purposes he would become in the eyes of the law a mortgagor and be treated as such. He would only be treated as such by estoppel, which is an artificial principle of law, and it would not make him a mortgagor in fact when he was not one. But as against anybody who knew the facts, particularly his co-mortgagor, there could be no estoppel. Nobody knew the facts better than his co-debtor, the actual mortgagor. The plaintiff paid the debt, or discharged the greater part of the debt, and he now seeks contribution. The question is-the claim being under Rs. 500 whether there is any second appeal. If it is a suit of a Small Cause Court nature, there is none. The only way in which the plaintiff can take it out of the category of a suit of a Small Cause Court nature, is by bringing it within Article 42. But Article 42 applies to a suit by one or several joint mortgagors, and as we have pointed out here, there were no joint mortgagors; but only one mortgagor. When the plaintiff, having lost his suit in the court of the District Judge, appealed in second appeal to this Court, this objection, which we have just stated, was taken by the respondent. The learned Judge accurately set out the objection in his judgment. He dismissed it without giving any convincing reason, being content to say that as they both joined in executing the document, he thought they could be brought within the words "joint mortgagors." We find ourselves unable to agree. Joint executants they certainly were, joint debtors they certainly were, joint participants in a mortgage transaction they certainly were, but there was only one mortgagor. The preliminary objection therefore before the learned Judge ought to have prevailed, and we are of opinion that he was wrong in dismissing it. This is sufficient to dispose of this appeal, but it does happen that the court of first appeal, namely the District Judge, definitely dismissed the claim on the ground that the plaintiff had failed to establish by proof the mortgage debt, or the right to contribution at all, and if that decision is right a matter which this High Court cannot consider it is clear that the defendant is right on the merits as well as on the technical objection. We must allow this appeal-overruling the learned Judge and giving effect to the technical objection and hold definitely that this was not a suit within Article 42. The appellant must have the costs here and below.

Appeal allowed.

1924 Allahabad 788.

WALSH, A.C.J. and RYVES, J.

Gobind Singh and others—Defendants-Applicants.

v.

Bhirgunath Singh and others—Plaintiffs—Opposite-Parties.

Civ. Rev. No. 27 of 1923, decided on 29th April, 1924, from an order of the Subordinate Judge of Benares.

(a) *Civ. Pro. Code, Sch. II, Para. 16—Where application to set aside award is refused a decree must be passed in accordance with it*

An award having been made and an application

to set it aside on the ground of misconduct or any other illegality having been refused the Judge has no option but to pronounce a decree in accordance with it. [P. 789, C. 2,]

(b) *Civ. Pro. Code, S. 115—Refusal to hear objection to award justifies interference.*

If a Court refuses to hear a valid objection properly raised before him or entertains matters which are outside his jurisdiction, then the High Court can interfere under section 115 not with the arbitrators nor with the award but with the exercise of the jurisdiction of the Court in dealing with the application. [P. 789, C. 2.]

(c) *Evidence Act S. 101 — Objectors to award must prove the objection—Civ. Pro. Code, Sch. II, Para 15.*

Any party wishing to set aside an award on the ground that the arbitrators in arriving at an unfair award either refused to hear somebody or heard the matter without giving notice of the hearing, undertakes the burden of satisfying the court that this is what really happened. [P. 789, C. 2.]

Lalit Mohan Banerji and *A. Sanyal* for the Applicants.

Tej Bahadur Sapru and *Kamala Kant Verma* for the Opposite Parties.

Walsh, A.C.J.:—This is a plain case. An attempt was made in the lower court to destroy the award by alleging misconduct against the arbitrators in the sense that they did not give the parties, or one of the parties, or some of the parties, a proper hearing, or adequate notice of the date of the hearing of the matter in which they were engaged. There are only two ways in which you can get rid of an award either by getting it set aside in accordance with the provisions of paragraphs 15 and 16 of the Code, in which case it is the duty of the Judge to refuse to file the award and grant a decree in the terms of the award; or if the learned Judge to whom application is made commits material irregularity in the course of the hearing, when he has the parties before him to decide whether or not the award filed was objectionable, then an application in revision may be made to this Court. These matters are really so elementary that it is hardly necessary to repeat them but the distinction so far as the powers of the High Court are concerned cannot be better expressed than in the head-note in the well-known Privy Council case *Ghulam Khan* v. *Muhammad Hassan* (1). The Privy Council there pointed out that the award having been made and an application to set it aside on the ground of misconduct or any other illegality having been refused, the Subordinate Judge has no option but to pronounce a decree in accordance with it. On the other hand they recognise that if the Subordinate Judge commits a material irregularity or refuses to exercise jurisdiction, for example as Mr. Lalit Mohan suggested here refused to hear a valid objection properly raised before him or entertains matters which are outside his jurisdiction, then undoubtedly this Court can interfere under section 115 of the Civil Procedure Code not with the arbitrators nor with the award but with the exercise of the jurisdiction of the Subordinate Judge in dealing with the application. Those general observations cover the question we have to determine in this revision. No serious attempt is really made to show that the learned Subordinate Judge did anything which can be brought within the terms of section 115. On the other hand he gave the parties a very full hearing. In dealing with the application to him to set aside the award he took evidence, he heard the statements of the arbitrators, and he formed a definite opinion on adequate material. After fully considering the matter and setting out his reasons clearly, he comes to the conclusion that no misconduct on the part of the arbitrators had been made out. The result is that he exercised his jurisdiction properly and having arrived at certain findings of fact those are conclusive. Mr. Lalit Mohan suggested that somewhere or other, latent rather than patent, might be found, objections to what the arbitrators did which the learned Judge had not dealt with. These subordinate allegations are so vague that they are extremely difficult to handle. But the answer to them is that if there was any evidence of them at all the parties failed to satisfy the learned Judge of their credibility. On the face of it the award is an admirable and careful document. Any party wishing to set aside an award on the ground that the arbitrators in arriving at an unfair award either refused to hear somebody or heard the matter without giving notice of the hearing, undertakes the burden of satisfying the Court that this is what really happened. The objectors in this case have utterly failed to do so and the application in revision must be dismissed with costs.

(1) (1902) 29 Cal, 167=29 I. A. 51=6 C.W.N. 226 =12 M.L.J. 77=4 Bom. L.R. 161=8 Sar. 154 (P.C.).

The stay order will be discharged with costs. Costs will include fees on the higher scale.

Revision dismissed.

** **1924 Allahabad 790.**

MUKERJI AND DALAL, JJ.

Ram Sia and another—Plaintiffs-Appellants

v.

Bua—Defendant-Respondent.

L. P. A. No. 27 of 1923, decided on 3rd July, 1924, under section 10 of the Letters Patent, from a judgment of Stuart, J., dated the 15th November, 1922.

Hindu Law—Succession—Heritable Bandhus.

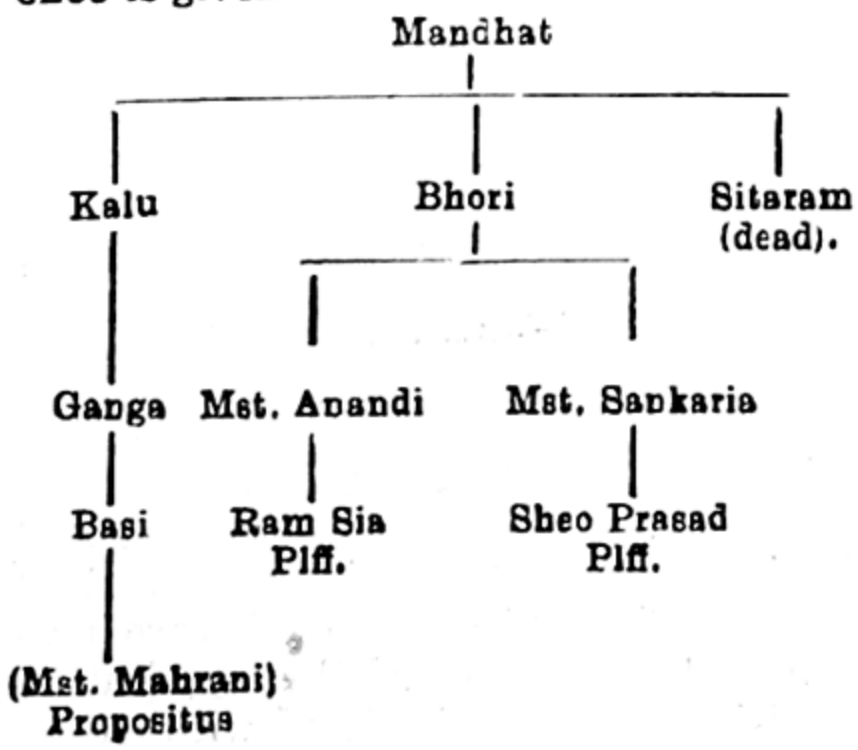
The counting for fixing on heritable bandhus should be not from the propositus but from the common ancestor. (42 Cal. 384 (P.C.)=48 I.A. 86 (P.C.), *Foll.*) [P. 791, C. 1.]

A. Sanyal—for the Appellants.

Damodar Das—for the Respondent.

Mukerji, J.:—This appeal raises a question of Hindu law namely, whether claimants Ram Sia and Sheo Prasad are heirs as *Bandhus* to the deceased Basi. The pedigree is given in the judgment of the learned Subordinate Judge hearing an appeal who dismissed the suit on the ground that, the plaintiffs on their own showing, were no heirs to the last male holder of the property. The pedigree, it must be understood, was not found by the learned Subordinate Judge as correct, for he did not apply his mind to this question of fact. The judgment of the Subordinate Judge was confirmed by a learned Judge of this Court and hence this Letters Patent Appeal.

The pedigree for the sake of easier reference is given bolow :—



The learned Subordinate Judge dismissed the suit relying on certain dicta of this Court in the case of *Shib Sahai* v. *Saraswati* (1). There can be no doubt that the actual decision of the case was correct and nobody impeaches the correctness of the decision. But their Lordship at pp. 584-5 express themselves as follows :—

> "Therefore for *Bandhu* relationship to exist, it is essential that the persons claiming to be the *bandhu* and the last owner must have been *sapindas* of each other. The rule of *sapinda* relationship has been laid down in the *Mitakshara* and it extends to 7 degrees on the father's side including the last owner. Taking the pedigree put forward by the plaintiff, which will be found at p. 9 of the paper book, it is clear that Bulaki was one degrees beyond the 7th degree counting from the last owner Khairati Rai. We are asked to count the 7 degrees from the great grand-father to Khairati who was the common ancestor and it is said that computing from the common ancestor Khairati is within the seventh degree, but this computation would leave out of consideration altogether Khairati. The mode in which relationship should be computed is stated in Sarvadhikari's Lectures (1880), p. 707 and that is a mode which the lower appellate Court has adopted."

The learned Subordinate Judge counted 7 degrees from Basi to the plaintiffs through Mandhat and found that they were within 7 degrees of the propositus. He added that, as the plaintiffs claimed through their mother and as it was necessary that they also should be *sapindas* of Basi, the latter must be within 5 degrees from themselves in order that Basi might be their *sapinda*. Thus counting from plaintiff to Basi through Mandhat he found that Basi was beyond the 5th degree. Thus, he said, there was no mutuality of *sapindaship* between the claimants and Basi and he held that the plaintiffs were out of Court.

We have read the reference made in the judgment to Sarvadhikari's book, both the

---

(1) (1915) 37 All. 583=30 I.C. 909=13 A.L.J. 786.

old and the new edition. We have also been referred to the Privy Council case of *Ram Chander Martand Waikar* v. *Vinayak Venkatesh Kotheka* (2) and to a later case decided by the same tribunal, namely, *Adit Narain Singh* v. *Mahabir Prasad Tewari*(3). All the three authorities agree in laying down that the counting should be not from the propositus but from the *common ancestor*. Where a party claims through his father he must be within 7 degrees from the common ancestor, counting the claimant himself. Where a party claims through his mother, he must be within 5 degrees from the common ancestor, counting the claimant himself. The claimants in this case claim through their mothers and therefore they should show that they are within 5 degrees of the common ancestor and this they have shown. Taking the propositus, he is connected with the common ancestor through his father and he should be within 7 degrees of the common ancestor Mandhat and such is the case here. It is clear therefore that the plaintiffs ought to succeed.

Before leaving the subject we may point out that in the second edition of Sarvadhikari's book on Hindu Law of inheritance the case in Indian Law Report, 37 Allahabad, has been adversely criticised by the learned Editor (*vide* foot-notes of page 499). As we have already stated the criticism is really towards what is practically an *obiter dictum* and not against actual decision of the case which was perfectly correct. In the case in 37 All. the claimant Bulaki was claiming through his mother and he could not succeed since he did not prove that he was within 5 degrees from the common ancestor, being in the 6th degree.

The result is that we set aside the decree of this Court and the decree of the learned Subordinate Judge and remand the appeal to the Subordinate Judge for being disposed of according to law. The costs here and hitherto will abide the result.

A further test has to be applied, which test is meant to decrease the number of the people who but for the test would be entitled. This is laid down at pp. 591 to 594 of Dr. Sarvadhikari's book (2nd edition) which has always been accepted as very reliable on the point. This test was applied in the case of *Sheo Nandan* v. *Munni* (4) by Gokul Prasad and Ryves, JJ. Applying this test, we find that, the plaintiffs' maternal grand father was Bhori, who was a *sapinda*, and the common ancestor was Bhori's father, *also* a *sapinda* of the plaintiffs. Mandhat, the common ancestor being directly in the father's line of the propositus, was his *sapinda*.

Suit remanded.

(2) (1914) 42 Cal. 884=41 I.A. 290=18 C.W.N. 1154=27 M.L.J. 538=1 L.W. 831=10 N.L.R 112=16 M.L.T. 447=(1914) M.W.N. 935=16 Bom L.R. 868=25 I.C. 290=12 A.L.J. 1281=20 C.L.J. 573 (P.C.)

(3) (1921) 48 I.A. 66=40 M.L.J. 270=(1921) M.W.N. 153=19 A.L.J. 208=23 Bom. L.R. 693=25 C.W.N. 642=33 C.L.J. 268=2 Pat. L.T. 97=22 M.L.T. 240=60 I.C. 251=6 Pat. L.J. 140=14 L.W. 20 (P.C.)

(4) 1923 All. 393=21 A.L.J. 288=4 L.R.A. Civ. 155.

1924 Allahabad 791.

SULAIMAN AND KANHAIYA LAL, JJ.

Bhawani Singh—Plaintiff—Appellant.

v.

Makhan Lal and others—Defendants—Respondents.

S. A. No. 51 of 1923 decided on 22nd May, 1924, from the decree of the District Judge of Budaun dated the 3rd October, 1922.

Pre-emption—Custom of.

A custom of pre-emption of which there is *prima facie* evidence in the entry in the *wajib-ul-arz* is not necessarily negatived by three instances of sales to strangers. [P. 792, C. 1]

Harnandan Prasad—for the Appellant.

Panna Lal—for the Respondents.

Sulaiman, J.:—This is a plaintiff's appeal arising out of a suit for pre-emption. The learned District Judge conceded that the entry in the *wajib-ul-arz* relied upon by the plaintiff was a *prima facie* evidence, which ought ordinarily to be taken as evidence of custom. He however held that in view of the peculiar circumstances, disclosed by the "*halat dehi*," the presumption had been rebutted. He referred to the circumstances that the village was originally a "*muafi*" village and was populated by some Gosain, after whom it is now named. This however happened more than a hundred years ago and the exact date cannot be ascertained. The learned Judge thought that in 1216 Fasli the village was confiscated and a settlement was made

with certain Thakurs. It however appears that it was *muafi* originally and the *muafi* was only resumed owing to the refusal of the previous holders to pay the revenue assessed thereon. The learned Judge then goes on to say that between the years 1842 (1824 is a misprint) and 1864 there were seven cases of sales. He therefore thought that the presumption had been rebutted. We may point out that out of the seven sales three were auction-sales about which by virtue of any custom there could have been no right of pre-emption asserted. Further we find that with the exception of three sales of 1842, 1853 and 1854 the others were cases of sales to co-sharers. It is also not quite clear that even with regard to these three cases the transferees were necessarily strangers and not co-sharers, as the *khewats* for these periods have not been produced. In any case we do not consider that the three instances of sales to strangers, assuming that there had been such transfers, would necessarily negative the existence of the custom. It may well be that these sales were not objectionable to the co-sharers or that the purchaser had offered prices so high as to make it impossible for the co-sharers to outbid them. We set aside the decree of the Court below and decree the plaintiff's claim with costs. The finding as regards consideration is not now challenged. The decree will be subject to the payment of Rs. 436-4-0 on or before the 2nd of July, 1924. In case of payment the plaintiff will get his costs in all courts including in this Court fees on the higher scale. In case of default the plaintiff's suit shall stand dismissed with costs in all courts including in this Court fees on the higher scale.

We may note that the sum of Rs. 436-4 is quite independent of any sum which the plaintiff may be liable to pay, if at all, to the prior mortgagee mentioned in the sale-deed.

Decree set aside.

** **1924 Allahabad 792.**

WALSH, A.C.J. AND SULAIMAN, J.

Mehi Lal—Plaintiff—Appellant.

v.

Ramji Dass and another—Defendants—Respondents.

L.P.A. No. 58 of 1923 decided on 4th July, 1924 under section 10 of the Letters Patent from a judgment of Daniels, J. dated 25th January, 1923.

(a) *Evidence Act, S. 63 (5) — "seen it" meaning of.*

Mere fact of having seen the document is enough the witness need not have read it or have been able to do so, in order to make his evidence admissible. [P. 793, C. 2.]

(b) *Interpretation of statutes—Safest course.*

The safest course is to hold fast to the exact language in its ordinary interpretation. [P. 793, C. 1.]

(c) *Evidence—Admissibility and credibility.*

Admissibility is a question of law and credibility of evidence is one of fact. [P. 793, C. 2.]

S.N. Sen—for the Appellant.

K.N. Katju—for the Respondents.

Walsh, A.C.J.--This appeal raised a nice point and a very interesting point, namely, as to the meaning of the word "seen it"—used with reference to a document in section 63 of the Evidence Act. The facts of the case are—so far as they are material—that an attesting witness to a certain mortgage transaction for Rs. 80, alleged to have taken place in 1865, which is either lost or not forthcoming, so as to entitle the party to give secondary evidence of it, was produced in the trial court. His name was Anandi Lal. He was ignorant of Persian character, and therefore unable to read the document itself, but he purported to give evidence, or at any rate the first court of appeal understood him to give evidence, that the contents of the document were either translated, or read out to him, or explained to him, in such a way that he was able to remember them, and he gave on oath his recollection of the material contents of the document, and has been believed by the first court of appeal. If that finding of fact can be justified in law, the plaintiff's case is established. The question is whether the judge was entitled to hear and believe the witness's oral account of the contents of the document. The matter came before a Judge of this Court, and in a very clear judgment he has held that the District Judge was not so entitled. He rightly says: "under sub-section 5 of section 63, only a witness who has himself seen a document is entitled to give evidence of it", and he goes on to say "this clearly implies that he must be a witness who could read "the document", and he follows a decision of Mr. Justice Tudball in the case

of *Ghure* v. *Chatrapal Singh* (1). After hearing the matter very fully argued, we have come to the conclusion, with great respect to these two Judges, that we are unable to agree. The critical words in the section are "seen it". The result of the decision would be, for example, that a highly educated person knowing several languages except German, who had seen an original document in German which been lost, and who was interested in its contents and had had them translated to him by an equally highly educated person who knew German, and explained to him phrase by phrase in such a way that the English translation of the German contents were firmly imprinted on his memory, could not give the contents of that documents in evidence under section 63, although he undoubtedly had seen the document. It does not follow, because an interpretation leads to a startling result, that it is necessarily wrong. But it must be admitted that the interpretation which produces this result is not the literal meaning of the language used, but involves the addition of words which are not in the section. Nobody can doubt that one is from time to time compelled to imply or read into the language of an ambiguous section something which is not actually there, but as a general rule the safest course is to hold fast to the exact language in its ordinary interpretation, if it is capable of bearing it. It is difficult to draw the line once you begin to introduce ideas of your own, and a loose method of interpretation undoubtedly leads to a great deal of difference of opinion and uncertainty. We are of opinion that the section means what it says. The question is, has the witness seen the document? The further question whether he is able to give evidence of its contents, is a question of his credibility. Mr. Justice Tudball in his judgment is of opinion that the words "seen it" mean having seen and examined the document, so as to be in a position to give direct evidence of its contents. The section does not say that, it might have said "read it." It says neither. If, as might be expected, the legislature intended the right of the witness to give the contents, to depend upon what he saw, the language should have been not "seen it", but "seen them". As the matter stands, he is allowed to give an oral account of the contents, when he has merely seen the document, and obviously once he has seen the document, his capacity to give the contents may result, not from what he saw, but from what he was told at the time when he saw it. In other words the admissibility of the evidence is one thing, the weight to be attached to it by a Judge of fact is another. If one were to indulge in speculation upon what is undoubtedly a rather interesting literary problem, it is not impossible that the original intention was to say "read it." But a great proportion of the population in India cannot read at all, and that provision would have excluded a large body of valuable evidence. Whether this was so or not, we have to take the language as we find it, according to its natural meaning. The fact that the witness has seen it makes his oral account admissible. The important question whether his account is credible is a question of fact for the trial Court.

We therefore allow the appeal and restore the decree of the District Judge with costs here and below, including in this Court-fees on the higher scale.

Appeal allow ed.

(1) (1914) 12 A.L.J. 289=28 I.C. 11.

1924 Allahabad 793.

SULAIMAN AND KANHAIYA LAL, JJ.

Debi Prasad—Plaintiff-Appellant.

v.

Kamta Prasad and others—Defendants-Respondents.

S. A. No. 91 of 1923, decided on 5th June, 1924, from a decree of the Second Additional District Judge of Gorakhpur, dated the 14th November, 1922.

Pre-emption—Custom of wajib-ul-arz.

A custom of pre-emption is negatived by entry in *wajib-ul-arz* showing that all co-sharers agreed that there would, since the time of such agreement be no custom of pre-emption in vogue. [P. 794, C. 1.]

M. L. Agarwala—for the Appellant.

Sankar Saran—for the Respondents.

Sulaiman, J:—Second Appeals Nos. 91 and 92 of 1923 arise out of two suits for pre-emption. The only question raised in these appeals is whether there is a custom of pre-emption with regard to sales and usufructuary mortgages in the two villages, Salempur and Chainpur, in which the shares sold are situated.

Both the Courts below have held that the custom has not been established. The plaintiff relies on the entries of the *wajib-ul-arzes* of the years 1833 and 1860, but the Courts below, having regard to the previous history of the village, have concluded that inasmuch as the villages were waste till about the year 1220 Fasli when they were settled either with only one man or two and that since that time the heirs and legal representatives of these persons alone have remained in possession there could be no occasion for its growth. If the matter had stood at that we would have had some hesitation in upholding the finding of the Courts below.

It appears, however, that at the last settlement of 1885 the word "*nadarad*" (nil) was noted against paragraph 4 of the *wajib-ul-arz* relating to the custom of pre-emption. This was not all. After reciting a number of other practices and customs prevailing in the village, the *wajib-ul-arz* goes on to remark that with the exception of the aforementioned practices there are for the present no other practices or customs; it is therefore ordered that the ancient customs shall be maintained. It is to be noted that these were not non-Muhammedan villages in 1885 in respect of which strict proof with regard to the existence of the custom of pre-emption was required. The entry in the *wajib-ul-arz* clearly indicates that all the co-sharers agreed that there would since that time, be no custom of pre-emption in vogue. Even if a custom of pre-emption had existed prior to 1885, it must be deemed to have been abrogated. There is no evidence of a fresh growth since that time. We may also note that the Court of first instance has distinctly found that the plaintiff had refused to make the purchase and had refused to accept a registered post-card containing an offer from the vendor and was therefore estopped from bringing the suit. The lower appellate Court however has not gone into that question.

Both these appeals accordingly fail and are hereby dismissed with costs including in this Court-fees on the higher scale.

Appeals dismissed.

*1924 Allahabad 794.

SULAIMAN, J.

Lachmi Narain—Applicant-Appellant.

v.

Mt. Brij Rani—Opposite-Party-Respondent.

Ex. F. A. No. 106 of 1923, decided on 27th May, 1924, from a decree of the Subordinate Judge of Bareilly, dated the 27th January, 1923.

(a) *Civ. Pro. Code, S. 96—Application in execution.*

No appeal lies from an order refusing to restore an application in the Execution Department. [P. 795, C. 1.]

(b) *Civ Pro. Code, S. 47—Order of stay of proceedings and of cost is not a decree.*

Under S. 2 read with S. 47 an order passed by the execution Court is a decree only when it determines a question relating to the execution, discharge or satisfaction of the decree; stay of proceedings is not a decree. [P. 795, C. 2.]

(c) *Civ. Pro. Code, S. 96—Generally no appeal lies from an order as to costs.*

An order as to costs is ordinarily a matter in the discretion of the trial Court and unless some question of principle is involved no appeal can ordinarily be entertained. [P. 795, C. 2.]

U. S. Bajbai—for the Appellant.

Iqbal Ahmad—for the Respondent.

Judgment:—This appeal has been filed as an Execution First Appeal from an order, dated the 27th of January, 1923.

A compromise decree had been passed in favour of the respondent against the appellant under which the respondent was entitled to recover a sum of money. The appellant filed a declaratory suit to avoid this decree as he was a minor. His suit was dismissed and an appeal was filed in this Court. An injunction was issued from this Court restraining the respondent from proceeding with the execution of her decree. On the 9th of August, 1922, the Execution Court stayed proceedings and on the 10th of August it passed an order directing that the execution case should be struck off as the appeal might take a long time for disposal. It however ordered that the costs were to be borne by the decree-holder. On an application made by the decree-holder the Court modified its order on the 9th of October, 1922, and directed that the decree-holder should get her costs but no notice of this application had been served on the present appellant.

On the 13th of October, 1922 the present appellant applied for setting aside the order of the 9th of October, 1922 on the ground that it had been passed *ex parte* and was not a just and proper order. After notice had been served on the respondent and she had put in objections the Court on the 27th of January, 1923 dismissed the application for restoration saying that the previous order was one correcting an obvious error in the earlier order and that the Court could not change the order.

I am of opinion that no appeal really lies from the order, dated the 27th of January, 1923. Under section 647 of the Code of Civil Procedure of 1882 there was a conflict of opinion whether procedure for setting aside *ex parte* decrees could or could not be applied in *extenso* to applications to set aside orders passed by the Execution Department. By the Amending Act of 1892 an explanation to that section was added saying that the section did not apply to applications for the execution of decrees. In the meantime an appeal from a judgment of this Court went up to their Lordships of the Privy Council and their Lordships, independently of the explanation, held that the old section 647 did not apply to applications for execution (*vide Thakur Prasad* v. *Fakir Ullah* (1). Accordingly the Legislature has now omitted the explanation for section 141 of the new Code of Civil Procedure as it was unnecessary. It has been held in the case of *Bharat Indu* v. *Asghar Ali Khan* (2) that no appeal lies from an order refusing to restore an application in the Execution Department.

What in the present case has happened is that the appellant made an application for setting aside the order, dated the 9th of October, 1922 and the Court below has refused to set it aside. I cannot treat this last order, dated the 27th of January, 1923 as a decree so as to give the appellant a right of appeal. Under section 2 read with section 47 of the Code of Civil Procedure an order passed by the execution Court is a decree only when it determines a question relating to the execution, discharge or satisfaction of the decree. In the present case the question before the Court was really one of staying proceedings and directing each party to bear costs. It really did not relate to the execution, discharge of satisfaction or the decree itself, No appeal therefore lies from this order.

Assuming however that an appeal lies, I am of opinion that even on the merits the appeal cannot succeed. It was no fault of the decree-holder that an injunction was issued restraining her from proceeding with the execution of her decree. If the execution is stayed in the interest of the present appellant there is no reason whatsoever why the decree-holder should be made to bear her own costs. Her application was made at a time when no injunction had been issued and the decree-holder was at that time perfectly entitled to apply for execution.

Furthermore, the order as to costs is ordinarily a matter in the discretion of the trial Court and unless some question of principle is involved no appeal can ordinarily be entertained.

This appeal accordingly fails and is hereby dismissed with costs.

Appeal dismissed.

(1) (1895) 17 All. 106=22 I.A. 44=5 M.L.J. 3=6 Sar. 526 (P.C.)
(2) 1923 All. 460=45 All. 148=21 A.L.J. 135.

1924 Allahabad 795.

SULAIMAN AND MUKERJI, JJ.

Baijnath Singh—Plaintiff-Appellant.

v.

Chandrapal Singh and others—Defendants-Respondents.

L. P. A. No. 108 of 1923, decided on 24th July, 1924, from the judgment of the Daniels, J, dated 5th April 1923, reported in 1923 All. 553.

(a) *Agra Tenancy Act, S. 4.*

Persons who obtained land from the landholder on payment of lump sum as premium without agreement to pay rent for the express purpose of planting trees are not tenants. [P. 796, C. 1.]

(b) *Agra Tenancy Act, S. 4 (2)—Definition of land.*

Land on which a grove stands is not 'land' as defined in S. 4. cl. (2) of the Tenancy Act. [P. 796, C. 1.]

(c) *Transfer of Property Act, S. 6—Interest of a person's holding on which he has planted grove is transferable.*

All property and certainly the interest of a person's holding on which he has planted a grove is property and is transferable under S. 6. [P. 796, C. 1.]

U. S. Bajpai and *Kumuda Prasad*—for the Appellant.

K. N. Katju—for the Respondents.

Judgment:—The question raised in this Letters Patent Appeal is whether the respondents had a right to transfer their

grove. The suit was for the ejectment of the respondents on the ground that the respondents Nos. 2 and 3 were holding the land with the permission of the plaintiff, the land-holder, and they had no right to transfer the same on which a grove was standing to the respondent No. 1 without his consent.

It is common ground that the respondents Nos. 2 and 3 obtained the land from the land-holder, on payment of a lump sum as a premium without any agreement to pay any rent, for the express purpose of planting trees. There is no evidence that any custom obtained in the village such as may govern a case like this. We have to decide the question on the provisions of the general law having special regard to the provisions of the Tenancy Act.

The position of the respondents Nos. 2 and 3 cannot be that of a tenant within the meaning of the Tenancy Act. They do not pay any rent. Much less do they pay any rent for a grove. Even if they had agreed to pay a rent for the land, on which they proposed to plant a grove, the rent would have been paid for the *land* and not for the grove. Land on which a grove stands is not 'land' as defined in section 4, clause (2) of the Tenancy Act. See *Habibullah* v. *Kalyan Das* (1) and *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (2). The premium which they paid can in no sense of the term be called a rent. A tenant under section 4 of the Tenancy Act is one who pays a rent for land or a grove and other things mentioned there. The respondents Nos. 2 and 3 are therefore no tenants. It is clear therefore that the provisions of the Tenancy Act, specially section 20 of that Act, do not apply.

According to the general law all property—and certainly the interest of a person's holding on which he has planted a grove, is property—is transferable under section 6 of the Transfer of Property Act. It therefore follows that the respondents Nos. 2 and 3 were entitled to transfer the interest that they possessed in the grove to the respondent No. 1. On this short ground the appeal fails. We, therefore, affirm the decree of this Court and dismiss the appeal with costs which will include counsel's fees in this Court on the higher scale.

Appeal dismissed.

(1) (1914) 12 A.L.J. 1080=26 I.C. 169.
(2) (1921) 19 A.L.J. 749 (F.B.)

1924 Allahabad 796.

WALSH, A.C.J. and BOYS, J.

Lal Umrao Singh—Judgment-Debtor—Applicant.

v.

Lal Singh—Decree-Holder and *Chittu Mal*, Purchaser—Opposite party.

Civ. Rev. No. 110 of 1923, decided on 30th June, 1924, from an order of the Additional District Judge of Aligarh, dated 28th March 1923.

(a) *Civ. Pro. Code, O.* 21, R. 46—*Mortgage bond—Gen. cl. Act, S.* 3 (25) *Gen. Cl. S.* 3 (34)—*Penal Code, S.* 22.

Simple mortgage bond is moveable property for the purpose of procedure for attachment—(Case law discussed) 15 All. 134; 26 Bom. 305; 18 P.R. 1909; 37 Mad. 51; 50 I.C. 157 Foll.

(b) *Civ. Pro. Code, O.* 21, *R.* 79—*Mortgage bond.*

Simple mortgage bond is moveable property for the purpose of sale.

(c) *Civ. Pro. Code, O.* 21, *R.* 89—*Mortgage bond.*

Simple mortgage bond is moveable property for the purpose of setting aside sale and R. 89 has no application to it. [P. 798, C. 1.]

K.N. Laghate—for the Applicant.

Boys, J.:—Lal Umrao Singh judgment-debtor (the applicant in revision here) held a simple mortgage bond which was attached and sold by Lal Singh, the first opposite party here in execution of a decree. On the 23rd of October 1922, the judgment-debtor sent the money by telegraphic money-order but it arrived after the sale. The 24th being a Sunday, he deposited the money on the 25th and on the 28th filed an application under rule 89 to get the sale set aside. The decree-holder objected that the simple mortgage bond not being "immoveable property" the sale could not be set aside. The Munsiff disallowed this objection holding that a mortgagee's rights, whether the mortgage was simple or usufructuary, constituted "an interest in immoveable property", that the fact that the property attached was attached as moveable did not render it moveable once for all and that it was immoveable within the meaning of the term in the Transfer of Property Act.

The District Judge on appeal relying on *Nataraja Iyer* v. *South Indian Bank* (1) and

(1) (1911) 37 Mad. 15=10 M.L.T. 503=13 I.C. 91=(1911) 2 M.W.N. 590=22 M.L.J. 105.

Karim-un-nissa v. *Phul Chand* (2) allowed the appeal holding the simple mortgage-bond to be moveable property and held that, that being so, the sale could not be set aside. The judgment-debtor asks us to revise this order.

For the applicant no serious attempt has been made to show that a simple mortgage-bond is not "moveable property" for the purpose of determining the procedure appropriate to attachment and that such procedure is not contained in Order 21, rule 46 (section 268 of the old Code). This is a position he could hardly take up in face of the provisions of the Code of Civil Procedure and adverse authority. Compare *Karim-un-nissa* v. *Phul Chand* (2), *Tarvadi Bholanath Harishanker* v. *Bai Kashi* (3), *Bantu* v. *Ganda Singh* (4), *Nataraja Iyer* v. *The South Indian Bank of Tinnevelly* (1) (and cases there quoted), and *Shah Mohammad Yusuf* v. *Lachmi Narain* (5), *Karim-un-nissa* v. *Phul Chand* (2) was referred to in *Sheocharan Lal* v. *Sheo Sewak Singh* (6) but not overruled and *Bantu* v. *Ganda Singh* (4) was referred to and distinguished but not overruled in *Sewa Ram* v. *Dheru Shah* (7). The applicant however contends that while a simple hypothecation bond may be treated as moveable property for the purpose of attachment and the procedure of Order 21, rule 46 be applicable it does not follow that it is not "immoveable property" for the purpose of the sale and setting aside of the sale under Order 21, rule 89 and he has referred to *Mussammat Bhawani Kuar* v. *Gulab Rai* (8), *Sheo Charn Lal* v. *Sheo Sewak Singh* (6), *Mutsaddi Lal* v. *Muhammad Hanif* (9), *Sewa Ram* v. *Dheru Shah* (7), *Ram Sarup* v. *Harpal* (10), and *Hafizuddin* v. *Jadu Nath* (11).

Of these 1 All. 348 was shown in 15 All. 134 to be no longer law. Of the others, 18 All. 469 ; 10 A.L.J. 167 ; 12 C.W.N. 821 and 15 A.L.J. 33 have very little bearing, if any, on the point. But the ruling of Kensington, J. in 18 I.C. 318 does go the whole length of his contention. The learned Judge held,

> "It does not follow that because a mortgage 'debt is to be treated as moveable property for 'the purpose of attachment under r. 46, it 'should therefore be considered as moveable 'property in all cases.

and for that as well as for another reason ordered the lower Court to hear the application for setting aside the sale. In support of his view the learned Judge relied only upon 58 P.R. 1899 in which it was held, in a case dealing with the rights of a Hindu female heir to alienate, that a mortgage debt is immoveable property.

The opposite party, on the other hand contends that the bond being certainly attached as moveable property must be held to be sold as moveable property. The first part of this contention is, as I have already said, well established and in effect admitted. In support of the conclusion it may be said that in two of the cases quoted 15 All. 134 and 37 Mad. 51, language was used which suggests that in the minds of the learned Judges, what was moveable for the purposes of attachment was moveable for the purposes of sale. A consideration of these authorities and another to which I shall refer and particularly of the nature of a simple hypothecation bond leaves no doubt in my mind that the contention of the opposite party is correct, that the bond is moveable property for all three purposes, attachment sale and setting aside the sale under Order 21, rule 89.

The learned Munsif has held that the bond constitutes an "interest in immoveable property" and is therefore "immoveable property" within rule 89. Is the premise correct? A simple mortgage bond carries with it two rights; a right to a decree for money and to a decree for sale. The latter gives the mortgagee a right to be recouped from the sale proceeds but gives absolutely no right of any sort to or in the land. He has not even a right to all the sale proceeds but to only so much as may be necessary to meet his debt.

In 26 Bom. 305, Chandavarkar, J., said at page 311. "A simple mortgage creates "a right to recover the debt due on it "from land; a mortgage with a right of "foreclosure creates a right to recover the "land itself. Therefore a debt due on a "simple mortgage is a debt, though it is

---

(2) (1893) 15 All. 134=1893 A.W.N. 51.
(3) (1902) 26 Bom. 305=4 Bom. L.R. 18.
(4) (1909) 18 P.R. 1909=1 I.C. 450=22 P.W.R. 1909.
(5) (1919) 6 O.L.J. 49=50 I.C. 157=21 O.C. 409.
(6) (1896) 18 All. 469=1896 A.W.N. 154.
(7) (1913) 125 P.L.R. 1913=18 I.C. 318=79 P.W.R. 1913.
(8) (1875-78) 1 All. 348.
(9) (1912) 10 A.L.J. 167=15 I.C. 859.
(10) (1917) 39 All. 300=39 I.C. 668=15 A.L.J. 33.
(11) (1908) 12 C.W.N. 821.

'secured on land, and the security is 'merely collateral." What justification is there for holding that a simple hypothecation bond creates "an interest in immoveable property."?

Next we have the consideration clearly stated by Jenkins, C.J., in the case 26 Bom. 305 just referred to and concurred in by Chandavarkar, J. quoting 19 Bom. 121, that the debt has been sold and that certainly the sale of the debt cannot be set aside, and that the security must go with the debt. It is urged for the applicant that from the mere fact that for the purposes of the procedure for attachment it is convenient to treat the bond as moveable, it does not follow that other considerations as to the attributes of the property to be affected or possibly affected, did not determine its nature when the legislature was considering its sale and the consequences to follow from its sale. This may be conceded but there is no evidence to show that this consideration did weigh with the legislature or that effect was given to such considerations. On the other hand, it must be conceded that, in the absence of a clear intention to the contrary, what is held to be moveable property at the time of the attachment may reasonably be considered to continue to be moveable at the time of the sale, and I find myself in agreement with the view of Chandavarkar, J., in 26 Bom. 305 at p. 312 where he further says that, even assuming that "it is an interest in immoveable property and as such is immoveable property itself, we have as I said at the outset a clear indication of the intention of the legislature that for the purposes of the Code of Civil Procedure it should be treated as moveable property".

Lastly to hold that it is not immoveable property is consistent with the definition of "immoveable property" to be found in the General Clauses Act, section 3 (25). The expression "benefits to arise out of land" was never intended to cover such a matter as the security held by the mortgagee under a simple mortgage-bond, but such benefits as the right to a ferry.

For these reasons I have no hesitation in holding that a simple hypothecation bond is "moveable property" not only for the purposes of attachment but also for the purposes of sale and Order 21, rule 89 has no application.

It is not clear that any question affecting the jurisdiction of the District Judge arises in this case, such as would justify this Court interfering in revision, were we otherwise inclined to do so, but we had heard much argument before this point emerged and we thought it desirable then to hear the argument out as the matter appears not to have been definitely determined by this Court and is one which might arise again at any time. I would dismiss the application.

Walsh, A. C. J.:—I have read the judgment of my brother Boys and I agree with it.

By the Court:—The order of the Court is that the application is dismissed with costs on the higher scale (if any).

Application dismissed.

---

*1924 Allahabad 798.

SULAIMAN AND KANHAIYA LAL, JJ.

Sita Ram Singh and another—Plaintiffs-Appellants.

v.

Cheddi Singh and others—Defendants-Respondents.

S. A. Nos. 120 and 121 of 1923, decided on 4th June, 1924, from a decree of the Second Additional Judge of Gorakhpur, dated the 20th November, 1922.

Hindu Law Joint family property—Alienation—Subsequently born son has no fresh start for limitation though he can question alienation which was unvalid at the time it is made Limitation Act, S. 6.

Although it cannot be disputed that a subsequently born Hindu son has a right to avoid an alienation which took place at a time when other members of the family, not parties to the deed, were alive, it does not follow that he has a fresh start for the purpose of limitation from the time of his birth. When an alienation is made which is not justified by necessity a cause of action arises in favour of the other members to have it set aside and to recover possession from the alienee but there is only one cause of action in favour of the other members of the family. Successive causes of action cannot arise as new members are born year after year. (33 All. 654; 19 A.L.J.R. 978, *Dist.*) [P. 799, C. 1.]

St. C. Thompson—for the Appellants.

S. N. Sen—for the Respondents.

Sulaiman, J.:—This is a plaintiffs' appeal arising out of a suit brought by two plaintiffs to set aside a deed of transfer by their father on the ground that there was no legal necessity for it. The plaintiffs' case was that the elder plaintiff had attained majority within three years of the date

of suit. The pleas in defence amongst others were that the elder plaintiff was more than 21 years old at the time of the institution of the suit and that the younger plaintiff had not been born on the date of the alienation at all.

Both the Courts below have dismissed the claim. The findings are that plaintiff No. 1 was more than 21 years of age at the time of the institution of the suit and that the plaintiff No. 2 had not been born on the date of the alienation.

It is contended in second appeal before us that inasmuch as the plaintiff No. 1 had a right to challenge the alienation and the plaintiff No. 2 was born while that right was subsisting, the plaintiff No. 2 also acquired the right to challenge the alienation and that so far as he is concerned his claim cannot be barred by time if three years after his attaining majority have not expired. We are unable to accept this contention.

Although it cannot be disputed that a subsequently born Hindu son has a right to avoid an alienation which took place at a time when other members of the family, not parties to the deed, were alive, it does not follow that he has a fresh start for the purpose of limitation from the time of his birth. When an alienation is made which is not justified by necessity, a cause of action arises in favour of the other members to have it set aside and to recover possession from the alienee, but there is only one cause of action in favour of the other members of the family. Successive causes of action cannot arise as new members are born year after year. If the contention of the appellants were to be accepted the result would be that in many cases such suits would never become barred by time inasmuch as new members may be born before the minority of an elder member is over.

The learned Advocate for the appellants has relied on the cases of *Tulshi Ram* v. *Babu* (1) and *Bhup Kuar* v. *Balbir Sahai* (2), but both these cases are distinguishable inasmuch as no question of limitation arose in those cases. On the other hand it has been laid down in several Oudh cases vide, *Oudh Behari Singh* v. *Suraj Bali* (3), *Chokhey Singh* v. *Hardeo Singh* (4) and *Sheoambar Khan* v. *Ratipal Singh* (5), and which view has been followed by this Court in several unreported cases, that the younger members of the family born subsequent to the alienation cannot get an extention of the period of limitation owing to their own minorities. We are of opinion that this is a correct statement of the law.

We accordingly dismiss the appeal with costs including in this Court, fees on the higher scale.

Appeal dismissed.

(1) (1911) 33 All. 654=10 I.C. 908=8 A.L.J. 783.
(2) (1922) All. 342=44 All. 190=19 A.L.J. 978.
(3) (1921) 8 O.L.J. 205=61 I.C. 801.
(4) (1921) 24 O.C. 330=64 I.C. 757.
(5) (1921) 65 I.C. 404.

1924 Allahabad 799.

WALSH, A.C.J. AND RYVES, J.

Yasin Bibi and others—Defendants-Appellants

v.

Syed Munawar Husain—Plaintiff-Respondent.

F.A.F.O. No. 127 of 1923, decided on 8th May, 1924, from an order of District Judge of Gorakhpur.

(a) *Registration Act, Ss. 32, 33—Handing over the deed to Sub-Registrar by husband and asking the Sub-Registrar to go to pardanashin lady's house does not amount to presentation.*

Where the husband of a pardanashin lady went to the Sub-Registrar and handing over the deed asked him to go to her house to have it executed, *Held* that this act of the husband did not amount to a presentation.

Held further that the handing over by the husband of the deed was inoperative but not injurious to the subsequent presentation which in fact took place at the house of the lady. (18 A.L.J. 717 (P.C.), *Ref.*) [P. 800, C. 1.]

(b) *Registration Act, S. 32—Civ. Pro. Code, S. 100.*

Presentation is a question of fact requiring no formality. [P. 800, C. 1.]

Peary Lal Banerji and *Mushtaq Ahmad*—for the Appellants.

M. A. Aziz—for the Respondent.

Walsh, A.C.J.:—We are of opinion that no question of law arises in this appeal. In order to support the argument of the learned Vakil on the point of law which he submitted to us, it is necessary for his case that presentation should have been made at the office of the Sub-Registrar. Then the point would have arisen. If presentation had been made at the office of the Sub-Registrar, it would have followed that it

had been made by somebody under a power-of-attorney, which was not duly executed in accordance with the provisions of the Act. But the difficulty of considering that question of law in this particular case, is that the learned Judge has definitely held, that the act of the husband in going to the Sub-Registrar and handing over the deed, and asking him to go to the house of the *purdahnashin* lady to have it executed, was not presentation. He has found as a fact that the presentation did not take place until the Sub-Registrar went to the house of the lady. It is admitted that if that is true, the decision of the learned District Judge is correct. As Lord Buckmaster in the course of argument in the Privy Council in the case of *Bharat Indu* v. *Hakim Mohammad Hamid Ali Khan* (1) the material passage occurs on page 718, plainly says: "presentation is a question of fact requiring no formality. The "servant (and if we substitute the word "husband' instead of 'servant' in this case, "the cases become similar) really wrongly "handed over the document to the Registrar. "He should merely have told him to go to "the house." Lord Phillimore in the course of delivering their Lordship's opinion said: "That the "handing over by Wazir Beg, "that is the servant, was inoperative but "not injurious to the subsequent presentation". So that the learned Judge had the support of the Privy Council for taking the view of the fact of presentation which he had done. In other words he has found a fact which is binding upon us. There was evidence to entitle him to do so, and we cannot interfere. The appeal is dismissed with costs including in this Court-fees on the higher scale.

Appeal dismissed.

(1) (1920) 47 I A. 177=39 M.L.J. 41=18 A.L.J. 717=28 M.L.T. 98=58 I.C. 386=(1920) M.W.N. 413 (P.C.)

1924 Allahabad 800 (1).

WALSH, A.C.J. AND RYVES, J.

Mt. Aftab Begam—Plaintiff-Appellant

v.

Haji Abdul Majid Khan—Deft-Respondent.

F. A. from Order No. 146 of 1923, decided on 6th June, 1924, from an order of the Subordinate Judge of Bareilly, dated 17th May, 1923.

Arbitration—Court has no jurisdiction to delet anything from an award of arbitrators.

An arbitration in substance ousts the jurisdiction of the Court except for the purpose of controlling the arbitrators and preventing misconduct and for regulating the procedure after the award. So far as the hearing of the merits is concerned and the decision contained in the award the Court has nothing to say, good bad or indifferent. It has no right to review it or to consider it; to hear an appeal from the arbitrator and delete from the award something with which it did not agree is beyond the jurisdiction of court. [P. 800, C. 2.]

S. B. Johari—for the Appellant.

Iqbal Ahmad—for the Respondent.

Walsh, A.C.J.:—The attack on this award is really an attack upon the substance which the arbitrators have decided. They may be right, they may be wrong, it is no business of the court. Judges cannot be reminded too often that an arbitration in subetance, ousts the jurisdiction of the Court, except for the purpose of controlling the arbitrators and preventing misconduct, and for regulating the procedure after the award. So far as the hearing of the merits is concerned and the decision contained in the award, the court has nothing to say, good, bad or indifferent. It has no right to review it or to consider it and in substance what the court below has done in this case, has been to hear an appeal from the arbitrator and to delete from the award something with which it did not agree. The court had no jurisdiction to do that. We must, therefore, allow the appeal, and direct the award to be filed. The appellant will have his costs in this Court on the higher scale.

Appeal allowed.

1924 Allahabad 800 (2).

WALSH, A.C.J. AND RYVES, J.

Mathura Ram and another—Petitioners—Appellants.

v.

Baldeo Ram and others—Opposite-Parties Respondents.

F. A. from Order No. 174 of 1923, decided on 12th June, 1924, from an order of the District Judge of Ghazipur, dated, 18th August 1923.

Provincial Insolvency Act, S. 10—The finding as to the judge not being satisfied as to the debtor's inability to pay his debts must be arrived at like any other finding of fact-Provincial Insolvency Act, S. 25.

A finding that a judge is not satisfied that the debtors are unable to pay their debts must be a

finding arrived at like any other finding by a judicial tribunal in which the reason for so holding is stated in such a way that it may be checked against the evidence and weighed in the balance. It is not enough for a Judge to resort to a mere negative and say: "I do not know you may able or you may not, but I am not satisfied." be [P. 801, C. 1.]

M. L. Agarwala—for the Appellants.

K. Verma—for the Respondents.

Judgment:—We are afraid that it will become necessary to warn Judges that they must not seize on sections 10 and 25 of the Provincial Insolvency Act as an excuse for getting rid of troublesome applications. There seems to be a danger of Provincial Insolvency Courts going from one extreme to the other. The provisions in section 10 and section 25 of the new Act were intended to prevent the abuse of debtors filing their applications as a method of evading liability of arrest, and getting out of payment of their debts. On the other hand it would appear that these sections have been utilised on more than one occasion for getting rid of business before the District Judge, which is certainly not congenial and it gives a great deal of trouble to the Judge. We must press upon the lower Courts, that a finding that a Judge is not satisfied that the appellants are unable to pay their debts must be a finding arrived at like any other finding by a judicial tribunal in which the reason for so holding is stated in such a way that it may be checked against the evidence and weighed in the balance. It is not enough for a Judge to resort to a mere negative and say: "I do not know, you may be able or you may not, but I am not satisfied". As a general rule we should like a Judge to be able to say," there is one piece of property realizable, there again is another piece of property which may be realized easily, there again is a flourishing business, or stock, there again is a sum of money in the Bank, " and taking these matters into consideration and adding them up together and allowing for the difficulty of realization, I am satisfied that the debtor has liquid assets more than sufficient to pay his creditors." The Courts below must consider the matter from the point of liquid assets. A man may have property tied up either in land or securities, which, owing to the state of the market, he cannot realize and be insolvent although the face value of his property may be more than his actual liabilities. Putting one's fingers on the weak spot in the judgment, the defect is that the Judge has said that he is " far from being satisfied that the applicants were unable to pay their debts." The statute requires him to be " satisfied that he is able to pay," and the learned Judge has given no reasons for being satisfied on that question of fact. Indeed he has not found it. The case must go back to the lower Court for re-consideration on these lines.

Case remanded.

---

*1924 Allahabad 801.

MUKERJI AND DALAL, JJ.

Sri Ganeshji Maharaj—Judgment-debtor-Appellant.

v.

Lalta Prasad—Decree-holder-Respondent.

E.F.A. No. 184 of 1923, decided on 26th May, 1924, from a decree of the Second Subordinate Judge of Cawnpore, dated the 9th February, 1923.

Hindu Law — Religious endowment— Decree against idol.

A decree for mesne profits passed against an idol is recoverable from endowed property and not from the manager personally. (35 Cal. 691, *Foll.*; 2 I.A. 145, Dist.) [P. 802, C. 1.]

Gulzari Lal—for the Appellant.

M. T. Agarwala, K. N. Katju and *Indu Bhusan Banerji*—for the Respondent.

Dalal, J.:—This is an appeal from an order passed by the Additional Subordinate Judge of Cawnpore, in the execution department. A suit was brought by one Lalta Prasad against Sri Ganeshji Maharaj, under the management of Shiam Lal, Shiam Lal and two other defendants for partition of a one-third share and mesne profits for six years, prior to the date of the institution of the suit and subsequent mesne profits up to the date of possession. A preliminary decree was passed on 27th June, 1918, for possession and for mesne profits of the past six years and future. The decree-holder obtained possession of his ⅓rd share and took out execution for recovery of mesne profits by sale of the ⅓rd share of the house, belonging to Sri Ganeshji Maharaj. The objections, made by on behalf of the endowment, through its manager, so far as we are concerned in this appeal, are two:—(1) that interest

should not be allowed on the mesne profits from year to year and (2) that the amount should be recovered from Shiam Lal personally and not from the endowment.

The objector, judgment-debtor, succeeded on the first ground, but in appeal it is further prayed that interest should run from the date of the final decree, *i.e.*, from 22nd January, 1919, and not from the date of the preliminary decree, *i.e.* from 27th June, 1918. We have read both the decrees. In the preliminary decree the mesne profits for six years were decreed and only the amount was not ascertained. That amount was subsequently ascertained and mentioned in the final decree to be Rs. 1,995 and odd. Both the parties are agreed that interest is payable on this sum, so it is clear that interest must run from the date on which the amount was decreed and not from the date on which it was ascertained. We hold that interest was rightly calculated from the date of the preliminary decree.

The decree was actually passed for recovery of mesne profits from Sri Ganeshji Maharaj. As pointed out by the learned Judge of the lower Court, when such a decree is passed, it is recoverable from endowed property, as held by the Calcutta High Court in *Pramada Nath Ray* v. *Poorna Chandra Ray* (1). The ruling of the Privy Council in *Prosunno Kumari Debya* v. *Golab Chand Bahoo* (2) was passed on different facts. There the decree was passed against the Sebait (Manager) of the temple personally and against the profits of the temple. Even there, their Lordships held that the term Sebait meant the successive managers of the temple, and not only the person who happened to be the manager at the time of the suit. In the present case, there is a definite decree against the temple. The learned Counsel for the appellant drew our attention to the plaint in which it was pleaded that Shiam Lal was really the owner of the ⅓rd share in the house and Sri Ganeshji was merely a fiction. This plea, however, was not admitted by Shiam Lal and he asserted that the property was really owned by the idol. It was so held in the suit. When such was the finding it cannot be said that the plaintiff desired to recover the mesne profits from Shiam Lal and not from the idol. In the relief, claimed by him, he specifically desired relief both against the idol and against Shiam Lal. Execution was rightly ordered by the lower Court against the idol.

The appeal fails and we dismiss it with costs here on the higher scale.

Appeal dismissed.

(1) (1908) 35 Cal. 691=12 C.W.N. 550=7 C.L.J. 514.

(2) (1874-75) 2 I.A. 145=4 B.L.R. 450=23 W.R. 253=3 Suth. 102=3 Sar. 449 (P.C.).

---

*1924 Allahabad 802.

SULAIMAN AND KANHAIYA LAL, JJ.

Mt. Ram Sakhi Kuar — Defendant-Appellant.

v.

Lachmi Narain Lal—Plaintiff-Respondent.

S. A, No. 245 of 1923, decided on 13th June, 1924, from a decree of the District Judge of Ghazipur, dated the 6th December, 1922.

(a) Benami *transactions—Suit against* benamidar *binds real owner but plaintiff cannot defeat* benamidar *where real owner if made a party cannot be defeated.*

A suit against a *benamidar* binds the *benamidar* as much as the real purchaser even though the latter may not have been made a party to the suit.

The plaintiff cannot be allowed by keeping the real purchaser out of the record to enforce a right against an ostensible vendee which he would not have been entitled to enforce against the real purchaser had he been brought on the record.

Where the plaintiff was not entitled to any preference as against the real vendee in a matter of pre-emption.

Held he could not claim pre-emption by confining his action to the *benamidar* alone (8 I.C. 527, *Foll.*) [P. 803, C. 1, and P. 804, C. 1.]

M. L. Agarwala—for the Appellant.

S. N. Sen—for the Respondent.

Judgment :—The appeal arises out of a suit for pre-emption and two questions arise for consideration. The first is whether a suit for pre-emption brought against an ostensible vendee without impleading the real purchaser is maintainable. The second is whether the plaintiff is entitled to preference as against the vendee real or ostensible. The Court of first instance was of opinion that the suit could not be entertained against an ostensible purchaser without the real purchaser being made a party to the suit. The lower appellate Court was however of opinion that the real vendee could not take advantage of a *benami* transaction to defeat the claim of the

plaintiff though he was not made a party to the suit. It then proceeded to consider whether the plaintiff was entitled to a preferential right as against the real vendee and came to the conclusion that he was entitled to such a preference. A decree for pre-emption was accordingly awarded to the plaintiff subject to the payment of a sum of Rs. 300 in respect of each of the sales which form the subject of pre-emption.

It is a well-settled rule that a suit against a *benamidar* binds the *benamidar* as much as the real purchaser even though the latter may not have been made a party to the suit. The purchase in the present instance was made by Jagannath Prasad in the name of his wife Musammat Ram Sakhi Kuar. Musammat Ram Sakhi Kuar pleaded that she was only a *benami* purchaser and that the purchase had been really made by her husband. The plaintiff took no step to bring her husband on the record. Both the Courts below found that her husband was the real purchaser, but while the trial Court thought that the plaintiff was not entitled to a preferential right as against him the lower appellate Court thought otherwise.

It is admitted that Musammat Ram Sakhi Kuer the ostensible purchaser, is not a co-sharer in the village in which the property sold is situated, but it is clear from the *khewat* to which the lower appellate court has referred that her husband, Jagannath Prasad the real purchaser is a co-sharer in the *patti* in which the property in dispute stands. It appears from the *wajib-ul-arz* of 1840, that the village Sonrupur formed part of two mahals. One of the mahals called mahal Shanker Prasad included a half of the village Sonrupur and another village named Bhartipur, while the other called mohal Thammandas covered the remaining portion of the village Sonrupur. At that time mahal Thammandas was divided into two parties known as patti RamTawakkul and patti Thammandas. The share of Raghunandan Prasad which has since passed to the defendant vendor was situated in patti Ram Tawakkul. Subsequently in 1883 the village Bhartipur was separated from the former mahal and the different portions of the village Sonrupur were brought together and divided into two mahals known as mahal Mahesh Lal and Mahal Thammendas Shankar Prasad. According to the *wajib-ul-arz* of 1920 F. Mahal Thammandas Shankar Lal was subdivided into two pattis known as patti Thammandas and patti Shankar Prasad. The *khewat* for 1325 F. shows that patti Thammandas consisted of land situated in Nos. 1 to 46 *khewat*, out of which which *khewat* Nos. 1 to 28 constitute about a 4 annas 4 pies and odd share while Nos. 29 to 46 *khewat* constitute an equal share within the patti. The property in dispute is situated in No. 38 *khewat* which forms a part of patti Thammandas. The defendant vendor claimed to derive his title from Raghunandan Prasad who was a co-sharer in No. 38 *khewat*. The plaintiff is also a co-sharer in No. 38 khewat by virtue of a litigation in which a 3 pies share of Raghunandan Prasad was awarded to him. The defendant vendor Mussammat Ram Sakhi Kunwar has admittedly no share in the village but her husband Jagannath Prasad, the real purchaser is a co-sharer in other holdings inside the same patti.

The *wazib-ul-arz* of the village Sonrupur mahal Thammandas provides that the right of pre-emption shall belong in the first instance to near relations who are descended from the same common ancestor and whose names are entered in the khewat, in the second place to nearer co-sharers (*hissadar qaribi*) and in the case of their refusal to co-sharers inside the *patti* then to the other co-sharers in the mahal and to the co-sharers in other mahals in the order mentioned. The plaintiff claimed to be a nearer co-sharer inside the patti, but it is admitted that he is in no way related by common descent to the defendant vendor. He merely claims to be a distant relation of Raghunandan Prasad to whom the vendee Jagannath Prasad is also related by a common descent. Neither of them is a relation or *hissadar qaribi* of the vendor within the meaning of the *wajib-ul-arz* and the plaintiff cannot on that ground claim any preference.

His contention is that the words "*hissadar qaribi*" indicate nearness in space and that as he is a co-sharer in the same subdivision with the vendor, he is entitled to preference. But as the lower appellate Court has rightly pointed out the first two categories given in the *wajib-ul-arz* deal with the relationship, while the last two categories deal with proximity in space. The *wajib-ul-arz* gives a right of pre-emption to the near relations descended from the common stock then to the other near relations not so descended, after them to the

co-sharers of the same patti then to the other co-sharers of the mahal and then to the co-sharers in the other mahals. There is no preference granted as between the co-sharers inside the same patti unless some of them happen to be the kinsmen of the vendor. The lower appellate Court was of opinion that since the holding Nos. 1 to 28 in which Jagannath was a co-sharer formed a group of co-sharers distinct from these belonging to the holdings, Nos. 29 to 49, in which the vendor and the plaintiff were co-sharers, the plaintiff was entitled to preference. But the copy of the *khewat* produced clearly shows that the holdings Ns. 1 to 46 belong to the same patti. The plaintiff is not therefore entitled to any preference as against the real vendee who is a co-sharer in the same patti, though not in the same holding. As pointed in *Harsaran* v. *Mt. Dilraj* (1) the plaintiff cannot be allowed by keeping the real purchaser out of the record to enforce a right against an ostensible vendee which he would not have been entitled to enforce against the real purchaser had he been brought on the record.

This appeal must therefore be allowed and the claim of the plaintiff will stand dismissed. As the purchase was made in the name of a person who was not a co-sharer in the village, we do not consider that it would be equitable to award any cost to the other party here or in the courts below. The parties must bear their own costs throughout.

Appeal allowed.

(1) (1910) 8 I.C. 537.

** 1924 Allahabad 804.

MUKERJI AND DALAL, JJ.

Santi Lal and another—Judgment-debtor-Appellants.

v.

Raj Narain and another—Decree-holders-Respondents.

E. F. A. No. 255 of 1923, decided on 23rd May, 1924, from a decree of the Subordinate Judge of Agra, dated 7th April, 1923.

(a) *Civ. Pro. Code, S. 11—Execution proceedings.*

Fresh objection to an application in execution proceedings is not barred where the application has been remitted by superior Court overruling former objection. [P. 805, C. 1.]

(b) *Civ. Pro. Code, O. 34, r. 6—Application need not be written or signed by decree-holder.*

There is nothing in r. 6 which requires that an application to the Court should be in writing, much less is there anything to show that the application should be signed by anybody. All that the rule lays down is that the Court is authorised to pass a decree, where the judgment-debtor is personally bound to pay the balance. Under the circumstances the fact that an application was not signed by the decree-holders will not affect the case. [P. 805, C. 2.]

(c) *Civ. Pro. Code, S. 153—Court should allow parties to supply by way of amendment, signature to application—Civ. Pro. Code, O. 6, R. 6.*

Under S. 153 the Court is authorised to amend any defect or error in any proceeding in a suit. An application should be allowed to be signed by parties by way of amendment where their signature is necessary but has not originally been made. [P. 805, C. 2.]

M. L. Agarwala and *M. L. Sandal*—for the Appellants.

N. P. Asthana—for the Respondents.

Mukerji, J.:—The facts which have given rise to this appeal are briefly as follows:—The decree-holders, who are the respondents in this appeal brought a suit of mortgage and obtained a decree. In execution of the decree the mortgaged property was sold and on 29th March, 1921, an application was made to the Court under Order 34, rule 6, schedule 1 of the Civil Procedure Code, for the passing of a money decree against the mortgagors. The judgment-debtors, who are the appellants in this Court, filed objections to the granting of the application once on 30th April, 1921 and then on 7th May, 1921. In fact, the objections were that the application was barred by time and the decree-holder had prepared the account without giving credit for all the sums realised and without calculating the interest by the proper method. The lower court decided the question of limitation alone and held that the application was time barred. An appeal was preferred to this Court, and by a judgment, which will be found printed in 21 A. L. J. 37, this Court allowed the appeal, holding that the application was within time. Thereafter the judgment-debtors, who were dissatisfied with the judgment of this Court, presented an application for permission to appeal to His Majesty in Council. That application was granted and the order of this Court will be found printed at page 686 of the same volume of A.L.J. When the case went back to the court below to find out what

was the amount really due to the decree-holders and thereupon to frame a decree, the judgment-debtors came forward with a fresh objection on 20th March, 1923. The objection taken was that the application for a personal decree was not properly signed. It appears that it was not signed by any of the plaintiffs and the legal practitioner, B. Kanhaiya Lal who signed it, held no vakalatnama on behalf of the plaintiffs. The court below held, that this objection could not be heard as it was barred on the principle of *res judicata*. The judgment-debtors have come to this Court again and the contention is that there can be no *res judicata* by implication in an execution proceeding.

On behalf of the decree-holders the order of the Court below has been sought to be supported both on the ground on which it proceeded in the Court below and also on the ground that the application, dated 29th March, 1921, was not required by law to be signed and at any rate the objection to this effect had been waived.

The first question to be decided is whether the plea of *res judicata* is sound. We think it is not. The application, which was pending in the Court below, was the same application with respect to which the objection of 1921 had been taken. When it went back before the Court again, to dispose of the remaining objections of the judgment-debtors, fresh objections were taken. To argue by way of analogy, when suit is pending (the application is in the course of a suit), a defendant, with the permission of the Court, may be allowed to take a fresh defence to the suit. The matter, however, would be entirely in the discretion of a Court, *viz.*, whether to allow an amendment to the written statement or not. The law on the point is laid down in Order 6, rule 17 of the Code of Civil Procedure and the matter is entirely within the discretion of the Court. The object of an amendment is to determine the real question in controversy between the parties. We, therefore, are of opinion that the plea of *res judicata* taken on behalf of the decree-holders, plaintiffs, cannot be sustained.

Coming, however, to the question now raised in this appeal, we are of opinion that the application of decree-holders should not be thrown out on the ground taken by the judgment-debtors.

The application was, as already stated, one under Order 34, rule 6 of the Code of Civil Procedure. There is nothing in that rule which requires that an application to the Court should be in writing, much less is there anything to show that the application should be signed by anybody. All that the rule lays down is that the Court is authorised to pass a decree, where the judgment-debtor is personally bound to pay the balance. Under the circumstances, the fact, that the application was not signed by the decree-holders, will not affect the case.

From the facts of the case, already stated, it will be seen that it is not the case that the decree-holders repudiated the action of Babu Kanhaiya Lal, who purported to sign the application on their behalf. On the other hand they entirely adopted the application made on their behalf. They resisted the objection preferred by the judgment-debtors in the court of first instance and filed an appeal in this court; when the case went back they were prepared to proceed on the very application which had been filed on 29th March, 1921.

Assuming, however, that a written application would be necessary on behalf of the decree-holders, such application may certainly be allowed to be signed at any stage of the proceedings. Under section 153 of the Code of Civil Procedure the court is authorised to amend any defect or error in any proceeding in a suit. If the application is offered to be signed by the decree-holders or anybody on their behalf, authorised to do so, we see no reason why the application should not be allowed to be signed by them, by way of amendment.

It appears that Babu Kanhaiya Lal, Vakil, who signed the application for the decree-holders, appeared at a certain stage of the execution proceedings for the judgment-debtors. His vakalatnama, on their behalf, is dated 21st June, 1917. We have heard it. We find that he was engaged for a particular purpose, *viz.*, to file an application objecting to the execution of the decree under section 47 of the Code of Civil Procedure. That application was struck off for default of prosecution and he made another application for the restoration of it. The application was finally disposed of on 22nd December, 1917, and the purpose for which Babu Kanhaiya Lal had been engaged came to an end.

There was, therefore, nothing to prevent Babu Kanhaiya Lal from being engaged on behalf of the decree-holders for making the application under Order 34, rule 6 of the Code of Civil Procedure.

We are satisfied that, although the decision of the Court below on the question of *res judicata* was not right, the Court was fully justified in brusing aside the objection of the judgment-debtors.

We dismiss the appeal with costs, which will include counsel's fees in this Court on the higher scale. We hope the matter will now be expedited.

Appeal dismissed.

---

* 1924 Allahabad 806.

SULAIMAN AND KANHAIYA LAL, JJ.

Rao Bahadur Muhammad Abdul Rahman Khan—Plaintiff-Appellant

v.

Muhammad Ayyub Khan and others—Defendants-Respondents.

S. A. No. 282 of 1923, decided on 6th June, 1924, from a decree of the Additional District Judge of Saharanpur, dated the 25th November, 1922.

(a) *Mahomedan Law — Pre-emption — Fresh demands.*

The plaintiff pre-emptor need not make fresh demands when the vendee, to whom he had already made the demands required by law, transferred the property to another person. (32 All. 45 ; 11 A.L.J. 527, *Foll*.) [P. 807, C. 2.]

Nehal Chand—for the Appellant.

Iqbal Ahmad—for the Respondents.

Sulaiman, J.:—This is a plaintiff's appeal arising out of a suit for pre-emption. On the 1st of June, 1918, Farzand Ali Khan sold some lands to Pir Khan. On the same date Pir Khan sold these lands to Abdul Aziz Khan. It was the plaintiff's case that within a few days of the sale news of it was brought to him by his *karinda* Maqbul Husain and that there and then he made the first demand in the presence of three witnesses, Faiyaz Ali Khan, Maqbul Husain and Abdul Rahman. It was his case that he then took these three witnesses with him to the house of Abdul Aziz and made his second demand in the presence of Abdul Aziz and in the presence of the same three witnesses. Subsequent to these demands the property along with other properties was sold by Abdul Aziz to Abdul Karim by a sale-deed, dated the 3rd of May, 1919. The claim was based both on the alleged custom of pre-emption as recorded in the *wajib-ul-arz* of mauza Raipur. The defendant-vendee took a large number of pleas and resisted the claim. No less than six issues were framed by the trial Court. With the exception of the issue relating to the existence of the custom of pre-emption, all the other issues were decided in favour of the plaintiff and the claim was decreed.

The defendant vendee appealed to the lower appellate Court which has reversed the decree of the first Court and dismissed the claim. There are however only two points decided by the learned District Judge. The other points have been left altogether untouched.

The learned District Judge has come to the conclusion that Abdul Aziz wanted to defeat the plaintiff's right of pre-emption and that in pursuance of that idea he transferred the property *bona fide* for valuable consideration to Abdul Karim. He however found that the transaction in favour of Abdul Karim was not fictitious but a real one, though he thought that it was a device adopted to defeat the right of pre-emption. The other finding was that even if the statement of the plaintiff be taken to be true it fell short of establishing the performance of necessary demands.

Taking up the second point first, we are of opinion that the learned Judge is in error. The point made against the plaintiff is that when he went to make the second demand at the house of Abdul Aziz, although he had the three witnesses with him, he neither referred to the first demand nor invoked those witnesses to bear witness. The learned Judge is not correct in saying that at the time of the second demand there was no reference to the first demand. In the words used by the plaintiff which are quoted by the learned Judge himself the following words occur:—

"Aur yihthi kah diya tha ki main ne in gawahon ke samne bhi apne makan par peshtar kah diya tha ki tum gawah rahna main dwa kirunga.

We are of opinion that these words contain a very clear and specific reference to the first demand at the time when he received the news of the sale. As to the second point made against his statement, it is certainly true that in the record of his statement in Urdu there is no express

sentence which says that on the occasion of his making the second demand he had asked the witnesses to bear testimony. We however find that in the English notes made by the learned Munsif there is a clear statement in the deposition of the plaintiff to the effect "I again told the above persons to bear witness to the above facts." It is apparent that there is an omission in the deposition recorded in the vernacular. The two cannot be said to contradict each other. It is possible that what happened was that the reader (*peshkar*) either omitted to record this part of the plaintiff's statement or might have considered it a superfluous repetition to be recorded. It is inconceivable that the learned Munsif would have noted it down in English unless the statement had actually been made by the plaintiff. The ground on which the second demand was held to be defective therefore altogether fails.

The substantial question which arises in this case is whether the plaintiff was bound to make fresh demands when the vendee Abdul Aziz had transferred the property to Abdul Karim. The learned Judge has himself conceded that this transfer took place in order to defeat the plaintiff's right of pre-emption. Having regard to the dates alleged by the plaintiff it is also clear that the pre-emption demands must have been made before the transfer to Abdul Karim. The question which arises then is whether it was incumbent on the plaintiff pre-emptor to make fresh demands when the vendee, to whom he had already made the demands required by law, transferred the property to another person.

Mr. Wilson in his book on Anglo Muhammadan Law, paragraph 390 says that the right to claim pre-emption is not affected by any intermediate dealings with the property. The proceedings must in any case be taken against the original purchaser, but when a decree has been obtained against him it can be enforced against any person deriving title from him by purchase, gift, inheritance, or otherwise.

This view is supported by Baillie on Muhammadan Law (Vol. 1, p. 503) and Hamilton's Hidaya (Vol. III, p. 586) Mr. Tyabji in his book on Principles of Muhammadan Law, paragraph 551 says that the claim to pre-emption is not affected by any act on the part of the buyer purporting to transfer or alienate the land, nor by his death; provided that any such act takes effect (holds good) until the Court decrees the claim to pre-emption. In the illustration attached he says that if buyer B purports to sell the land to B.A. the pre-emptor can claim it either from B or B A and similarly if B purports to make a gift or *wakf* of it or to convert in into a mosque or cemetery or to let it on hire the pre-emptor may annual the said acts.

In a case arising under a *wajib-ul-arz* *Kamta Prasad* v. *Mohan Bhagat* (1) it was held that a subsequent transfer by a vendee was subject to the pre-emptor's right of pre-emption. In the case of *Khettar Chandra Basu* v. *Narbinkali Devi* (2) which was a case under a custom governed by the Muhammadan Law, it was pointed out that the second sale must be taken to have been made subject to the right of pre-emption, and the plaintiff was only bound to pre-empt the first sale, making of course the subsequent vendee a party to suit so as to bind him by the proceedings. No authority to the contrary has been cited before us. We are accordingly of opinion that the plaintiff's right to pre-empt the property was complete after the demands had been duly made by him and that it was not at all incumbent on him to make fresh demands when Abdul Aziz transferred the property to Abdul Karim. The sale to Abdul Karim must be deemed to have been effected subject to any right of pre-emption in force by the plaintiff.

The lower appellate Court has not recorded any finding as to whether the oral evidence produced by the plaintiff with regard to the making of the demands should or should not be believed, nor has it decided any other question which arose in the case. We accordingly allow this appeal and setting aside the decree of the lower appellate Court remand the case for disposal of the remaining issues according to law. Costs here and hitherto will abide the event.

Appeal allowed.

(1) (1910) 32 All 45=8 I.C. 782=6 A.L.J. 966.
(2) (1918) 11 A.L.J. 527=95 All. 385=20 I.C. 424.

1924 Allahabad 808.

DANIELS AND BOYS, JJ.

Husain Bhai and another—Decree-holders-Appellants.

v.

Y. Beltu Shah Gilam—Judgment-debtor-Respondent.

Execution F.A. No. 365 of 1923, decided on 8th May, 1924, against the decree of the Subordinate Judge, Dehra Dun, dated 23rd July, 1923.

Civ. Pro. Code, S. 47—Order granting stay of execution is not appealable as decree under S. 47—Civ. Pro. Code, S. 2 and O. 21, r. 26.

Per *Daniels, J.*—An order granting stay is not appealable because it does not determine the rights and liabilities of the parties with reference to the relief granted by the decree but merely the incidental question whether execution should proceed at once or after an interval of two months. [P. 808, C. 2.]

Per *Boys, J.*—The phrase "determination of any question within S. 47" in S. 2 does not make every decision of any question within S. 47 into a decree any more than every decision in a suit is a decree, but only those determinations are decrees which are formally expressed as adjudications *and which are conclusive so far as regards the Court expressing them.* (34 All. 530, *Foll.*; 45 Bom. 241, *Appr.* 7 All. 73, *Not Foll.*) [P. 811, C. 1.]

(b) *Civ. Pro. Code. S. 35—Decision not appealable but bad on merits—Costs not allowed.*

Where the order appealed was held as not appealable but it was held as bad on merits, the appeal was dismissed without costs. [P. 809, C. 2.]

N. P. Asthana and *Durga Prasad*—for the Appellants.

T. B. Sapru and *P. N. Sapru*—for the Respondent.

Daniels, J.:—The order against which this first appeal is preferred is an order staying execution of a decree from 23rd July, 1923 to 6th September, 1923 on payment of Rs. 5,000 by the judgment-debtor. The period to which the order relates having long since expired, the appeal has really became superfluous, but the appellant decree-holder desires a decision on it because he contends that the Court below had no power to stay execution and because four successive orders of stay for limited periods were passed by the same Subordinate Judge in each case on payment of Rs. 5,000. The amount of the decree was Rs. 74,558 and it was passed on 28th of March, 1922. The judgment-debtor contended that the decree-holder owed him money in Bombay and he asked for stay in order either to file a suit or to institute arbitration proceedings under an arbitration agreement for the recovery of this amount.

The respondent takes a preliminary objection that no appeal lies as the order complained of does not amount to a decree within the meaning of sections 2 and 47 of the Code of Civil Procedure and it is not one for which an appeal is provided under Order 43, of the First Schedule of the Code. The principles which should govern our decision of this objection are laid down in the case of *Mukhtar Ahmad* v. *Muqarrab Hussain* (1). It is pointed out in that judgment that the language of section 47 is very wide and if taken in its literal sense will cover every order of an interlocutory nature that may be passed in execution proceedings. The particular order which was being construed in Mukhtar Ahmad's case was an order cancelling the dismissal of execution proceedings for default and holding that the previous attachment still subsisted. It was held that this order did not come under section 47. The Court adopted the judgment of Mr. Justice Banerjee in a Calcutta case [24 C. 725 F.B. Ed,] under the old Code in which two tests were laid down for determining whether a particular order came under section 47 (old section 244) or not. The first is thus stated:

"An order in execution proceedings can come under S. 244 only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree; *not when as in this case it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way*".

The second test, deduced from the language of the section which enacts that questions arising under it "shall be determined by the Court executing the decree *and not by a separate suit*" was that the questions contemplated by the section must be of such a nature that it is possible to suppose that but for the section they could have formed the subject of determination in a separate suit. Judging by both these tests the order before us is not one coming under section 47. It does not determine the rights and liabilities of the parties with reference to the relief granted by the decree but merely the incidental question whether execution should proceed at once or after an interval of two months. It certainly could not have formed the subject of a separate suit.

---

(1) (1912) 34 All. 530=15 I.C. 50=10 A.L.J. 56

The case of *Janardan Triumbak* v. *Martand Triumbak* (2) is a direct and recent authority for the view that an order staying execution is not appealable. The Chief Justice, Sir Norman Macleod, says in his judgment that it is difficult to imagine that the legislature thought that an order for the stay of execution would be construed in any way as in the nature of a decree or that it should be deemed to be included within the term "decree." He adds that a question relating to the stay of execution is within the discretion of the Court to which the application is made, and it is certainly not desirable to extend the number of appealable orders unless there is a distinct authority for such an extension.

It is true that the opposite view was taken by a Bench of this Court in *Ghazidin* v. *Fakir Baksh* (3). There are two reasons why we are not bound to follow that decision. In the first place the case was decided under the Code of 1882. Under that Code there was a difference of opinion on the question. The legislature in 1888 settled the question by inserting the words "or to the stay of execution thereof" in section 244. These words have been again omitted in the Code of 1908, and it would be rash to assume that their removal leaves the law unchanged. Secondly the view taken in that case is inconsistent with the decision in the subsequent case of *Mukhtar Ahmad* v. *Muqarrab Husain* (1). The earlier case took the view that the widest possible meaning should be attached to the language of the section. In the later case it was laid down that the language of the section must be construed subject to reasonable limitations, and that to take the words in their widest possible meaning would lead to results which were clearly contrary to the intention of the legislature. An unreported Calcutta case *Srinivas Prasad Singh* v. *Kesho Prasad Singh*, (4) has been cited in support of the view that an appeal lies but the observations in that case are purely *obiter*. The actual decision was that no appeal lay as no appealable order had yet been passed. I would therefore allow the preliminary objection and hold that no appeal lies. We have been asked to treat the appeal as an application in revision but the difficulty in the way of doing this is that no case has yet been decided within the meaning of section 115, C. P. C.

We think it right to add that on the merits the order of the Court below would be difficult to support. It is admittedly not covered by either rule 26 or rule 29 of Order 21, and the respondent's learned Counsel in order to support it is driven to fall back on the inherent powers of the Court under section 151 of the Code. No case however was made out for resort to the Court's inherent powers. As we have already said any decision on the point is now purely academic as the period for which stay was granted has long since expired but we think that the learned Subordinate Judge should not pass any more stay orders on the same grounds unless the decree-holder consents. As we think that the order on the merits was a bad order we allow the respondent no costs of the appeal.

The result is that the appeal is dismissed but without costs.

Boys, J.:—Though for different reasons, I arrive at the same conclusion that no appeal lies against an order staying execution.

I have considered, among others, particularly the cases *Ghazidin* v. *Fakir Baksh* (3), *Srinivas Prasad Singh* v. *Kesho Prasad Singh* (4), *Mukhtar Ahmad* v. *Muqarrab Husain* (1) and *Janardan* v. *Martand* (2).

Admittedly if an order for stay of execution is a decree an appeal lies. Therefore the case for the appellant, in reply to the preliminary objection of the respondent that no appeal lies, may be stated as a simple syllogism of which the first premise is:—"All determinations of questions which are within section 47 amount by virtue of section 2 to decree"; the second:—"An order for stay of execution is a determination of a question within section 47"; and the conclusion: "Therefore an order for stay of execution is a decree."

Difference of opinion has hitherto centered round the second of these premises. It has been assumed that the first premise is true and held (*e.g.* in *Ghazidin* v. *Fakir Baksh* (3)) that the second premise is true and that therefore the conclusion is true. It has been assumed that the first premise is true and held (*e.g.*, *Mukhtar Ahmad* v. *Muqarrab Husain* (1)) that the second premise is false and that therefore the conclusion is false.

(2) (1921) 45 Bom. 241=59 I.C. 523=22 Bom. L.R. 1212.
(3) (1884) 7 All 73=(1884) A.W.N. 226.
(4) 14 C.L.J., p. 469.

But, the truth of the first premise appears always to have been assumed in the above and other cases without discussion. This fact, while increasing very greatly my diffidence in now challenging it, at the sametime affords me some measure of encouragement in venturing to state the view that, while the second premise is true as held by Straight, O. C. J. and Mahmud, J., *in* 7 *All.* 78), the first premise is false, and therefore the conclusion is false, a view for which I have not found any support in judicial authority but, which is, I suggest, sustained by the correct interpretation of section 2.

It appears to me a forced construction of the language of section 47 to hold that the second premise is not true *i.e.*, to hold that a decision to stay execution where the decree-holder wants to execute and the judgment-debtor wants execution stayed is not a determination of a question relating to the execution.

So far it appears to me a question of the ordinary meaning of the words used, and I find support also in the opinion of Straight, O. C. J. and Mahmud, J., expressed at page 77 of their judgment in *Ghazidin* v. *Fakir Husain* (3).

The section, so far as our present purpose is concerned, stood in 1884, the date of the decision just quoted, as it stands now. Certain words were added later by Act VII of 1888 but they were again dropped when the present Code came into force.

Mahmud, J. however, went on to say at page 78. "We are of opinion that the widest meaning should be attached to clause (*c*) of section 244, so as to enable the Court of first instance and *the Court of appeal to adjudicate upon all kinds of questions* arising between the parties to a decree, and relating to its execution."

It is the proposition that "the Court of appeal has power to adjudicate upon all kinds of questions arising between the parties to a decree, and relating to its execution" which assumed the truth of the first premise which gave rise to difficulty; which created alarm (cf. 34 A 538) as declaring a right of appeal against an almost unlimited number of orders, many of small importance; and which has led to the search for some formula by which to narrow the scope of section 47 and avoid so undesirable a result.

The desired formula has been arrived at by devising certain tests, not always unanimously approved, referred to in *Srinivas Prasad Singh* v. *Kesho Prasad Singh* (4) and *Mukhtar Ahmad* v. *Muqarrab* (1) the result of applying which is to restrict the ordinary meaning of the words "question relating to execution" and thereby exclude from section 47 many orders against which it is considered that there should be no appeal. For instance, it has been held that the words "all questions arising between the parties to the suit in which the decree was passed and relating to the execution" do not include all questions so arising but only questions relating to the rights and liabilities of parties with reference to the relief granted by the decree. What justification is there other than that of expediency for so cutting down the scope of the language?

As the matter presents itself to me, the crucial words are not those in section 47 but the words in section 2:—"It (*i.e.*, the word "decree") shall be deemed" to include the determination of any question within section 47."

If it is an inevitable conclusion from these words that the first premise is true, *i.e.*, that if a question comes within section 47 the decision upon it is a decree then we are forced to choose between holding that practically every order, even of the most trifling importance, under section 47 is appealable as a decree or in the alternative doing the violence to language to which I have adverted, by devising some formula to control the section.

But it appears to me that the language of section 2 is reasonably and properly susceptible of an interpretation that does not involve the consequence that decisions in regard to all questions coming within section 47 are decrees.

The essential characteristic of a decree as defined in section 2 is that it is "the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to any matter in controversy." For a moment only I omit from consideration the further limitation imposed in the first part of the definition by the words "in the suit". This essential charateristic may be accurately paraphrased as "a determination of the rights of the parties with regard to any matter in controversy formally expressed as an adjudication and conclusive so far as regards the Court expressing it."

The "determination" *bearing the characteristics* is first limited to such a "determination in a suit." It is then extended to a "determination of any question within section 47." It is a proper inference that the scope of the word "determination" in the phrase "determination of any question within section 47" is no greater and no less than that of the word "determines" as used in reference to "suits," and therefore that the phrase "determination of any question within section 47" does not make every decision of any question within section 47 into a decree any more than every decision in a suit is a decree, but only those determinations which are formally expressed as adjudications *and which are conclusive so far as regards the Court expressing them.*

The addition of the words "the determination of any question within section 47," merely extends the scope of the word "decree" so as to make it include not only determinations having certain characteristics and made in a suit but also determinations having those characteristics but made in execution proceedings within section 47.

It is clear that an order for stay has not attached to it the characteristics of formal expression of an adjudication conclusive so far as regards the Court expressing it, and therefore, though giving to the language of section 47 its ordinary meaning, a stay order comes within section 47, it is not a decree as defined by section 2 and is therefore not appealable as a decree.

I do not lose sight of the fact that in section 47 (1), the word "determines" is used in regard to all questions included in section 47 (1) but it is there used without the qualifying words which are indubitably attached to it where it first occurs in section 2 and which therefore, as I have endeavoured to show, can properly and should be attached to it where it occurs for the second time in the very same section 2.

I am led to the conclusion that section 47 does by its very language inevitably cover, and therefore must properly be held to cover, a very wide variety of orders divisible into three classes: (1) Orders that have the characteristics of a formal adjudication conclusively binding on the Court and amounting therefore to decrees as defined in section 2; (2) Orders against which an appeal is specifically allowed, see Order 43; (3) other orders of an interlocutory nature against which there is no appeal at all.

For the reasons I have given I am of opinion (*a*) that a stay order is a determination of a question relating to execution within the meaning of section 47; (*b*) that, though a stay order does fall within section 47, it is not a decree because it is not a determination which has attaching to it the characteristics required by section 2 to be attached to a determination, whether in a suit or in execution, if it is to amount to a decree; (*c*) that a stay order is therefore not appealable as a decree and, no special appeal against such an order as an order being given no appeal lies.

Since the above was written the research of my learned brother Mr. Justice Daniels has drawn my attention to *Surendra Nath* v. *Mrityunjoy Banerji* (5) in which the cases *Sivagami* v. *Subramania* (6) and *Deokinandan* v. *Banai Singh* (7) were approved and followed. Remarks in the Patna case and also in the Calcutta case go some way to support the view I have expressed above as to the effect of section 2 though I observe that in neither of the cases was it apparently noticed that the Madras case which was at the same time approved proceeded upon the principle of ruling the orders out of section 47, and not of admitting them within section 47 and ruling them out of section 2.

For these reasons I concur in dismissing the appeal, and for the reason given by Mr. Justice Daniels, without costs.

By the Court.—The order of the Court is that the appeal be dismissed but without costs.

Appeal dismissed.

(5) (1920) 5 Pat. L.J. 270=1920 Pat. H.C.C. 227-56=I.C. 452=1 P.L.T. 645.
(6) (1904) 27 Mad 259=14 M.L.J. 57 (F.B.).
(7) (1911) 16 C.W.N. 124=10 I.C. 371=14 C.L.J. 35.

1924 Allahabad 811.

RYVES and MUKERJI, JJ.

P. Chiraunji Lal — (Decree-holder)-Appellant.

v.

Ganga Sahai and others—(Judgment-debtor)-Respondents.

Ex. S. A. No. 742 of 1923, decided on 22nd February, 1924, from the decree of the District Judge of Meerut, dated the 18th January, 1923.

Limitation Act—Execution case, question of limitation—Affidavit filed that there were no incumbrances on property—But no written application to date fixed for disposing of matter—But on back of affidavit endorsement of Court directing that it should be filed. Held no oral application was made on the date asking for sale and limitation was not saved.

Where in an execution case limitation was urged and was denied on the ground that on a particular date an affidavit had been filed to the effect that there were no incumbrances on the property but where there was then no written application to have the property sold and on the date fixed for disposing of the matter, but on the back of the affidavit, there was an endorsement of the Court directing that it should be filed.

Held, that it was filed sometime later on the same date but that no oral application for sale could have been made then and that therefore the plea against limitation failed. (22 O.C. 76, *Dist.*) [P. 812, C. 2.]

U. S. Bajpai—for the Appellant.

S. N. Gupta—for the Respondents.

Ryves, J.:—This is a second appeal in an execution case. The appellant is the decree-holder. A petition to execute the decree was filed by him on the 1st of June, 1918. That was an application asking the Court to transfer the decree to the Collector as the property was ancestral property. The last application was filed on the 12th August, 1921, and it was objected to on the ground that it was on the face of it clearly barred by limitation. It is sought by the decree-holder to bring it within limitation on two grounds. (1) It is said that on the 24th September, 1918, the decree-holder filed an affidavit in the Court of the Collector to the effect that there were no incumbrances on the property. (2) The next circumstance is that on the 13th November, 1918, the Court after considering the Tahsildar's report and perhaps the affidavit, directed that the property should be sold in one lot. It appears from the order-sheet of the Collector's Court that on the 9th August, 1918, the decree-holder was directed to file an affidavit to show whether there were any incumbrances or not on the property and the Tahsildar was asked to report if persons were willing to take the property on lease. It is argued that on the 24th September, 1918, when the affidavit was filed there must have been an application made by the decree-holder to have the property sold. There was no written application; that is admitted; but we are asked to infer that there must have been an oral application to this effect. We find in the order-sheet that the 24th September was the date fixed for disposing of the matter and that on the date it was recorded that the decree-holder was not present. On the back of the affidavit however there is an endorsement of the Court directing that it should be filed. This is dated the 24th September, 1918. It therefore seems clear that after the order had been written in the order-sheet this document was filed some time later on that date. It seems to us impossible to hold that there must have been an oral application made when that affidavit was filed asking for the sale. The affidavit did nothing more than state that there was no incumbrance on the property and it was in answer to the usual direction of the Court before the final sale of the property whether it was possible to dispose of it otherwise. Stress has been laid on the case of *Gulzari Lal* v. *Ram Bhajan* (1) but the facts there are different. In that case there was an entry in the order-sheet showing that the decree-holder requested that the sale might proceed and it was held that this was evidence of an oral application. In this case there is no such entry and we are unable to hold that any application was made on behalf of the decree-holder. The result is that we dismiss this appeal with costs including in this Court-fees on the higher scale.

Appeal dismissed.

(1) (1919) 22 O.C. 76=52 I.C. 116.

* **1924 Allahabad 812.**

KANHAYALAL, J.

Bhagwan Das and another—Plaintiffs-Appellants.

v.

Sukhdeo Korie and others—Defendants-Respondents.

S. A. No. 818 of 1923, decided on 14th June, 1923, against the decree of the Subordinate Judge of Jaunpur, dated the 24th February, 1923.

Limitation Act, Sch, I, Arts, 62 and 127—Hindu joint family—Partition—Certain money bonds remaining joint—One of them realised by defendants five years before plaintiff's suit for share therein—Plaintiff's suit is barred by limitation—Art 127 does not apply to a family which has separated prior to suit—Limitation Act, Sch. I, Art. 127.

Where certain money bonds remained joint property even after the partition in a Hindu joint family and one of them was realised by the defendants who were some of the separated members, five

years before the plaintiffs, the other members, filed a suit for their share of the money realised.

Held that Art. 62 and not Art. 127 applied as the latter does not apply to a family which has separated prior to the suit and that the suit was barred by limitation. [P. 813, C. 2.]

Bhagwati Shanker—for the Appellants.

Kanhaiya Lal:—This was a suit by the plaintiffs-appellants for the recovery of money due on account of their share in four bonds which the defendants are stated to have realised from their common debtors. It appears that the parties formed a joint family at that time when the loans in question were advanced to those persons. They separated 7 years ago; but the bonds evidencing the loans in question remained the joint property of the parties. Subsequent to the separation the defendants are said to have realised the money due on the said bonds to the exclusion of the plaintiffs. The defence was that one of the bonds had fallen to the share of the defendants by partition and that the money due on another bond which was joint was realised by both the parties jointly. It was also alleged that the remaining two bonds were obtained by the defendants after partition and were their exclusive property. The Court of first instance decreed the claim, holding that all the four bonds were obtained when the family was joint, that they remained the joint property of the parties after they had separated 7 years prior to the suit, and that the defendants were liable to pay the plaintiffs their share of the said bonds, which they had realised. The lower appellate Court however came to the conclusion in respect of one of the bonds that its money was realised by defendants about 5 years prior to the suit; and applying article 62 of the Indian Limitation Act (No. 9 of 1908), it held that the claim of the plaintiffs in regard to their share of the money due on that bond was barred by limitation. In applying that article it followed the decisions of this Court in *Amina Bibi* v. *Najmunnissa Bibi* (1) and *Abdul Ghaffar* v. *Nur Jahan Begam* (2). The learned Counsel for the plaintiffs-appellants relies on the decision in *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (3) but as explained in the decisions first cited, the main question for determination in the last mentioned case was whether article 123 or article 120 was applicable to the case. Article 62 was not considered, because both under article 123 and article 120 the claim was in that case beyond time. It is also contended that article 127 of the Indian Limitation Act would in any case apply; but that article does not apply where a family has as in this case separated and divided its property prior to the suit. That article pre-supposes the continuation of the joint family and of the joint family property till the date of suit and an exclusion from the enjoyment of such joint family property of one party by another. The decision in *Mahomed Riasat Ali* v. *Hasin Banu* (4) is also inapplicable because that was a suit by one heir against another heir for the recovery of property which the other had appropriated. It was also contended that by virtue of a decision of a *panchayet* the money realised by the defendants was allowed to remain with them as a deposit and that the plaintiffs had no knowledge before that *panchayet* was held as to whether the defendants had realised the same, but the story of the *panchayet* was disbelieved by the lower appellate Court. There was no fraud specifically pleaded or alleged. The appeal is therefore rejected.

Appeal dismissed.

(1) (1915) 37 All. 233=27 I.C. 712=13 A.L.J 255.
(2) (1915) 37 All. 434=29 I.C. 847=13 A.L.J. 686.
(3) (1897) 19 All. 169=(1897) A.W.N. 34.

(4) (1894) 21 Cal. 157=20 I.A. 155=6 Sar. 374 (P.C.)

1924 Allahabad 813.

SULAIMAN, J.

Khub Chand—Defendant-Appellant

v.

Todar Mal and others—Plaintiffs-Respondents.

S. A. No. 945 of 1923, decided on 16th July, 1923, against the decree of the District Judge of Budaun, dated the 14th March, 1923.

Civ. Pro. Code, O. 21, r. 15—Joint decree-holders—Purchase by one decree-holder in execution enures for the benefit of all.

Where several persons hold mortgage-decrees jointly and in execution of the same the property is sold and purchased by one of them, the purchase is made on behalf of, and for the benefit of, all joint decree-holders and they are entitled to their respective shares in the property. [P. 814, C. 1.]

Harnandan Prasad—for the Appellant.

Judgment:—This is a very clear case. One Sewa Ram a mortgage left four sons who were entitled to his mortgagee rights on his death. These persons secured a decree for sale of the mortgaged property for a sum exceeding Rs. 12,000. This decree was put in execution in September, 1916 by Khub Chand defendant No. 6 alone. The learned District Judge has found that when Khub Chand applied for execution he expressly reserved the rights of his co-decree-holders, but for this reservation it is possible that the Court would have declined to execute the decree under Order 21, rule 15, sub-clause 2, C. P. C. The property of the judgment-debtors was put up for sale and was purchased for a sum of Rs. 5,562 in the name of the decree-holder Khub Chand. No money was paid in cash by him but the price was set off against part of the decretal amount. Khub Chand obtained a sale certificate as well as the delivery of possession, and has admittedly remained in exclusive possession of the property ever since.

One of the co-decree-holders has brought the suit for recovery of possession of his one-fourth share in the property as well as mesne profits.

Both the Courts below have decreed the suit holding that the purchase must be deemed to have been made on behalf of and for the benefit of all the decree-holders.

In my opinion the view taken by the Courts below is perfectly correct. The property was purchased in lieu of a part of the decretal amount which had belonged jointly to all the decree-holders. Execution had been ordered subject to the reservation of the rights of the co-decree-holders. One decree-holder therefore cannot be allowed to purchase the decree exclusively for himself and realise his share of the decretal amount leaving nothing for the co-decree-holders. In equity and justice therefore the sale must be deemed to have taken place in favour of all the persons who were interested in the decretal amount.

The learned Vakil for the defendant-appellant has relied on a case of this Court reported in *Ganeshi Lal* v. *Jaganath* (1). It may be that that case is distinguishable from the present case inasmuch as the facts of that case were somewhat different. There the co-mortgagees had not joined in the suit at all, but had been arrayed as *pro forma* defendants. The decree was in favour of one mortgagee alone. Then at the time of the auction-sale it appears that the decree-holder had purchased the property for himself in spite of the protest raised by the other mortgagees. On those circumstances the Court was of opinion that the other mortgagees had no interest in the property purchased at auction-sale though they might have had a right to insist on the deposit of the purchase-money in Court. But even if that case on principle were not distinguishable from the present case it would be impossible for me to follow it as it would then be contrary to the view expressed by their Lordships of of the Privy Council in the case of *Ganga Sahai* v. *Kesri* (2). In this latter case Ganga Sahai one of the co-decree-holders had applied for execution of his mortgage decree against the mortgagor and his application had stated that execution was sought subject to the rights of the other mortgagees. The purchase however was made by Ganga Sahai himself in his own name and the purchase-money was set off against the decretal amount. Their Lordships held that the properties in question must be deemed to have been purchased for the benefit of all the mortgagees and that the co-decree-holders were entitled to recover from Ganga Sahai their proportionate share of the properties purchased by him in execution of the joint mortgage decree. On facts the present case is quite parallel to it.

In my opinion therefore there is no force in this appeal and I dismiss it under Order 41, rule 11, C. P. C.

Appeal dismissed.

(1) (1916) 32 I.C. 171.

(2) (1915) 37 All. 545=42 I.A. 177=19 C.W.N. 1175=18 M.L.T. 203=29 M.L.J. 329=2 L.W. 837=13 A.L.J. 999=17 Bom. L.R. 998=22 C.L.J. 508=30 I.C. 265=(1915) M.W.N. 715 (P.C.)

*1924 Allahabad 814.

SULAIMAN, J.

Piyare Lal—Plaintiff-Appellant

v.

Bed Ram—Defendant-Respondent.

S. A. No. 1161 of 1923, decided on 31st October, 1923, against the decree of the Subordinate Judge of Bulandshar, dated the 9th March, 1923.

Limitation Act, Sch. I, Art. 120—Defendant building construction on his occupancy land without plaintiff's permission—No allegation of dispossession—Suit by plaintiff for demolition of constructions and injunction—Art. 120 only applies to the case.

Where plaintiff sued defendant for demolition of certain constructions made by defendant on his (defendant's) occupancy lands without plaintiff's permission and for injunction and where the plaintiff did not allege in the plaint that he had actual possession of lands or that he had lost possession and where he had not availed himself of his right under the local Tenancy Act to eject the defendant.

Held, that it was not a suit for possession at all and that Art. 144 could not apply and that if the defendant's action had perverted the property to a purpose for which he had no right to use it, the claim fell within Art. 32 but that in any event 120 only applied both as regards the relief for demolition of construction and for injunction. [P. 815, C. 2.]

C. Thompson—for the Appellant.

Judgment:—This is a plaintiff's appeal arising out of a suit for demolition of certain constructions and for an injunction. The plaintiff's case as set forth in the plaint was that the defendant had on his occupancy lands built these constructions without his permission some 5 years before the suit. The defendant pleaded that these constructions were not new but had existed for some 40 years. When the case came on for hearing the plaintiff in his evidence stated that these constructions had been built some 6 or 7 years before. On the other hand the defendant's evidence was that they had been built some 15 years before. The Court of first instance in its finding on issue No. 3 came to the conclusion that these contructions were within 6 years of the institution of the suit. It held that the article applicable was article 120 and therefore overruled the plea of limitation raised by the defendant.

On appeal by the defendant the lower appellate Court has, it appears to me, come to a quite different finding on the facts. It was not impressed by the plaintiff's vague statement that the houses were built 6 or 7 years ago and there being no other satisfactory evidence to corroborate it, it came to the conclusion that the plaintiff had failed to prove that these constructions were made within 6 years of the suit. By implication it has inferred that these constructions must have been made more than six years before the suit. On this finding it dismissed the suit holding that it was barred by time.

On appeal the only point taken is that the claim is not barred by time. The learned Counsel who appears for the appellant argues that article 120 is not applicable but that article 144 is applicable. He has cited no other article except article 144. It is manifest that article 144 can in no sense be applicable. The houses were built on defendant's occupancy lands. The plaintiff does not allege in his plaint that he had actual possession of the lands and has ever lost possession. It is not a suit for possession at all. The landlord has not tried to avail himself of his right to eject under section 57 (*a*) of the Tenancy Act. Under the circumstances article 144 can have no application whatever. If the defendant has by building the houses on the occupancy lands perverted the property to a purpose for which he has no right to use then the claim falls within article 32 of the Limitation Act and is governed by only two years rules of limitation. In any event article 120 only applies both as regards the relief for demolition of constructions and for injunction. I take the finding of the lower appellate Court to be that the cause of action accrued in favour of the plaintiff more than six years previous to the suit. The claim is therefore on that finding barred by time. I am supported in this view by the rule of law laid down in the case of *Lach Ram Rao* v. *Jangi Rai* (1). The appeal has no force and I dismiss it.

Appeal dismissed.

(1) (1911) 8 A.L.J. 914=12 I.C. 109.

1924 Allahabad 815.

MUKERJI, J.

Musammat Khatoon Bibi and another—Defendants-Appellants.

v.

Nazir—Plaintiff-Respondent.

S. A. No. 1524 of 1923, decided on 19th December, 1923, against the decree of the Judge of the Court of the Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 27th August, 1923.

Civ. Pro. Code, S. 11—Res judicata *against 3rd parties.*

Where in a previous suit between the husband and wife it was decided that there was no divorce, on the husband's suit for restitution of conjugal rights against his wife and father-in-law.

Held, that the question of divorce was *res judicata* and that the *father-in-law* could not be

permitted to agitate it again. *Held*, further, that though S. 11, C. P. C., had no application when the question was raised by the father-in-law yet that section was not exhaustive and that rules of justice should not be interpreted so as to operate against the course of justice. [P. 816, C. 2.]

(b) *Husband and wife—Suit for restitution of conjugal rights.*

Where in a suit by the husband for restitution of conjugal rights the father-in-law was also made a deft. along with the wife and where the father-in-law pleaded that there was no cause of action against him.

Held, that his words and conduct showing his unwillingness to let his daughter live with plff. was ground for cause of action against him. [P. 186, C. 2.]

U. S. Bajpai—for the Appellants.

Mukherji, J.:—The facts of this case which have given rise to this appeal are these :—The plaintiff, Nazir, is the husband, the appellant, Mt. Khatoon Bibi is said to be his wife. Mubammad Ismail, appellant No. 2, is father of Mt. Khatoon Bibi. In a previous suit between the husband and wife it was held that there was no divorce. Nazir instituted this suit, out of which this appeal arises, for the restitution of conjugal rights against his wife. The father-in-law, Ismail, was made a party to the suit on the ground that the father-in-law was puting obstructions in the way of the wife's going to live with the plaintiff. The lower Court found that the question of divorce was *res judicata* and did not permit the father-in-law, Ismail, to adduce evidence in proof of his allegation that there was in fact a divorce. Ismail raised a further plea that there was no cause of action against him. On that plea the learned Judge of the lower appellate Court has pointed out that it was clear from his statement that he was not prepared to allow his daughter to go and live with her husband and there was, therefore, a cause of action against him.

In this appeal it is urged that the lower Courts were wrong in shutting out evidence. It is also urged that there is no cause of action against Ismail. The last of the grounds taken in appeal, namely, the 4th ground, has not been pressed before me.

As regards the question of divorce, I think the lower Courts were perfectly right. The question of the status between the alleged husband and wife has been once decided as between themselves. It would be simply monstrous to allow the father to prove that there was, as a matter of fact, a divorce. It is true that section 11, C.P.C., has no application when the question is raised by Ismail. But that section is not exhaustive. In the case of *S. Ramamurti Dhora* v. *Secretary of State* (1) it was held that where there was a dispute between two rival claimants for a property and the suit was decreed in favour of one it was not open to a third party to contend that the property did not belong to the successful party. In this connection see also *Naba Kishore Tilokdas* v. *Paro Bema* (2). The principle on which these decisions were given applies to this case. If the Courts were to allow Ismail to prove successfully that there was a divorce, the result would be that while the wife would be compelled to go and live with her husband, the decree would be nullified by the father being allowed to keep back the wife. The rules of procedure are framed for aiding justice and they should not be so interpreted as to operate against the course of justice.

In my opinion, therefore, there is nothing in the first and second grounds of appeal.

The next point is whether the Court below was wrong in holding that the statement of the appellant himself showed that there was a good cause of action against him. I think that the Court below was justified in saying that it was clear from the attitude and pleadings of Ismail in the conduct of the case that the plaintiff was right in saying that Ismail was unwilling to allow his daughter to go and live with the plaintiff.

The appeal fails and is hereby dismissed under Order 41, rule 11, C.P.C.

Appeal dismissed.

(1) (1913) 36 Mad. 141=19 I.C. 656=24 M.L.J. 469.
(2) 1922 Cal. 198=50 Cal. 23.

---

* 1924 Allahabad 816.

MEARS, C.J. AND PIGGOTT, J.

Gur Prasad Mukerji—Plaintiff-Appellant.

v.

Bishunlal—Defendant-Respondent.

Letters Patent Appeal No. 103 of 1922, decided on 11th February, 1924, against the judgment of Stuart, J., dated 15th May, 1922.

Easement—Agreement not to block window—Effect is only to create an ancient light and not to preclude the servient owner from putting up any building which in the slightest degree would diminish the free ingress of light and air.

Where the agreement arrived at in a compromise in a suit between the parties A and B was that A should not block a particular window belonging to B.

Held, that the effect of the agreement was nothing more than to entitle the window to the same quantity of light and air as if it were a window having a prescriptive right for light and air and that it did not preclude A from ever raising any building which would in the slightest degree diminish the free ingress of light and air into the window. [P. 817, C. 2.]

K. N. Katju and *H. K. Kaul*—for the Appellant.

U. S. Bajpai—for the Respondent.

Judgment:—This was a suit by the plaintiff to restrain the defendant from diminishing the light and air enjoyed by a window belonging to the plaintiff. The position appears to be that in 1913 Bishun Dat, the present defendant, was plaintiff in a suit against Gur Prasad Mukerji. Bishun Dat then complained that Gur Prasad Mukerji had unauthorisedly opened the two windows in his house which looked over the plaintiff's property. A compromise was arrived at by which Bishun Dat secured the closing up of one of the windows entirely and the present plaintiff secured the maintenance of the southern window with liberty to heighten it by one foot if that were possible, otherwise to leave it as it was before the suit. There was an agreement that the defendant would not block up that southern window. The exact words of the compromise were.

"And he (Bishun Dat will have no right to block this window" (*band karne*).

Subsequent to the compromise the defendant erected a tinshed which according to the plaintiff was an infringement of this compromise. No oral evidence was given in the Court below but the Munsif went on two occasions to see whether "by his proposed constructions the defendant would be materially interfering with the light and air which used to pass through the window". He came to the conclusion that there would be a certain extent of diminition but sufficient light and air would be left for the purposes for which the room was used. The room was in fact used as a store-house. The learned Munsif relying upon the decision of *Paul* v. *Robson* (1) came to the conclusion that he could not grant to the plaintiff the relief claimed. The lower appellate Court reversed that finding which was in turn reversed by the decision of Mr. Justice Stuart. The point that Dr. Katju has argued is that this case must be decided on the basis of the particular agreement between the parties and not according to the general relationship which exists between a servient and dominant tenement. There is no doubt that this case ought to be decided according to the special agreement of the parties because but for that agreement of the parties the present plaintiff would not have acquired any prescriptive right to light and air in respect of that window. In effect the agreement following on the first litigation did give to that window in our opinion the character of an ancient light. That being so it having the advantages attaching to an ancient light it was also subject to its limitations and disadvantages, and the owner of the servient tenement is permitted to reduce the access of light and air provided he does not so diminish the light and air as to make it in the language of *Paul v. Robson*(1) less than the owner of the dominant tenement required for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings. Dr. Katju has contended that the agreement is absolute in its language and it for ever precluded the defendant from putting up any building which in the slightest possible degree diminished the free ingress of light and air. We think that this is not the proper construction of the agreement for if that is what the parties had intended it would have been quite easy to express it and believing as we do that by this compromise the plaintiff obtained nothing more for that window than the character of a window which had a prescriptive right to light and air we are of opinion that the decision of the learned Judge of this Court was right and we therefore dismiss the appeal with costs.

Appeal dismissed.

(1) (1914) 42 Cal. 46=41 I.A. 180=18 C.W.N. 933=27 M.L.J. 117=1 L.W. 561=16 M.L. T. 204=(1914) M.W.N. 631=12 A.L.J. 1166=24 I.C. 300=16 Bom. L.R. 803=20 C.L.J. 953 (P.C.).

1924 Allahabad 818 (1).

WALSH, A.C.J. and RYVES, J.

Moazzam Ali—Plaintiff-Appellant

v.

Raza Ali—Defendant-Respondent.

L.P.A. No. 142 of 1922, decided on 29th May, 1924, from a judgment of Gokul Prasad, J., dated the 21th June, 1922, reported in 1923 All. 12.

Arbitration—Rights awarded under arbitration cannot be denied by defendant on the pretext that property is public trust property.

Where while question of the validity of the waqf and of lawful appointment of mutwalli was still open the parties referred certain differences to an arbitrator who by his award determined their rights and held each to be entitled to an equal share in the management and profits of the property.

Held, that one of the parties could not exclude the other from his civil rights under the cloak of public right. (7 A.L.J. 761, *Dist.*) [P. 818, C. 2.]

S. N. Sen—for the Appellant.

M. A. Aziz—for the Respondent.

Walsh, A.C.J.:—In our opinion this decision cannot be supported. The learned Judge has misapplied the decision in the case of *Ibruhim Khan* v. *Ahmad Saeed Khan* (1) which was founded upon an earlier case, namely *Mahadeo Prasad* v. *Bindeshri Prasad* (2) in which it was held "that the appointment of guardian to a minor, not being a matter of private right as between parties, is not a question which can be settled by reference to arbitration". That is to say, the Court has a kind of parental control over a minor, and a special jurisdiction over the guardian, and it cannot allow that jurisdiction to be taken out of its hands by any private arrangement between the parties. In the decision in the case in 7 A.L.J. that principle was applied to the mere appointment of a *mutwalli*, and we express no opinion as to whether it was rightly applied or not. But that is not the question in this suit. It cannot really be better put than the learned District Judge put it. Independently of the question of the appointment of *mutwalli*—it being still an open question as to whether this *waqf* is a valid one and whether a *mutualli* has lawfully been appointed the parties referred certain differences to an arbitrator, who, by his award, determined their rights. As the learned District Judge says: "the status of the parties has been determined by the award, and each is entitled to an equal share in the management and profits of this property". That is what the plaintiff sued for, and the defence really amounts to an act of importance. That is to say, under the cloak of public right, public charity, and religious endowment, the defendant claims to stick to the whole of the profits of this property to the exclusion of the party who is entitled to half. The law is not so foolish as to deprive a plaintiff of his just civil rights in a suit of this nature. The appeal must be allowed, and the decree of the lower appellate Court restored with costs, including in this Court fees on the higher scale.

Appeal allowed.

(1) (1910) 32 All. 503=6 I.C. 219=7 A.L.J. 761.
(2) (1908) 30 All. 137=5 A.L.T. 101=(1908) A.W.N. 51=3 M.L.T. 208.

---

* 1924 Allahabad 818 (2).

WALSH, A.C.J. and RYVES, J.

Pandit Balgobind—Deft.-Appellant.

v.

Sheo Kumar, minor through Mt. Lachmi Koer and others—Plaintiffs and Defendants-Respondents.

F.A.F.O. Case No. 143 of 1922, connected with F.A.F.O. No. 177 of 1922, decided on 30th May, 1924, from order of the 2nd Subordinate Judge of Cawnpore, dated 7th September, 1922.

(a) *Civ. Pro. Code, S. 33—Decree should conform to judgment—Civil Pro. Code, O. 20, r. 6.*

The Code is clear in insisting that the decree which is drawn up by the Court shall be in accordance with the judgment. [P. 821, C. 1.]

(b) *T. P. Act, S. 67—Foreclosure versus sale.*

Obiter.—In decree for foreclosure after expiration of period of grace property passes to mortgagee. In decree for sale the mortgagor has still further time even after the period of grace till the sale is held and afterwards confirmed by the Court. [P. 821, C. 2.]

(c) *Civ. Pro. Code, O. 9, r. 13—Summons is not duly served if it has no relevance to real proceeding which is contemplated.*

A summons cannot be said to be duly served which is a misleading document having no relevance to the real proceeding which is contemplated and having no reference to the order ultimately passed. [P. 823, C. 1.]

(d) *Practice—Misguidance by Judicial Officer vitiates proceedings.*

It would be absolutely shocking, if the Court were to enforce against a mortgagor or any one interested in the equity of redemption a foreclosuer

decree when he had been misled by its duly accredited agent owing to the issue of a notice for a decree for sale. [P. 823, C. 2.]

(e) *Evidence Act, S. 115—There is no estoppel against litigant arising out of wrongful acts of Court.*

There can be no estoppel against a litigant arising out of the wrongful act of the Court permitted or performed by its own officials. [P. 824, C. 1.]

(f) *Practice—Court's object is to decide parties' rights and not punishing them for mistakes in procedure by deciding against their rights.*

Even if parties have not taken every step open to them or have not shown a prompt sense of their obligation or a right appreciation of the appropriate procedure it is none the less the object of Courts to decide the rights of parties and not to punish them for mistakes they make in the conduct of their case by deciding otherwise than in accordance with their rights. (*Cropper v. Smith*, 16 Ch. D. 700, *Foll.*) [P. 824, C. 2.]

(g) *Civ. Pro. Code, S. 151—The Court can interfere for correcting miscarriage of justice appearing on face of proceedings.*

Section 151 could not be invoked more appropriately than for the purpose of correcting a miscarriage of justice appearing on the face of the proceedings and for making such orders in the nature of consequential orders as may be necessary for the ends of justice and to prevent an abuse of the process of the Court which includes the idle multiplicity of proceedings. [P. 824, C. 2.]

(h) *Civ. Pro. Code, S 148—Extension of time.*

Court can extend time fixed by the Court for doing any act. [P. 824, C. 2.]

(i) *Civ. Pro. Code, S. 152—Abortive proceeding in lower Court.*

High Court has power not merely to set aside abortive proceeding in lower Court but to pass such order as the Court ought to have passed itself, and can if the matter be referred back, still pass. [P. 825, C. 1.]

M. L. Agarwala and *K. A. P. Dube*—for the Appellant.

T. B. Sapru, S. N. Sen, Iqbal Ahmad and *Ajodhiya Nath*—for the Respondents.

Judgment:—These are three appeals by certain second mortgagees, and a lessee of the mortgagor, against an order of the Subordinate Judge of Cawnpore, dated the 7th of September, 1922, rejecting an application to set aside under Order 9, rule 13, C.P.C., a decree absolute for foreclosure. The parties are persons of position, but the history of the case illustrates the astounding complications and delays which arise in this country, in effecting service, in fixing dates for hearing, in determining the real controversy between the parties, and in enforcing decrees, and also the difficulties with which this Court is frequently confronted, owing to the gross negligence of the officials in the Subordinate Courts, instances of which generally come to our notice when it is too late to investigate the matter with any hope of saddling the responsibility on the right shoulders. This case, in which the only substantial issue, namely how much is due under two ordinary mortgages, might have been settled in less than three hours, has taken three years in the lower Court, and owing to the transfers of judicial officers, which have taken place has passed through the hands of four Judges. It is now nearly eighteen months since the appeal was admitted in this Court.

The plaintiffs are the minor children of the deceased mortgagee Ram Charan Shukul, suing under the guardianship of their mother. The defendants were one Gauri Shanker, the original mortgagor, who died pending the appeal, Mt. Gyan Devi, widow of a deceased District and Sessions Judge of this Province, Jwala Devi her daughter, who are second mortgagees, and Bal Gobind an Honorary Magistrate, husband of Jwala Devi, and lessee of the mortgaged property.

The difficulties which have occurred in effecting service from time to time, partly owing to the fact that Gyan Devi is a *purdanashin* lady living at Agra and partly to the desire of the defendants to gain time are fully set out in the elaborate judgment of the Subordinate Judge. For the purpose of reference, the following schedule of dates, which was prepared by the parties, may be useful :—

1-*a*. Dates of mortgages.

1-*b*. Suit filed—2nd December, 1919.

2. Date fixed for written statement—7th January, 1920.

3. Court found summons not served—5th January, 1920.

4. Date fixed for written statement—30th January, 1920.

5. *Ex parte* decree passed by Babu Lachmi Narain (order-sheet says Order 34, rule 24)—30th January, 1920.

6. Defendant's application to set aside *ex parte* decree. In this application Gauri Shanker defendant did not implead Gyan Devi—25th February, 1920.

7. Date fixed for hearing application—13th March, 1920.

8. Gauri Shanker applied to implead Gyan Devi, and for issue of notice to all unserved—13th March, 1920.

9. Date fixed for application for restoration—10th April 1920.

Notices served on minor plaintiffs' guardian Lachmi Kuar personally and Balgovind personally and by affixation on Jwala Devi and Gyan Devi.

10. Case adjourned for personal examination of Gauri Shanker to—1st May, 1920.

11. Balgovind applied to set aside the *ex parte* decree—10th April, 1920.

12. Both applications for setting aside *ex parte* decree—1st May, 1920.

13. Accounts produced under order of Court by defendant Balgovind—19th May, 1920.

14. Application adjourned several times till—17th January, 1921.

15. Subordinate Judge Lachmi Narain passed order setting aside *ex parte* decree—20th January, 1921.

16. Date fixed for issues—1st February, 1921.

17. Written statement filed by Gauri Shankar, Balgovind and Jwala Devi—1st February, 1921.

18-*a*. Judgment of Lachmi Narain—5th February, 1921.

18-*b*. Foreclosure decree passed—Do.

Defendants allowed usual six months. Gyan Devi did not contest.

19. Six months expired on 5th August, 1921.

20. Present application for decree absolute—30th August, 1921.

21. Date fixed for hearing application—28th September, 1921.

Notices sent as follows :—

Gyan Devi—Agra.

Gauri Shankar—at Satti Chaura.

Balgovind and Jwala Devi—at Kursawan.

22. Case taken up. It was found that notice to Gyan Devi had not returned and that serving officer's report showed that Gauri Shankar was inside the house at Satti Chaura but would not come. Notices affixed. Similar report with regard to Balgovind and Jwala Devi—28th September, 1921.

23. Mr. Aghornath Mukerji declared service sufficient and ordered case to be put up—26th November, 1921.

24. Notice to Gyan Devi had not returned and case postponed. Court ordered fresh notices to issue for Jwala Devi, Balgovind and Gauri Shankar—14th January, 1922.

25. Gauri Shankar's notice returned unserved with the report that he was not at Satti Chaura but at Sariyan (Unao District). Notices on Balgovind and Jwala Devi served by affixation.

26. Gyan Devi served personally—17th December, 1921.

27. Babu Raja Ram, Subordinate Judge, held service insufficient. Case fixed for 18th February—14th January, 1922.

28. Notices to Balgovind and Jwala Devi sent by registered post had come unserved, and Gauri Shankar's notice not returned—18th February.

29. Case postponed to—2nd March, 1922.

30. Plaintiffs' application and affidavit for substituted service—2nd March, 1922.

31. Court ordered substituted service by affixing copy on the outer door and by beat of drum and by publication in "Albrid", and fixed 25th March for hearing—3rd March, 1922.

32. Case called on. Defendants absent. As Albrid had not come case again postponed to 1st April—25th March, 1922.

33. Case again postponed for the same reason—29th April, 1922.

34. Case taken up. Defendants absent and Court passed *ex parte* order for final decree for foreclosure—29th April, 1922.

35. Application by Gauri Shankar, Jwala Devi and Balgovind to set aside the above order—21st June, 1922.

36. Applications applied to be allowed to pay the money and deposit it in Court. No order—29th July, 1922.

The original decree in the suit was passed *ex parte* in January, 1920. It was however set aside by Babu Lachmi Narain Sahib, Subordinate Judge of Cawnpore, in January, 1921. The suit was one for foreclosure, and claimed that relief. It was heard on the merits, and decided by the learned Judge on the 5th of February, 1921. The defendant Gauri Shankar put in no defence. The issues were settled as follows :—

1. What sum, if any, are the plaintiffs entitled to on the basis of the mortgage bonds dated the 4th of January, 1912, and the 25th of May. 1912?

2. Whether the interest at 9% per annum with 6 monthly rests is penal?

Presumably the defendants, who were interested in the equity of redemption, were desirous of saving the property from foreclosure, and of obtaining from the Court a decision as to the actual amount due under the mortgages. The learned

Judge gives no reason, but in his judgment he ascertains and decrees the amount due, less a sum for proportionate costs, and awards to the plaintiffs interest at the contractual rate till the period of grace, namely 6 months, and thereafter future interest at the Court rate, in terms of Order 34, rule 4, C. P. C., allowing 6 months for payment before sale. It is quite clear that this provisional decree was a provisional decree for sale. In the recital of the plaintiffs' claim, the learned Judge describes the suit as one for recovery of the amount due by sale of the hypothecated property. The plaintiffs throughout have relied upon the fact that they were asking for foreclosure. But it is evident from the judgment, that either they modified their claim and asked for a sale, or the learned Judge, in the exercise of his discretion under Order 34, rule 4, sub-section (2), C.P.C., intended to pass a decree for sale in lieu of a decree for foreclosure. This is made evident by the operative part of the judgment citing Order 34, rule 4. Rules 2 and 3 relate to the preliminary and final decrees in a foreclosure suit, but rule 4, sub-section (2) provides, that in a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of any person interested in the right of redemption, pass a decree for sale in lieu of a decree for foreclosure on such terms as it thinks fit.

The decree drawn up in the office of the Subordinate Judge and signed by the Munsarim as the ministerial officer of the Court, was a preliminary decree for foreclosure. We have come to the conclusion that the Court of the Subordinate Judge had no jurisdiction, in view of the judgment, to draw up such a decree. The Code is clear in insisting that the decree, which is drawn up by the Court, shall be in accordance with the judgment. It will be necessary for this Court to direct an enquiry in Cawnpore as to the circumstances under which this decree came to be drawn up in this way. In our opinion this decree is invalid and vitiates the whole of the subsequent proceedings which have been taken subsequent thereto in the Subordinate Judge's Court. The objection is stated in the 6th ground of the appeal of Jwala Devi in the following terms:—

"The preliminary decree is incorrect and not "according to the order of the judgment, dated 5th "February, 1921, and hence the whole proceedings "thereafter are null and void".

With this view we agree. Whether we ought merely to declare it void, or to set it aside ourselves, is a question of procedure which, in view of the line taken by the Bar in this case, must be discussed hereafter. It is contended by Sir Tej Bahadur Sapru, on behalf of the plaintiffs, that the defendants knew of the form of the decree. There is certainly no evidence on the record that they did, but it is said that they must have known. It is *a priori* improbable that they knew. There is no reason why they should have known. Litigation is not conducted in this Province by Solicitors, who, as a matter of routine, concern themselves with looking at the minutes or the judgment as actually drawn up in an English Court. In India the Court makes itself responsible for the drawing up and final issue of the decree. An interval of time elapses between the judgment and the final decree, and the officer charged with the duty of writing the decree gives notice to the parties of the intention to prepare the decree. But although the defendants were much concerned to have the equity of redemption if they could, they were not concerned, once a decree for sale had been passed, to examine the formal document in which the decree was drawn up. If the officials of the Court did their duty, the document would follow the judgment, the total sum being a mere matter of arithmetic worked out on the direction contained in the judgment. It could not be worse for the defendants than the decision which the Subordinate Judge had given, and was not likely to be better. There is a rule in this High Court that the proposed decree before being finally passed, should be submitted to and initialled by the Vakils on both sides. It is a valuable rule, and it is a practice which has been much followed in the Subordinate Courts, but there appears to be no rule in the Subordinate Courts, a matter which this Court may well consider that it would be desirable to rectify.

The difference between a decree for foreclosure and a decree for sale, is of course considerable. In either case the mortgagor gets 6 months time to pay the money, but after the expiration of that 6 months period of grace, in the case of a foreclosure, the property passes to the mortgagee, and no *locus penitentiae* remains to the mortgagor; whereas in the case of a

decree for sale, there is the further delay caused by the preparation of the proclamation of sale, and the fixing of the date, a matter which we understand frequently covers two months or so. Then if the sale is successful, it has to be confirmed by the Court, and the debtor or mortgagor has still a month within which he may deposit the money with interest, and save the property. This is material as indicating that it is by no means surprising to find parties, who are interested in preserving the equity of redemption, treating the period which must elapse once a sale has been ordered before the time is reached, when they must make up their minds once for all to pay or lose the property with considerable indifference. It is a matter ingrained in the habits of the people of this Province, and the majority of mortgagors appear to prefer to put off the evil day as long as possible, even though interest at a high rate is running against them.

The lower Court seems in its judgment to have been not unnaturally influenced by the indications of procrastination on the part of the defendants in this matter, and to have come to the conclusion that they were well aware of the foreclosure decree against them before the 15th of June, 1922, when they say they learnt it through their agent from a triumphant remark of the *munib* of the decree-holders, who told them that the decree-holders would obtain possession of the mortgaged property. The learned Judge does not say how and when the knowledge came to them earlier than the 15th of June, and the only evidence of its coming to them, is the application upon which the order under appeal was made, which was dated 21st June, 1922, and it was not until a special and supplementary petition was put in by the defendant Balgobind on the 29th of July, 1922, that they formally took objection that the judgment and notice of hearing for the making of the decree absolute was for sale, whereas the actual decree absolute was for foreclosure.

Not the least extraordinary feature of this remarkable case is that the learned Judge himself, from whom this appeal has been brought, in the judgment which is before us, should have missed this point. He says: "The case was then heard on the merits, and the Court passed a foreclosure decree under Order 34, rule 4, C. P. C. (which it could not do by law) on the 5th of February, 1921, allowing the defendants 6 months within which to redeem. I find from a perusal of the judgment of Babu Lachmi Narain Sahib, that the contesting defendants went to issues only on the amount due under the mortgage-deeds and the penal nature of interest". We are unable to understand how the learned Judge could have failed to notice the fundamental error which had occurred in these proceedings, if he had read the judgment of the 5th of February, 1921, and appreciated that he was dealing with a decree for foreclosure.

On the 30th of August, 1921, the plaintiffs presented in the Court of the Subordinate Judge an application for a decree absolute for foreclosure. This application, although ignoring the judgment, was consistent with the original claim for relief in the plaint and with the decree which they had either dishonestly obtained from an innocent and careless official or which they had procured from him by chicanery and corruption. Whatever anybody else connected with the case knew on the 30th of August, 1921, they knew quite well that they were not entitled to a final decree for foreclosure, and that the preliminary decree was a dishonest proceeding.

The next step is perhaps more remarkable than anything which has gone before. On the plaintiffs' application for a decree absolute for foreclosure, the Court issued a notice, on the ordinary printed form of notices, to the respondents to show cause why an order for prepartion of a decree absolute should not be passed, that they the plaintiffs were applying for an order absolute for the sale of the property, and informing the defendants that if they had any objection to an order absolute for sale, they should attend the Court on the 25th of March, 1922 at 10 o'clock. This notice, we are told, was issued under the signature of the same Munsarim who had drawn up the preliminary decree for foreclosure, and the matter of the issue of this notice for sale based upon an application for foreclosure, is a further matter upon which this Court will have to direct an enquiry. The greater part of the judgment of the learned Subordinate Judge deals with the difficulties in effecting service, and the shifts adopted by the various parties to evade service, no doubt with the object of putting off the sale as long as possible with the

intention of finding the money when they could no longer stave off the sale. They probably had no intention of appearing to resist a decree absolute for sale. There was no reason why they should. They could not hope to resist it successfully, and after the judgment of the 5th of February, 1921, they could not escape the obligation ultimately of providing the money, if they were to save the property. But if the decision of the Subordinate Judge is accepted, namely, that they did in fact receive this notice, and in some way or another constructively or directly knew all about it, then the result is that, having received notice of an application for sale, and having deliberately kept away because they could not resist the order, a decree absolute for foreclosure was passed *ex parte* against them for default in appearing to resist a decree for sale. It is clear that an order so passed cannot stand. It matters little on what ground it is put. It seems to be vitiated by almost every objection to which an order can be exposed. One of the contentions before us by Sir Tej Bahadur Sapru on behalf of the respondents was that the case did not come within Order 9, rule 13, C.P.C., because the appellants had failed to satisfy the Court that the summons was not duly served or that they were prevented by any sufficient cause from appearing. Assuming that they knew that they were summoned to appear to show cause against legal proceedings which were being taken against them and that they were not prevented from appearing, and probably never had any intention of doing so, the question still arises whether the summons was duly served within the meaning of rule 13. The words "duly served" would appear to relate to the method of service, but in our view a summons cannot be said to be "duly served" which is a misleading document, having no relevance to the real proceeding which is contemplated, and having no reference to the order ultimately passed. Under such circumstances service even if effected is a mere sham, and this is not by mere *ex post facto* reasoning because the train had already been laid by the application of the 30th of August for an order for foreclosure.

Sir Tej Bahadur Sapru, on behalf of the plaintiffs respondents argued, that no notice is really necessary to show cause against the making of a decree absolute. The learned Subordinate Judge disagreed with this view, and held that the practice in this Province approved by the High Court, was to give such notice. We do not propose to follow the respondents' counsel into these high flights of procedure. It is only a rule of practice at the best, and no rule can apply so as to render the issue of a false notice, equivalent to the absence of any notice at all.

It is difficult to acquit the plaintiffs of complicity in the scheming by which this notice was issued. It is difficult to suppose that it was done by the Munsarim as the result of sheer ignorance and incompetence. He must be credited with having had some object to fulfil, or some obligation to repay in adopting such an astounding departure from the ordinary routine of his office. But in considering the rights of the defendants these alternative contingencies have no importance. The Court issues these notices through its responsibile ministers, and as their Lordships of the Privy Council pointed out in the case of *Kala Mea* v. *Harperink* (1) at page 334 in dealing with a litigant who had been tricked as the result of clumsy misrepresentation by one of the Court's sale officers said: "It is incumbent on the Court to be scrupulous in the extreme, and very careful to see that no taint or touch of fraud or deceit, or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness." To paraphrase their Lordships final sentence in this connection, "it would be disastrous, it would be absolutely shocking, if this Court were to enforce against a mortgagor, or any one interested in the equity of redemption, a foreclosure decree, when he had been misled by its duly accredited agent through the issue of a notice for a decree for sale."

The mortgage-debt is under Rs. 18,000. The property is said to be worth at least Rs. 45,000. Some one is obviously concerned to save the equity of redemption. We are of opinion that no summons for making decree absolute for foreclosure was ever served at all, and that the decree obtained was irregular and must be set aside.

(1) (1909) 36 Cal. 323=36 I.A. 32=13 C.W.N. 249=6 A.L.J. 84=5 M.L.T. 126=9 C.L.J. 165=11 B.L.R. 227=1 I.C. 122=19 M.L.J. 115 (P.C.).

We now come to the question of procedure which has been much argued before us. It was suggested on behalf of the plaintiffs-respondents when they began to realise that the *ex parte* decree absolute was doomed that we ought to send the case back, and allow the parties to renew the conflict as from April, 1922, when the decree which we now set aside was obtained and renew it, probably before a fifth Judge, at such time as the Court, already overwhelmed with work, is able to fix, after fresh devastating efforts to serve such of the defendants as may then be still surviving, or their legal representatives. We are unable to take this view. We are seized of the whole matter. The record is here. The rights of the parties are clear. The preliminary decree, even after the expiration of 3 years and 4 months, ought to follow the judgment. In our opinion, as we have said, the preliminary decree of the 5th of February, 1921 is waste paper, and no decree absolute based upon it would be binding on the defendants.

Sir Tej Bahadur Sapru, on behalf of the plaintiffs, contended that he was entitled to stand on that decree and to enforce foreclosure, although he had never obtained an order for it from any judicial tribunal. He suggested further, that if we left the defendants to take such steps as the Code and Rules provide, either by way of appeal or review, to set aside that preliminary decree he had a complete technical and equitable answer. It is open to his clients, if the case should go further, to raise any objection they may be advised. So far as we were able to follow his argument, he relied upon a kind of equitable estoppel by conduct. But there can be no estoppel against a litigant arising out of the wrongful acts of the Court, permitted or performed by its own officials, and we can see no ground of equity, justice or good conscience, which would justify us in upholding this preliminary decree.

The learned Judge says that the defenddants were well aware of all that was going on, but the learned Judge himself appears to be unaware that no notice for a decree absolute for foreclosure was even issued from his Court. Apart from any provision of the Code, we are of opinion that we have inherent power to correct such a mistake by any means consistent with the ends of justice. Even if the defendants have not taken every step open to them, or have not shown a prompt sense of their obligation, or a right appreciation of the appropriate procedure, it is nonetheless as Lord Justice Bowen said in the case of *H. Cropper* v. *Smith* (2) the object of Courts to decide the rights of parties. and not to punish them for mistakes they make in the conduct of their case, by deciding otherwise than in accordance with their rights. But it seems to us further that section 151 could not be invoked more appropriately, than in a case like this, for the purpose of correcting such a miscarriage of justice appearing on the face of the proceedings, and there is abundant authority, which it would be wearisome to cite, there being no case quite analogous to this one, where the Courts in India have held themselves justified, under this salutary provision, in making such orders in the nature of consequential orders, as may be necssary for the ends of justice, and to prevent an abuse of the process of the Court, which we take to include the idle multiplicity of proceedings.

We therefore exercise the inherent powers reserved to us by this section, and set aside not only the decree absolute but the preliminary decree of the 5th of February, 1921. and restore the parties to their rights and obligations respectively under the judgment of Babu Lachimi Narain of that date. We are satisfied although every sort of argument was addressed to us designed to show that we had no such powers that we have power in the light of what has happened, and what must now be done, to extend the time for payment. The 6 months allowed in 1921 has been effaced chiefly by the plaintiffs' own acts. But the Code seems to us to be clear on the subject, as, apart from the provisions of Order 34, section 148 enables a Court to extend any time fixed by the Court for the doing of any act allowed by the Code. The time fixed by Lachmi Narain was clearly a time which he was allowed by the Code to fix, and we have power to extend it, and we difier from the decisions and dicta which have been cited to us from judgments in this Court, which seem to hold that the Court has no power to extend the time fixed by its own decree. We are further satisfied that under section 151, we have power, not merely to set

(2) 16 Ch. D. 700.

aside this abortive proceeding, but to pass such order as the Court ought to have passed itself, and can, if we refer the matter back, still pass. The sole difficulty that has troubled us has been in determining, how the interest should run during this litigious interval. The matter seems to us to be due to faults on both sides, and also to faults on the part of the ministerial officers of the Court. In such a matter, interest partakes of the nature of damages, which their Lordships of the Privy Council have said, the Court may mould according to its will. We think that the plaintiffs ought to have the contractual rate for the period granted by the Subordinate Judge, namely from the 5th of February, 1921, to the 5th of August, 1921, and after that date, the Court rate down to the date of sale or payment a result which seems to do rough justice to both parties.

We, therefore, direct a preliminary decree for sale to be drawn up, and we give the plaintiffs 6 months from the date of this judgment for payment. In other respects the decree is to follow the usual provisions applicable to a decree for sale under Order 34, rule 4, C.P.C. The appellants must have the costs of this appeal on the higher scale and of the proceedings in the Court below.

Appeal allowed.

---

*1924 Allahabad 825.

WALSH, A.C.J. AND RYVES, J.

Kallu Shah and another—Defendants-Appellants

v.

Raheem Baksh—Plaintiff-Respondent.

L. P. A. No. 146 of 1922, decided on 13th May, 1924, under section 10 of the L. P. against the judgment of Mr. Justice Gokul Prasad, dated 19th July, 1920.

(a) *Easements Act, S. 60—Construction of a house.*

Construction of a house by licensee acting on license makes license irrevocable. [P. 825, C. 2.]

(b) *Easements Act, S. 56—License becoming irrevocable.*

The becoming irrevocable of a license does not make it transferable. [P. 825, C. 2.]

Iqbal Ahmad—for the Appellants.

S. C. Das—for the Respondent.

Gokul Prasad, J.:—This is a defendant's appeal arising out of a suit for possession of the site of a house built by the defendants. The defendants denied the plaintiff's title. The defendant No. 1 the owner of the house transferred it to the defendant No. 2. The first Court decreed the plaintiff's claim holding that the plaintiff was *mutwalli* of the land on which the house in dispute stood and that the defendant a mere licensee denied the plaintiff's title and was therefore liable to ejectment. The defendants went up in appeal and the learned Judge of the lower appellate Court has come to the conclusion that the plaintiff was the *mutwalli* and the defendant licensee had denied the plaintiff's title, but he held that such denial did not necessarily lead to a decree for dispossession of the defendant licensee. He however directed dispossession of the transferee, the defendant No. 2. The defendants come here in second appeal and their contention is that because of the building the license has become irrevocable and the transfer in favour of the defendant No. 2 was a perfectly valid transfer. Next it is contended that the decree maintaining the possession of defendant No. 1 and directing dispossession of defendant No. 2 the transferee was illegal. Now as to the first point the mere fact that the license had become irrevocable does not necessarily imply that the licensee acquired a right to transfer the license or the building. A license is ordinarily only a personal right and carries with it the incident of non-transferability. Under these circumstances it is impossible to hold with the appellant transferee that the decree for his ejectment was a decree bad in law. He did not and could not acquire any right by the transfer in his favour which was not warranted by law. The decree of the lower appellate Court was a correct decree so far as he was concerned and I dismiss this appeal with costs. It appears from an office report that a deficiency of Rs. 10 is due from the plaintiff, respondent for the first Court. The decree of this Court will not be prepared till the deficiency is made good by the plaintiff-respondent. He must do this within ten days from to-day, and if so deposited the office is to receive the deficiency. In case the deficiency is not made good the suit will stand dismissed in all Courts.

Upon the L.P.A. being heard the following judgment was delivered :—

There is nothing in this appeal. It was clearly rightly decided. We dismiss it with costs.

Appeal dismissed.

* 1924 Allahabad 826.

WALSH, A.C.J. AND RYVES, J.

Mt. Kunti and others—Defendants-Appellants

v.

Gajraj Tewari—Plaintiff-Respondent.

L. P. A. No. 161 of 1922, decided on 27th May, 1924, under section 10 of the L. P. from the judgment, dated 19th July, 1922.

Part-performance—Applicability— Principle is that where there is executory contract like compromise by unregistered deed transferring property it can't be enforced, but mutual arrangement carried out must be enforced.

Where the conduct of the parties creates a situation in which the parties stand upon nothing but an engagement which is not final or complete the *locus penitentiae* is not excluded, that is to say where the parties have given mutual promises but nothing has been done, the consideration is not performed on either side and the contract remains merely executory, then unless it is clothed in the legal forms which make it binding it cannot be enforced against either party by the other, but where parties agreeing not to go to law and not to fight out their disputes but by a mutual arrangement carry into execution their mutual promises so that the original contract by which they decided to terminate the disputes becomes an executed contract on both sides, and nothing remains to be done, the parties continuing each in the enjoyment of the interest which the other agreed that he should take, the Courts in India applying the rule of equity and good conscience will not permit either party who has bound himself both by the contract and by its performance to repudiate what he has done, and will also prohibit any person claiming under him from attempting the same thing. (42 Cal, 801; 14 A.L.J. 449, *Foll.*) [P. 826, C. 2 and P. 287, C. 1.]

P. L. Banerji—for the Appellants.

Iqbal Ahmad—for the Respondent.

Judgment:—In our view this decision cannot be upheld. The point is one which has been very much discussed in a variety of forms in which it arises, but the differences of opinion which are alleged to exist are not really differences of principle, or in the view taken of the law, but differences in the application of the principle to the exact set of facts. The moment a decision of a High Court obtains publicity and is believed to lay down the principle that a contract entered into whereby members of the same family, or two branches of the family, or two persons not connected by blood but having interests about which they are not agreed and who come to some sort of compromise in order to avoid further disputes—the moment it is believed that the Courts will not give effect to that class of arrangement when it has been mutually carried into effect, there is certain to be a crop of litigation in which some party seeks to apply the principle of the new decision to himself and to escape from the bargain he has entered into because in the light of subsequent events he has come to regret it. But a Court which deliberately ignores, or attempts to tear up a definite arrangement come to between people *sui juris* and carried into effect, will find itself sooner or later confronted with a *reductio ad absurdum* of its own decision. In our view the principle is clearly marked in all the decisions which have been referred to. Where, to quote the head-note from the decision of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (1), the conduct of the parties creates a situation in which the parties stand upon nothing but an engagement which is not final or complete the *locus penitentiae* is not excluded, that is to say, where the parties have given mutual promises but nothing has been done, the consideration is not performed on either side, and the contract remains merely executory, then unless it is clothed in the legal forms which make it binding. it cannot be enforced against either party by the other. For example a compromise to transfer property of over Rs. 100, in value which requires a registered transfer deed, creates no equitable interest in India and confers no legal right. In the absence of a registered deed, no transfer takes place, and the absence of a transfer deed and of the other requirements of the statutory law, provide a defence to a suit for example, for specific performance. Such a case is the case on which the learned Judge in the judgment now under review relied, reported in *Jagrani* v. *Bisheshar Dube* (2). It was a Full Bench case. The *ratio decidendi* in that case was, that nothing had taken place except that there was a document, or petition presented to the Revenue Court, and a mutation order made without objection on either side. The Chief Justice points out in his judgment that the parties setting

(1) (1915) 42 Cal. 801=42 I.A. 1=17 B.L.R. 420=21 C.L.J. 231=2 L.W. 258=23 M.L.J. 548=19 C.W.N. 250=13 A.L.J. 239=17 M.L.T. 143=(1915)M.W.N. 621=28 I.C. 930 (P. C.)

(2) (1916) 38 All. 366=35 I.C. 701=14 A.L.J. 449 (F.B.).

up the binding character of the arrangement were unable to adduce any evidence showing that the other side had transferred their interests in the property in dispute, or anything except the entry of a name recorded by the mutation officer. As the Chief Justice in that case says, all that the mutation officer had to do was to order the name to be recorded, the parties consented that the names of certain persons be recorded, and that this conferred no title upon them. If the facts of this case had been in accordance with the facts of that case the learned Judge would have been quite right to have held himself bound by the rule laid down in that Full Bench.

On the other side of the line may be mentioned a variety of cases, both in the Privy Council, and in this Court of which it may be compendiously stated that they enunciate definitely, and finally the principle, that where parties agreeing not to go to law and to fight out their disputes, but by a mutual arrangement, such as is frequently described, because it more frequently happens in families, as a "family arrangement," carry into execution their mutual promises so that the original contract by which they decided to terminate the disputes becomes an executed contract on both sides, and nothing remains to be done, the parties continuing each in the enjoyment of the interest which the other agreed that he should take, the Courts in India, applying the rule of equity and good conscience, will not permit either party who has bound himself both by the contract and by its performance, to repudiate what he has done, and will also prohibit any person claiming under him from attempting the same thing. We cannot do better than quote, amongst the cases illustrating this principle, a decision to which the learned Judge whose judgment is now under review was himself a party *Bahadur Singh* v. *Ram Bahadur* (3). The law is there carefully reviewed by my brother Ryves. He bases himself on two authorities of the Privy Council, namely, *Kanhaiya Lal* v. *Briji Lal* (4) and *Mt. Hardei* v. *Bhagwan Singh* (5) and he ultimately explains it, as being a branch of the law of estoppel. Speaking for myself, as a member of this Court, I am not satisfied that that is the soundest method of putting it (though I do not say it is not a branch of the law of estoppel) because I have noticed in some decisions with which I disagree, that the answer has been suggested that there can be no estoppel against statutory prohibition. I prefer to base it on that principle of mutual performance, or part performance, which I think is sufficient, following the principle laid down in the leading authority of *Maddison* v. *Alderson* (6) and applied by their Lordships of the Privy Council in the well-known case of *Muhammad Musa* v. *Aghore Kumar Ganguli* (1). On a superficial perusal of the learned Judge's judgment in this case it would appear that he was right, but it is pointed out by Mr. Peary Lal Banerji before us that he overlooked the salient finding of fact of the lower appellate Court which distinguishes this case from the Full Bench case in 14 A. L. J. already referred to. That salient finding of fact is contained in the closing passage of the District Judge's judgment where he dwells upon the conduct of the parties, each of whom had gone into possession of, and possessed as their own, the half share which they had mutually agreed to accept; and that they had been in such possession for nine years without any attempt on either side to dispute the arrangement. He draws attention in his judgment to the fact that the deed of compromise is not on the record but that the admission made on oath in evidence by the plaintiff himself supplied the gap made by its absence. Indeed, having regard to some of the *dicta* in the Full Bench case in 14 A.L.J. it would appear that the less documents there are to support a claim of this kind the less difficulty the litigant is likely to experience in the lower Court. In our view the appeal succeeds and the decree of the lower appellate Court must be restored. We accordingly allow this appeal with costs of both the hearings in this Court on the higher scale.

Appeal allowed.

(3) 1923 All. 204=45 All, 277=21 A.L.J. 140=4 L.R.A. Civ. 105.

(4) (1918) 40 All. 487=45 I.A. 180=22 C.W.N. 914=8 L.W. 212=24 M.L.T. 23=35 M.L.J. 459=16 A.L.J. 825=(1918) M.W.N. 709=28 C.L.J. 894=5 Pat. L.W. 294=47 I.C. 207=20 Bom. L.R. 1048 (P. C.).

(5) (1920) 24 C.W.N. 105=13 L.W. 486=50 I.C. 812=2 Pat. L.T. 237 (P.C.)

(6) 8 A.C. 467=52 L.J. Q.B. 737=49 L.T. 303=31 W.R. 820=47 J.P. 821.

* 1924 Allahabad 828.

PIGGOTT, J.

Man Singh—Defendant-Appellant

v.

Ram Nath—Plaintiff-Respondent.

S. A. No. 384 of 1922, decided on 28th June, 1923, from the decision of the District Judge of Meerut, dated the 8th February, 1922.

(a) *Limitation Act, Art. 29 —"Legal process" meaning of distraint under Agra Tenancy Act is seizure of moveable property under legal process.*

A distraint effected under Agra Tenancy Act (II of 1901) is a seizure of moveable property under legal process because it is done under the special provisions of the Local Act and subject to the due observance of the procedure therein laid down. [P. 829, C. 2.]

(b) *Limitation Act, Art. 120—Article should never be invoked if there is any other article capable of covering the suit.*

Article 120 should never be invoked if there is any other article in the schedule which upon a reasonable interpretation of its language seems to cover the particular suit with which the Court is dealing. [P. 830, C. 1.]

(c) *Agra Tenancy Act, S. 142—Civil Court has no jurisdiction but only the Revenue Court.*

A matter covered by S. 142 is beyond the jurisdiction of a Civil Court and is entirely within the cognisance of a Revenue Court. [P. 830, C. 1.]

P. L. Banerji—for the Appellant.

A. Sanyal—for the Respondent.

Piggott, J. :—The defendant to the present suit had brought a suit against the present plaintiff for arrears of rent under the Tenancy Act, claiming that the latter was his tenant in respect of certain land. The trial Court dismissed that suit, but it was decreed by the District Judge on first appeal on the 18th of July, 1916. Against that decree Ram Nath, the present plaintiff, appealed to this Court. Unfortunately his appeal was not disposed of until the 19th of December, 1918, when the decision of the District Judge was reversed and the decree of the trial Court dismissing the suit was restored. There was an appeal against this decision under the Letters Patent, but that appeal failed. In the interval between the 18th of July 1916 and the 19th of December, 1918, the present defendant, Man Singh, had taken advantage of the position which he occupied, as holding a decree for rent passed by the District Judge, to realise the rent of the same land from Ram Nath, for each of three successive years, by means of the process of distraint provided by section 119 and the following sections of the Local Tenancy Act (No. II of 1901). In each case, as soon as the standing crops were distrained by Man Singh under his alleged proprietary right, Ram Nath paid up the arrears of rent on account of which the distraint had been effected. The dates of payment are given as the 13th of December, 1916, the 18th of January, 1918 and the 3rd of January, 1919. When the decree of the District Judge was reversed on appeal, it does not seem to have occurred to Ram Nath to consider whether relief in respect of the payments, thus obtained from him on the strength of the erroneous decree of the District Judge, could not be obtained by means of a claim for damages or compensation, preferred to the Court of first instance, under section 144 of the Code of Civil Procedure. At any rate that point has not been raised in the present litigation and is not before me for consideration. Ram Nath waited until the 12th of July, 1921, when he instituted the present suit, claiming a total sum of Rs. 550 on account of the payments which he had made in consequence of the three distraints levied by Man Singh together with interest by way of damages. In defence Man Singh pleaded that the suit as brought was not cognisable by the Civil Court and that, in any event, the claim was barred by limitation. Both these pleas have been repelled by both the Courts below and both are raised before me in second appeal. I think it will simplify the decision of this appeal if I deal first with the question of limitation. Assuming, for the present, that this was a suit the cognizance of which by the Court in which it was instituted was barred, neither by the second clause of section 144 of the Code of Civil Procedure, nor by section 167 of the Tenancy Act (Local Act No. II of 1901), the question is, what article of the first schedule to the Indian Limitation Act is to be considered applicable to the plaintiff's cause of action. In the Courts below article 96 of the Schedule seems to have been suggested on the plaintiff's behalf. That article is in my opinion inapplicable. The plaintiff did not make these payments under any mistake. He knew that Man Singh was not really his landlord in respect of the land the produce of which had been taken in distraint. His position was that there had been an erroneous decision by the District Judge,

affirming in favour of Man Singh a right which the latter did not possess, and that he himself was prosecuting an appeal against that erroneous decision. I find myself quite unable to formulate the mistake on the ground of which it is suggested that Ram Nath made these payments. The plaintiff however is on safer ground when he falls back on article 120 of the schedule and challenges the defendant to suggest some other article as applicable to the present suit. Obviously, unless some other article can be found, the plaintiff is entitled to avail himself of article 120. It cannot be denied that he has a cause of action against Man Singh on account of these payments, whatever controversy there may be on the question whether he has availed himself of his proper remedy in law. If therefore no other article of the schedule can be suggested, the suit must be referred to article 120 and is within time. The defendant has suggested article 29 of the aforesaid schedule, and this seems to me the article which obviously applies to the case. Its provisions can only be avoided on one of the two contentions, either, (*a*) that Man Singh's seizure of the growing crops on Ram Nath's land was not wrongful at the time when it took place; or, (*b*) that it was not a seizure effected under legal process. In my opinion the seizure was undoubtedly wrongful. It has now been determined between the parties that Man Singh was not the land-holder, nor was Ram Nath his tenant in respect of the land on which the crops distrained upon were growing. Man Singh had no right to distrain those crops on a claim for arrears of rent which were not in fact due to him. His seizure was none the less wrongful because it was done on the strength of an erroneous judicial decision in his favour which has since been reversed in appeal. The lower appellate Court has avoided the applicability of this article by saying that a distraint under the Local Tenancy Act is not a seizure of property under legal process. The right of distraint is a special right conferred upon land-holders in this province by the provisions of the Tenancy Act. The right has to be exercised in accordance with law, and a land-holder who deviates from the provisions which regulate the whole process of distraint is liable to have to defend a suit for compensation under the first clause of section 146 of the Tenancy Act. A notice has to be served on the tenant through the Court and, under certain circumstances, assistance may be obtained from an officer deputed by the Court in making the distraint. We do not know in the present case if such assistance was invoked by Man Singh on any one of the three occasions which have given the plaintiff his cause of action for the present suit: but the point does not appear material. In my opinion a distraint effected under the Local Tenancy Act (No. II of 1901) is a seizure of moveable property under legal process, because it is done under the special provisions of the Local Act and subject to the due observance of the procedure therein laid down. Unfortunately this finding of mine on the question of limitation is in itself fatal to the plaintiff's suit. I do not deny the force of the contention that Ram Nath was put in a difficulty by reason of the long interval of time which elapsed before the erroneous decision given against him by the District Judge in the suit for arrears of rent was set right by this Court on second appeal. Nevertheless it seems to me that, if he had any faith in the justice of his cause or in the legal acumen of this Court, he could have protected himself in a variety of ways. In any event it was incumbent on him to consider carefully the limitation period applicable to any suit which he might think of bringing. There was no reason why he should not, after this Court's decision of December the 19th, 1918, have taken prompt action, at any rate with regard to the distraint levied upon him in the first month of that same year. Nor do I altogether understand why, on any possible view of the case, he submitted to the distraint levied a year later. Presumably, before he made this payment on the 3rd of January, 1919, he knew of the decision in his favour pronounced by this Court 15 days earlier. Whatever may be said about his failure to contest the other two distraints, he would have been on strong ground if he had adopted the remedy provided for him by the Tenancy Act itself in respect of the last of the three distraints. As regards the first distraint, in connection with which he made his payment of the 13th of December, 1916, it would have been possible for Ram Nath to have brought a suit for the recovery of that money within 12 months of the distraint, or of

the payment and to have asked the trial Court to suspend the decision of that suit until the determination of the appeal then pending in this Court. Whatever sympathy I may feel for the plaintiff in this suit, I cannot stretch the provisions of the Indian Limitation Act in his favour when they seem to me to be clearly against him. Article 120 of the first schedule to the said Act should never be invoked if there is any other article in the schedule which, upon a reasonable interpretation of its language, seems to cover the particular suit with which the Court is dealing, and in my opinion article 29 obviously covers the present suit supposing it to be one cognizable at all by the Court in which it was instituted.

This brings me to the other point raised by the appellant on which I do not propose to say much, because the result of the appeal is determined by the finding which I have already recorded. In my opinion, however, my decision on the question of limitation involves a finding against the plaintiff on the question of jurisdiction also. If the article to which I have referred, No. 29 of the first schedule to the Indian Limitation Act, really covers the present case, then the suit now before me is essentially one for which provision is made within the four corners of the Tenancy Act itself. I have no doubt that the legislature intended Chapter IX of the Tenancy Act, sections 119 to 149 inclusive, to deal exhaustively with all disputes which could possibly arise by reason of the exercise of the power of distraint, by any person claiming to be a land-holder, against any person whom he alleged to be his tenant and from whom he alleged an arrear of rent to be due. I have no doubt that the framers of the Tenancy Act did not contemplate the entertainment by any Court other than a Revenue Court of a suit like the present, which is in substance a suit for compensation for wrongful distraint. Courts other than Revenue Courts are debarred from taking cognizance of any dispute or matter in respect of which a suit or application under the Tenancy Act itself could have been made. Now, it is denied, and cannot be denied for a moment, that section 142 of the Tenancy Act provides a remedy for any person whose crops have been distrained upon by any person claiming to be his land-holder and entitled to an arrear of rent, if the owner of the said crops, either denies the title of the distrainer, or denies that the arrear of rent in respect of which the distraint has been effected is actually due. On each of the three occasions which are alleged to have given Ram Nath his cause of action for the present suit, his crops had been distrained upon by a person whose title as land-holder he denied, and on account of an alleged arrear of rent for which Ram Nath said that he was in no way liable. The case as put to me in argument on behalf of Ram Nath is not that he could not have instituted a suit to contest each one of these distraints, but that he could not have done so with any hope of success, so long as the District Judge's decision of the 18th of July, 1916, remained in force and the error committed by the District Judge had not been set right by this Court in second appeal. I am afraid there is no question, in the provisions of the law which I am bound to administer, as to the hopes of success or certainty of failure with which suits to contest a distraint might or might not have been instituted. The question I have to consider is whether, on the state of facts and of law which Ram Nath has all along asserted, and which he has successfully asserted on final appeal to this Court, it was or was not open to him to contest each of these distraints by a suit brought under section 142 of the Local Tenancy Act. There is even something to be said against the argument that such such suits were certain to fail. After all, in the original suit for arrears of rent, the decision of the trial Court, presumably the Court of the Assistant Collector, had been in his favour. He could have pointed out that an appeal was pending against the decision of the District Judge, which therefore could not have the effect of *res-judicata*, and he might have asked for a fair reconsideration of his case on the merits. In the worst event he could have asked the Court to release his crops upon security, under the appropriate provisions of the Tenancy Act, and to postpone the further hearing of the suit brought to contest the distraint until the determination of the second appeal pending in this Court. I cannot help thinking, moreover, that if a suit had been filed to contest the first distraint, and even a short adjournment obtained from the Assistant Collector's Court, an attempt might have been made, with fair chances of success, to obtain from this Court a

special order expediting the hearing of the appeal against the decision of the District Judge.

For these reasons I am satisfied that this appeal must succeed. The defendant Man Singh has in my opinion an adequate answer in law to the claim now made upon him. There are no equities in his favour; and I do not propose to allow him any portion of his costs. As an honest man he ought to have refunded the money. He has taken refuge behind the statute of limitation and has taken advantage of the fact that the plaintiff has been badly advised in the means by which he has sought to enforce his right. My order therefore is, that I set aside the decrees of both the Courts below and dismiss the suit, leaving the parties to bear their own costs throughout.

Appeal allowed.

1924 Allahabad 831.

DANIELS, J.

(*Sayed*) *Sultan Hussain and others*—Plaintiffs-Appellants.

v.

Jwala and others—Defendants-Respondents.

S. A. No. 528 of 1922, decided on 24th July, 1923, against the decree of the District Judge of Farrukhabad, dated 6th January, 1922.

(a) *Pleading—Variation between pleading and proof is not always fatal to suit or defence.*

It is not every variation between pleading and proof which is fatal to a suit or a defence. Where a custom was alleged in defence but not proved and it was not framed as a distinct issue.

Held, that it did not prejudice the defence. [P. 831, C. 2.]

(b) *Landlord and tenant—Permission by landlord to plant grove—Effect to convert the tenant into a grove-holder with transferable rights.*

When permission is given by the zemindar to plant a grove on the non-occupancy tenure the effect of this is to put an end to the tenancy as such and to substitute therefor a fresh contract between the parties by which the position of the tenant is converted into that of a grove-holder with transferable rights; the case is much stronger where the land is held with occupancy rights. It is most unlikely that the tenant would agree to spend the considerable sum of money necessary to convert the plot into a grove if he was still to remain liable to be turned out of the land and to loss of the trees at any time. [P. 831, C. 2.]

Baleshwari Prasad—for the Appellants.

M. A. Aziz—for the Respondents.

Judgment:—This was a suit for damages for certain trees alleged to have been wrongfully cut and for an injunction against the defendants forbidding them to cut any further trees in a plot numbered 378. The plaintiffs-appellants are the Zemindars. They alleged in their plaint that the trees were of spontaneous growth, but pleaded in the alternative that even if they had been planted the first defendant who is an occupancy tenant in the village, had no right to transfer them. The trees which have been cut were sold by the first defendant to the second and third defendants and cut down by them. The first defendant pleaded that he was the owner of the trees, which were planted by his ancestor with the permission of the Zemindar, and that he had a right to sell them. He also alleged a custom by which tenants planting a grove had a right to sell the trees. A great deal has been made in argument of the fact that the learned Judge finds that the *wajib-ul-arz* does not support the special custom relied on and that it is not proved. It has been argued that on this finding the suit should have been decreed without going into other matters, but as the Calcutta High Court remarked in a recent case it is not every variation between pleading and proof which is fatal to a suit or a defence. The main defence of the defendant was that he was the owner of the trees and was entitled to sell them, and it was on this question and not on the question of special custom that an issue was framed in the trial Court.

The facts found by the Court below are that this grove was planted some 40 years ago with the permission of the Zemindar by the defendant's ancestor on what was at the time a non-occupancy holding. He further finds that the grove was planted only a year or two after the commencement of the tenancy. The area which was converted into grove originally formed a portion of a larger plot but at the last settlement it formed a separate plot numbered 378. The learned Judge has relied on the reported ruling in *Jalesar Sahu* v. *Rajmangal* (1), and following that ruling has held that when permission was given by the Zemindar to plant a grove on the non-occupancy tenure the effect of this was to put an end to the

(1) (1921) 43 All 606=63 I.C. 487=19 A.L.J. 616.

tenancy as such, and to substitute therefor a fresh contract between the parties by which the position of the defendant was converted into that of a grove-holder with transferable rights. The case related to a non-occupancy holding but the case is much stronger where the land was held with occupancy right as in the present case. It is most unlikely that the tenant would agree to spend the considerable sum of money necessary to convert the plot into a grove if he was still to remain liable to be turned out of the land and to loss of trees at any time.

In appeal the plaintiffs have relied on an earlier decision in *Daya Kishen* v. *Mohammed Wazir Ahmed* (2). That decision is to my mind clearly inconsistent with the decision in *Jalesar Sahu* v. *Rajmangal* (1) and though in the later ruling an attempt was made to distinguish it on what appears to me very slender grounds, it appears to me that the earlier ruling must now be considered to have been overruled and to be no longer good law. The later ruling has been followed and approved in a number of cases by me personally, *e.g. Baijnath Singh* v. *Chandrapal Singh* (3), and I believe by other Judges also, and it has rightly been held by the learned District Judge to govern the present case. Following that ruling I dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(2) (1915) 13 A.L.J. 833=30 I.C. 565.
(3) 1923 All 553=21 A.L.J. 457=4 L.R.A C. 366.

---

* 1924 Allahabad 832.

KANHAIYA LAL, J.

Gaya Singh and others—Plaintiffs—Appellants.

v.

Surajbali Singh and others—Defendants—Respondents.

S. A. No. 549 of 1922, decided on 3rd July, 1923, against the decree of the Subordinate Judge of Jaunpur, dated 5th January 1922.

• (a) *Transfer of Property Act, S. 60—Suit for redemption can be resisted if subsequent to the original mortgage a subsequent charge is created on the same property.*

Where in the case of a mortgage by conditional sale it was shown that subsequent to the original mortgage another sum was borrowed by the mortgagor who also bound himself by a convenant not to redeem the first mortgage nor to transfer the property before paying in addition to the original mortgage money the further amount borrowed also and the document was described as a deed of further charge.

Held, that a suit for the redemption of the property by paying the amount of the first mortgage alone could be resisted. [P. 832, C. 2.]

(b) *Transfer of Property Act, S. 59—Illiterate mortgagor—Personally signing by illiterate mortgagor is not necessary in case of mortgage executed.*

Prior to Transfer of Property Act it is enough if some one has signed it at mortgagor's instance. [P. 833, C. 1.]

(c) *Evidence Act, S. 90—Presumption.*

Document duly registered by executants and over thirty years old is admissible where there is no reason to doubt its genuineness. (31 All. 482, Foll.) [P. 833, C. 1.]

H. Mushtaq Ahmad—for the Appellants.

Mukhtar Ahmad—for the Respondents.

Judgment:—This appeal arises out of a suit for redemption of a mortgage by conditional sale effected by Ram Dayal Singh and others in favour of Sukhai Singh and Gopal Singh on the 12th of January 1862. The suit was resisted by the defendant No. 1 who claimsd in addition the money due on what he described as two other deeds of further charge. One of them was disallowed by the court of first instance but allowed by the lower appellate court, and it forms the subject-matter of the present appeal. The latter deed recited the earlier mortgage by conditional sale and stated that a further loan of Rs. 400 was taken from the mortgagees, which was to be included in the money due on the earlier mortgage and repaid with it. It also contained a covenant that until the money due on the latter deed was paid, the mortgagors could not be entitled to redeem the mortgage by conditional sale or to transfer any portion of the mortgaged property elsewhere; the deed was described as a deed of further charge (*dastawez tamassuk mashrat-ul-rehan*). The language of the document, taken as a whole, clearly shows that the parties intended that the money due on the subsequent transaction, represented by the above deed of further charge, was to be consolidated with that due on the earlier mortgage by conditional sale, and that the said mortgage by conditional sale was not to be redeemed till the money due on the deed of further charge was paid. In fact the mortgagors had agreed not to transfer the property elsewhere till the money due

on the deed of further charge was repaid. The terms of the documents correspond very nearly with the terms of the documents which formed the subject of consideration in *Ranjit Khan* v. *Ramdhan Singh* (1) and *Har Prasad* v. *Ram Chander* (2). The learned counsel for the appellants has referred to the decisions in *Baldeo Rai* v. *Murli Rai* (3) and *Kesar Kunwar* v. *Kashi Ram* (4). But the terms of the documents considered in those cases were in no sense indentical with those which form the subject of consideration in the present appeal. In the former case there was no indication afforded by the deed of the creation of any further charge and all that it provided was that the money due on the later transaction was to be paid first, that is to say before that due on the earlier deed was paid. In the latter case the contract of consolidation was not explicit as in the present instance, and the document was not described as a deed of further charge.

It is also urged that the lower appellate Court was not justified in presuming the genuineness of the deed of further charge in question, inasmuch as the deed did not purport to have been signed by the executants personally or to bear their marks. The deed was, however, executed on the 12th of January 1862 before the Transfer of Property Act of 1882 had come into force, and it was usual at that time that the signatures of the executants and all such attesting witnesses, as were illiterate, were made by the scribe at their instance or request; and they were treated as signatures made by an authorised agent and as effectual as the signatures or marks of the executants themselves. The document was duly registered by the executants and over thirty years old; and there is no reason to think that it was otherwise than genuine. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) (1909) 31 All. 482=2 I.C. 859=6 A.L.J. 654.
(2) (1921) 19 A.L.J. 807=63 I.C. 750.
(3) (1912) 10 A.L.J. 120=16 I.C. 638.
(4) (1915) 37 All. 634=13 A.L.J. 889=30 I.C. 777.

1924 * Allahabad 833.

KANHAIYA LAL, J.

Ram Sarup—Defendant-Appellant
v.
Mohan Lal—Plaintiff-Respondent.

S. A. No. 566 of 1922, decided on 4th July, 1923, against the decree of the Additional Subordinate Judge of Bareilly, dated 26th of November, 1921.

Mortgage—Of future crops is enforceable as an executory agreement and creates valid equitable charge—But is unavailing against a bona fide purchaser without notice of prior charge.

A mortgage of a future crop neither sown nor cultivated at the time is recognised and enforced in this country as an executory agreement, binding on the parties to the transaction. The transaction is not governed by the Transfer of Property Act or by the Indian Contract Act, in so far as it is neither a mortgage of immoveable property nor a pledge of existing moveable property. It is in the nature of an agreement to mortgage moveable property that may come into existence in future and as such it creates an equitable charge which is valid and enforceable. But a *bona fide* purchaser of such property without notice of the prior charge is not liable for the money due on such a charge, for the interest of the charge-holder is more or less of the nature of an equitable interest, which it would be undesirable to enforce against a person who was not a party to the contract and had no notice of the charge (13 Cal. 262; 10 All. 139; 35 M.L.J. 450, *Ref.*) [P. 833, C. 2 and P. 834, C. 1.]

S. C. Das—for the Appellant.
K. N. Malaviya—for the Respondent.

Judgment:—A mortgage bond was executed by Sukhrani, the first defendant, in favour of the plaintiff on the 25th of May, 1917, whereby he hypothecated his future sugarcane crop for the years 1325 to 1327 fasli. The dispute in the present appeal relates to sugarcane crop of 1327 fasli, which has been appropriated by the defendant-appellant No. 5, under a sale effected in his favour by defendant Nos. 2, 3 and 4, who are stated to have purchased the same from defendant No. 1. The question for consideration in this appeal is whether the mortgage can be enforced against the defendant-appellant. A mortgage of a future crop, neither sown nor cultivated at the time, is recognised and enforced in this country as an executory agreement, binding on the parties to the transaction. The transaction is not governed by the Transfer of Property Act or by the Indian Contract Act, in so far as it is neither a mortgage of immovable property nor a pledge of existing movable

property. It is, to use the language adopted in *Misri Lal* v. *Mozhar Hossain* (1) in the nature of an agreement to mortgage moveable property that may come into existence in future and as such it creates an equitable charge which is valid and enforceable. But as pointed out in *Bansidhar* v. *Sant Lal* (2) and *Sreeram Naresh* v. *Bammireddi Venkata Ramiah* (3) a *bona fide* purchaser of such property without notice of the prior charge is not liable for the money due on such a charge, for the interest of the charge-holder is more or less of the nature of an equitable interest, which it would be undesirable to enforce against a person who was not a party to the contract and had no notice of the charge. The defendant-appellant denied that he had any notice of the charge and the question of notice must therefore be tried before any liability can be fastened on him in respect of the money due thereon. The defendant-appellant was added as a party on the application of the plaintiff after the institution of the suit. The circumstances in which he made the purchase are not quite clear. In fact the title deed, if any, under which he purchased has not been produced. The lower appellate Court is therefore directed to determine after taking such additional relevant evidence as the parties may adduce, whether the defendant-appellant purchased the sugarcane crop in question or its juice and had he any notice of the mortgage in suit at the time of such purchase?

Three months' time will be allowed for the return of the finding and ten days will be allowed after the receipt of the finding for the parties to file objections.

Case remanded.

(1) (1886) 13 Cal. 262.
(2) (1888) 10 All. 133=(1888) A.W.N. 35.
(3) (1918) 42 Mad. 59=35 M.L.J. 450=8 L.W. 517=24 M.L.T. 454=47 I.C. 976=(1918) M.W.N. 718.

1924 Allahabad 834.

MUKERJI, J.

Bijai Bahadur—Plaintiff-Appellant.

v.

Parmeshwari Ram and others—(Defendants.)-Respondents.

S. A. No. 612 of 1922, decided on 10th December, 1923, from the decree of the District Judge of Ghazipur, dated the 31st January, 1923.

(a) *Civ. Pro. Code, S. 11—Combined judgment in two appeals—Appeal to High Court filed only against one of them but parties to the other were impleaded—Appeal is maintainable—Civ. Pro. Code, O. 41, r. 4.*

Where a combined judgment was given in two appeals in the lower appellate Court and in the High Court only one appeal was filed against the judgment but it was filed by the principal parties and also the parties to the other appeal were impleaded and where it was objected that the omission to file a distinct appeal against the other appeal should cause the dismissal of the appeal in the High Court. *Held* that the objection was bad. (21 A. L. J. 465, *Foll.*) [P. 835, C. 2.]

(b) *Agra Tenancy Act, S. 79—Applies only to forcible ejectment and not to ejectment by mutual consent.*

S. 79 appears to apply to a case where there is more or less forcible ejectment and does not apply where there is an 'ejectment' by mutual consent. [P. 836, C. 1.]

(c) *Limitation Act, Art 148—Has no application to a suit for recovery of property from a person who without any right of redemption pays the money due on a mortgage and gets into possession of the property.*

Where two suits were brought by A, auction-purchaser from B, for redemption of two properties mortgaged by B and in the compromise that followed A agreed to pay in addition to half the moneys due on the two mortgages also half the amount due on a third mortgage made by B and A eventually got possession of all the three properties and B sued to redeem the third property from A.

Held that A did not get the rights and liabilities of the mortgagee by having paid the amount as he had had no right of redemption but that he had usurped B's rights and so had been in adverse possession and so Art. 148 did not apply to the case so that A's right was perfected on the lapse of the ordinary period of limitation. [P. 836, C. 2.]

(d) *T.P. Act, S. 74—Redemption by person not entitled to do so—Subrogation—T.P. Act, S. 101.*

A person who is not entitled to redeem the mortgaged property but who pays the mortgage money and gets into possession of the property does not thereby acquire the rights and liabilities of the mortgagee.

M. L. Agarwala—for the Appellant.

Mangal Prasad Bhargava, U. S. Bajpai and *S. K. Das*—for the Respondents.

Judgment:—In this appeal Mr. Bajpai has taken a preliminary objection namely that the appeal is not maintainable. The point raised is rather difficult. I have however given it my best consideration.

The facts are these:—The appellant's predecessor-in-title brought the suit out of which this appeal has arisen. It was a suit for redemption to which eleven persons were made parties. It was distinctly stated in the plaint that the suit was really directed against defendants 1 to 5 and if

the other defendants who had been made parties as a mere matter of form did not object, the plaintiff was not going to hold them liable either for costs of the suit or for damages. The suit succeeded in the Court of first instance and redemption was decreed on payment of a certain amount of money. Defendant No. 8 who was the original mortgagee filed a written statement but he nowhere said in it that the suit was liable to be dismissed *in toto* on any ground whatsoever. All that he asked for was that he should be allowed a certain amount of money in the case of redemption. From the decree passed in favour of the plaintiff there were two appeals before the first appellate Court, one was appeal No. 220 of 1921. This was instituted by the defendants 1-5. The other appeal No. 228 of 1921 was filed by the defendant No. 8, Bhagirath Ram, who died pending the appeal. Defendants 1 to 5 had urged in their written statement that the suit was incompetent and should be dismissed. They pleaded limitation and raised other objections. In their grounds of appeal they repeated the plea of limitation. This plea succeeded in the Court of first instance. In the appeal filed by Bhagirath Ram he urged that he should have his money, but in the last ground of appeal he asked that the suit should be dismissed.

The Court of first instance wrote a combined judgment allowing the appeal lodged by defendants 1 to 5. While concluding this judgment it said as follows:—"Civil Appeal No. 228 of 1921 was instituted by the representatives of Bhagirath Ram who claimed half the consideration money and he also asked that the appeal should be dismissed."

The appeal No. 228 was also allowed and the suit was ordered to be dismissed. The present appeal is against the decree passed in appeal No. 220 of 1921 which had been brought by the defendants 1 to 5 only. But in this Court Bhagirath's heirs namely Bujhawan Ram, Lakhan Ram and Nand Kishor, have been impleaded.

Now it is urged on behalf of the respondents that as no appeal has been lodged against the decree made in appeal No. 228 of 1921 this appeal is not maintainable.

On behalf of the appellant the case of *Ghanshiam Singh* v. *Bhola Singh*(1) recently decided by five learned Judges of this Court has been cited and it has been urged that practically there is one decree and the mere fact that the formality of filing an appeal against the decree in appeal No. 228 of 1920 has not been gone through should not prejudice the present case. I think I ought to accept this argument of the learned counsel for the appellant. I have already stated that the heirs of the defendant No. 8, Bhagirath Ram, are parties to the present appeal. It is not the case that an appeal has been lodged against only defendants 1 to 5 who alone were said to be in possession and were found to be in possession by the Court of first instance. If a separate appeal has been filed against the decree in appeal No. 228 of 1921 the same question would have arisen as would arise in the present appeal. I have already mentioned that the defendant No. 8 never urged in his written statement that the suit should fail. In his grounds of appeal too he never urged the plea of limitation. Under the circumstances I think we ought to look to what should operate substantial justice and should overlook the technical side of the question (if any).

I do not think it necessary to discuss the Full Bench case, but I may point out that what was decided there was that a Court has to look to the substance of a thing rather than to the form. In my opinion as the heirs of Bhagirath Ram are parties to this appeal they cannot in any way be prejudiced by the fact that no appeal was filed against the decree which they got in their own appeal. The appeal may therefore be argued on the merits.

Judgment:—The facts which have given rise to this appeal are shortly these:—One Harcharan Singh was the proprietor of the disputed property which he lost, as a result of the execution of a decree against him, at an auction-sale held on 20th of May, 1897. About a month later on the 17th June, 1897, he made the mortgage in question. By this mortgage he mortgaged with one Bhagirath Ram a small plot of land for the sum of Rs. 24. The auction-purchasers who are now represented by defendants 1-5 instituted two suits for redemption of certain mortgages executed by Harcharan Singh in the years 1886 and 1887. The suits for redemption did not include the mortgage now in question. The suits were referred to

(1) (1923) All. 490=45 All. 506=21 A.L.J. 465=4 L.R.A. Civ. 265 (F.B.)

arbitrators for decision and they decided that the auction-purchasers should pay half of the amounts of the two mortgages of 1886 and 1887 and also half of the amount of the mortgage of 17th June, 1897. The result was that after the redemption, the auction-purchasers took possession of the mortgaged properties sometime in 1905, Harcharan Singh put in an objection in the Execution Department. His objection was rejected on 17th June, 1905. The suit out of which this appeal has arisen was instituted by the son of Harcharan Singh for the redemption of the mortgage dated the 17th June, 1897, as against the defendants 1-5, the auction-purchasers. In the plaint he said that the original mortgagee Bhagirath Ram and others were merely *pro forma* defendants.

The suit was resisted *inter alia* on the ground of limitation. This plea succeeded in the first Court of appeal. This is the only question for determination in this Court namely whether the Court below was right.

On behalf of the respondents it has been urged that either section 79 of the Tenancy Act a pplies or article 144 of the Limitaion Act applies, and in either case the suit is time-barred.

It is urged that the arrangement, through the arbitration, that was come to, between the auction-purchasers and Bhagirath, amounted to an ouster of Bhagirath from the land and the ouster of Bhagirath amounted to the ouster of Harcharan Singh who had become an ex-proprietary tenant of the mortgaged plot, he having lost, a month before, his title as zamindar. This argument does not appeal to me and for this reason, that section 79 appears to apply to a case where there is more or less forcible ejectment and does not apply where there is an 'ejectment' by mutual consent.

On the second point I think the respondents' contention should succeed. As I have already mentioned, the redemption suits did not relate to the mortgage in question. That however, by itself, is not very important. In agreeing to pay half the money due on the mortgage of 17th June, 1897, the auction-purchasers really purported to assume the rights of Harcharan Singh as an ex-proprietary tenant. They had no right of redemption. They usurped, as it were, that right. It cannot be said that by the redemption, effected by means of the award, they became transferees or assignees of the mortgagee's rights. They claimed adversely to Harcharan Singh and in their own right. The redemption by the auction-purchasers was in defiance of all title as an ex-proprietary tenant that may have remained in Harcharan Singh. In this view article 148, schedule 1 of the Limitation Act would not apply. The suit, therefore, although framed as one of redemption, is really a suit for recovery of property against persons who had no right to hold that property with an offer to compensate them for such monies as they may have parted with.

I think that the decree of the Court below was right and I dismiss the appeal with costs.

Appeal dismissed.

1924 Allahabad 836.

DANIELS, J.

Dhannu Hajjam—Plaintiff-Appellant.

v.

Mt. Piari—Defendant-Respondent.

S. A. No. 631 of 1922, decided on 23rd July, 1923, against the decree of the District Judge of Ghazipur, dated the 1st of February, 1922.

Civ. Pro. Code, O. 21, r. 33 (1)—High Court will ordinarily refuse to interfere with lower Court's discretion in passing an order under r. 33.

O. 21, r. 33 (1) expressly permits of a condition being inserted in a decree for restitution of conjugal rights that it shall not be enforced by the imprisonment of the wife; imprisonment if allowed in these cases is not a penalty for anything the wife may have done, but a means of forcibly compelling her return to her husband; the tendency of modern legislature is against sending a woman to jail in such cases, and the High Court would ordinarily be very slow to interfere with the discretion of the Court below in a matter of this kind. [P. 836, C. 2 and P. 837, C. 1.]

S. A. Sen—for the Appellant.

Mohammad Yusuf—for the Respondent.

Daniels, J.:—This is an appeal in a suit for restitution of conjugal rights. The plaintiff-appellant has been given a decree but the Court below has added to it a condition that it shall not be enforced by the imprisonment of the wife and it is against this condition that he appeals. Order 21, rule 33 (1) of the Civil Procedure Code expressly permits of such a condition being inserted in the decree, and this Court would ordinarily be very slow to interfere

with the discretion of the Court below in a matter of this kind. It is quite true that this is not a strong case in favour of the wife. The allegations of cruelty which she made have been disbelieved. The finding of the learned Munsif, which the Court below adopts, is that the woman left her husband's house originally in the company of her brothers, but when the time came for her to return she was unwilling to do so. The learned Munsif says that the plaintiff has given no reason for her refusal but that the probabilities are that she is under the influence of a certain barber and that this has induced her refusal. Even in such a case it is possible if the husband got her back by force that he might take the opportunity for punishing her for her unfaithfulness. Imprisonment if allowed in these cases is not a penalty for anything the wife may have done, but a means of forcibly compelling her return to her husband. As the Bombay High Court remarked in a recent case *Bai Parwati* v. *Ghanchi Mansukh* (1) the tendency of modern legislature is against sending a woman to jail in such cases, and in fact since this decree was passed the law has been so altered by both houses of the legislature as to make imprisonment illegal as a means of enforcing a decree of this nature. The learned Judge has slightly anticipated the amendment of the law. On the whole I am not prepared to interfere with the discretion exercised by the learned Judge and I accordingly dismiss the appeal though under the circumstances without costs.

Appeal dismissed.

---

(1) (1920) 44 Bom. 972=59 I.C. 361=22 Bom. L. R. 1097.

---

* 1924 Allahabad 837.

SULAIMAN, J.

Kesri Singh—Plaintiff-Appellant.

v.

Channo—Defendant-Respondent.

S. A. No. 708 of 1922, decided on 31st October, 1923, against the decree of the Additional District Judge, Cawnpore, the 7th February, 1922.

Transfer of Property Act Ss. 59 and 54—Unregistered deed though not capable of passing title is yet admissible for other purposes—Transfer of Property Act S. 59.—Registration Act S 49.

An unregistered mortgage or sale deed though not capable of passing title is yet admissible for other purposes; for instance to show that a person is in possession of land not as tenant of another *i.e.*, that the relationship of landlord and tenant does not exist between the parties or to show that since the date of the deed a person is in possession adversely to the owner. [P. 837, C. 2 and P. 838, C. 1.]

U. S. Bajpai—for the Appellant.

S. P. Sinha for *Beni Bahadur*—for the Respondent.

Sulaiman, J.:—This is a plaintiff's appeal arising out of a suit for ejectment in the Revenue Court. The defendant pleaded that the relation of landlord and tenant did not exist between the parties. He in fact set up his rights as a mortgagee from the proprietor Ganesh, who is now dead, and one of whose sons is in jail and the other absconding. He in support of his contention produced an unregistered deed, dated the 22nd of April, 1909.

The Court of first instance found that the relation of landlord and tenant did not exist between the parties. It also remarked that in this village the *lambardar* was not the sole person who made collections, but that all the co-sharers made collections in respect of their separate shares. The first Court, therefore was further of opinion that the suit by the *lambardar* alone for ejectment was not maintainable.

On appeal the lower appellate Court has upheld the findings of the first Court and dismissed the suit. This judgment is not as clear as it might have been, but I take it that the lower appellate Court was of opinion that the relation of landlord and tenant did not subsist between the parties.

It is true that the mortgage deed in question not being a registered document is invalid as a mortgage deed and cannot affect the property purporting to have been transferred under it. At the same time this was executed in 1909 and delivery of possession followed. When the plaintiff came to Court on the allegation that the defendant was a tenant, I think it was open to the defendant to produce this document in order to show the nature of his possession and to satisfy the Court that he was not holding the land as a tenant. This is the view which was accepted in the Full Bench case of the Madras High Court reported in *Kurri*

Veerareddi v. *Kurri Bapireddi* (1), and by the Bombay High Court in the case of *Thakore Fatesingji* v. *Bomanji A. Dalal* (2). It is also clear that if a suit had been brought in the Civil Court for the ejectment of the defendant as a trespasser he would have been allowed to show that he had been put in possession on payment of a certain mortgage money, and might have asked the Court to give him some relief in equity. Similarly there may be a case where a co-owner has transferred his share under an unregistered sale-deed to his other co-owners and put them in possession. Even though the other co-owners cannot set up this unregistered deed as passing title, I think it is open to them to show by means of that deed that since that date they have been holding possession adversely to the original owner and not as mere co-owners. In this view of the matter I am of opinion that it was open to the defendant to show that his possession was not that of a tenant, and that, whatever else his possession may be, the relation of landlord and tenant does not exist between the parties. This I take to be the finding of both the Courts below. On that finding the suit for ejectment in the Revenue Court was liable to be dismissed.

It is to be noted that the present plaintiff, though a *lambardar*, is in no sense the legal representative of Ganesh or his sons. A suit by him either for redemption of the supposed mortgage or for the ejectment of the defendant as a trespasser would not have been maintainable in the Civil Court. It is therefore not open to him to turn round and treat the defendant as a tenant, when on the facts found by the Courts below the defendant has not been holding this land as a tenant at all.

I am therefore unable to interfere with the decree passed by the lower appellate Court and I dismiss this appeal with costs.

Appeal dismissed.

(1) (1906) 29 Mad. 336=16 M.L.J. 395=1 M L T. 153 (F.B.)
(2) (1903) 27 Bom. 515=5 Bom. L.R. 274.

1924 Allahabad 838.

SULAIMAN, J.

Bansolochan Rai—Plaintiff-Appellant.

v.

Jagarnath Lal and another—Defendants-Respondents.

S. A. No. 744 of 1922, decided on 30th October, 1923, against the decree of the District Judge of Ghazipur, dated the 17th February, 1922.

(a) *Hindu Law—Alienation—All alienations by widow need not be challenged in one and the same suit.*

There is no law which compels a reversioner to bring one common suit to challenge all alienations made by a Hindu widow even though such alienations are in respect of different rights and in favour of different parties. [P. 839, C. 1.]

(b) *Hindu Law—Alienations by widow—Reversioners may challenge only one out of several alienations.*

It is open to the reversioners to get only one of several transfers made by a Hindu widow set aside leaving aside the several transfers if they so choose to act. [P, 839, C. 1.]

Ambika Prasad—for the Appellant.

Haribans Sahai and *S. N. Verma*—for Respondents.

Sulaiman, J. :—This is a plaintiff's appeal arising out of a suit for declaration and recovery of possession of certain plots of land.

Musammat Soukali, a Hindu widow in possession executed a permanent lease on the 28th of April, 1902, of four *sir* plots in favour of Musammat Bhola Kunwar. There was another person who also joined in the deed, but as he did not actually become the heir of the estate it is immaterial to consider this circumstance. In 1913 Musammat Soukali executed a sale-deed of her rights in the same plots in favour of Bhawani Din. In 1916 Bhawani Din transferred his rights to Ram Naresh and others. On the 23rd May, 1920, the widow died.

The present plaintiffs, who are the reversioners to the estate, instituted this suit alleging that the lease in question was a fictitious document and in the alternative that it was not binding on them as subsequent heirs after the death of the widow. They also sought a decree for possession in case they were found to be out of possession.

There was some question raised in the Court below as to whether the whole estate had been transferred by Musammat Soukali in 1913 or not. It was suggested on behalf of the plaintiffs that a small fractional share was left out. This point has been decided against the plaintiffs by the learned District Judge, and they have not sought to challenge it before me. It may therefore be taken for granted that in 1902 Musammat Soukali executed a permanent lease of the four plots in question and then some eleven years afterwards she purported to transfer whatever she had left in those plots, along with other properties, to Bhawani Din.

The learned District Judge has dismissed the suit on the technical ground that so long as the plaintiffs had not got the subsequent sale-deed of 1913 set aside they had no *locus standi* to bring this suit in respect of the previous lease. This was the view which also had found favour with the Court of first instance.

I am quite unable to agree in this view. There are two points which have been entirely overlooked by both the Courts below. The first is that the plaintiffs had separate causes of action with respect to these two separate deeds which were in favour of different sets of persons. There is no law which compels a reversioner to bring one common suit to challenge all alienations made by a Hindu widow even though such alienations are in respect of different rights and in favour of different parties. Twevle years have not yet expired since the death of the widow and it cannot even be suggested that the reversioner's right to have the subsequent sale-deed set aside has in any way been extinguished. As a matter of fact on behalf of the appellant a certified copy of the judgment was tendered before me as showing that on a subsequent date a suit for cancellation of the subsequent sale-deed was actually decreed. I have not admitted this copy because for the purposes of this appeal the point is immaterial.

The second ground is that it is open to the reversioners to get only one of several transfers made by a Hindu widow set aside leaving aside the several transfers if they so choose to act. So far as the defendants who are the representatives of the permanent lessee are concerned, if it is established that the transfer in their favour was without legal necessity and was not binding on the reversioners; they would have to give up possession of the lands. The position of the reversioners would then be that they would obtain possession of these lands and hold them at least as against the defendants. If they succeed to get the subsequent sale-deed set aside they would then become absolute owners. If however they fail to do that or omit to institute a suit, then at best their liability would only be to pay the rent reserved in the permanent lease to Bhawani Din or his representatives.

I cannot see how the suit can be thrown out on the technical ground that the plaintiffs did not before instituting the present suits, institute another suit for setting aside a transfer which had taken place eleven years afterwards and which was in favour of persons who are no parties to the suit. In my opinion the ground on which the suit has been dismissed was wholly unjustified. No other question has been decided by the learned District Judge. The finding of the Court of first instance as regards the rights of defendant No. 8 have in no way been challenged.

I accordingly allow this appeal, set aside the decree of the lower appellate Court and remand the case for disposal according to law.

It has been brought to my notice that Raja Ram respondent No. 5 was not properly served and no further steps were taken as against him. It has also been pointed out that Tilakdhari respondent No. 6 is dead and no attempt has been made to bring his legal representatives on the record. If any of these persons did not form members of a Hindu joint family of which the surviving members are already on the record, it is quite clear that so far as the interest of that person in the lease is concerned, it will remain absolutely unaffected by the present decree.

The decree of the Court below shall stand as regards their interests.

Costs of the appeal will be costs in the cause and will abide the result.

Case remanded.

* * 1924 Allahabad 840.

KANHAIYA LAL, J.

Kanhaiya Lal—Plaintiff-Appellant.

v.

Mt. Azmatunnisa—Defendant-Respondent.

S. A. No. 785 of 1922, decided on 22nd November, 1923, against the decree of the Additional District Judge of Cawnpore, dated the 14th of February, 1922.

Civ. Pro. Code, O. 41, r. 22—One can file an appeal from one part of decree and cross objection about another part from which a cross-appeal has been filed by the other side.

There is nothing in O. 41, r. 22 to prevent a party from filing an appeal from one part of the decree and contenting himself with filing a cross-objection about another part of the decree in a cross-appeal filed by the other side before the former appeal has been decided. [P. 840, C. 2.]

Iqbal Ahmad and *Mangal Prasad Bhargava*—for the Appellant.

S. Raza Ali—for the Respondent.

Kanhaiya Lal, J.:—The question for consideration in this appeal is whether a party who has filed an appeal from one part of the decree can file a cross-objection in regard to another part of the decree in connection with the cross-appeal filed by the other party. The lower appellate Court has found that he cannot do so. It has relied in support of that view on the decision in *Ranji Das* v. *Ajudhia Prasad* (1). In that case the cross-objection was filed after the appeal was dismissed and the subject-matter of the appeal and the cross-objection was the same. That was clearly a case in which the decision of the appeal operated as a bar to the entertainment of the cross-objection. The same matter cannot obviously be agitated both in an appeal and in cross-objection. Order 41, rule 22 of the Code of Civil Procedure provides that any respondent cannot only support the decree on any of the grounds decided against him in the Court below but can take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection within a certain period therein mentioned, although he may not have appealed from that part of the decree, which the cross-objection is intended to cover. There is nothing in that provision to prevent a party from filing an appeal from one part of the decree and contenting himself with filing a cross-objection about another part of the decree in a cross-appeal filed by the other side before the former appeal has been decided. The appeal and the cross appeal in the present case came up for hearing along with the cross-objection on the same date. In fact they were heard together and disposed of by the same judgment. The lower appellate Court was not justified in refusing to entertain the cross-objection because the appeal had not till then been heard and the appeal and cross-objection related to different matters.

The learned Counsel for the defendant-respondent has referred to a decision in *Mt. Hoolas Koeri* v. *Mt. Bibi Sufihun* (2); but that decision proceeded on several grounds, any one of which would have been fatal to the entertainment of the cross-objection. The cross-objection sought to be filed in that case was an oral objection, unaccompanied by a written memorandum of the grounds of such objection or by the Court-fee required by law to be paid thereon. The language of section 348 of the Code of Civil Procedure (Act VIII of 1859) then in force was moreover not the same as that of Order 41, rule 22 of the present Code. The latter clearly lays down that the omission to file an appeal from any part of the decree shall be no bar to the filing of a cross-objection about that part; much less mere filing of an appeal about one part bar the filing of a cross-objection about another and a separable part of the decree, though the subsequent decision of the former may in some cases directly or indirectly affect the decision of the latter.

This appeal must therefore be allowed and the case remanded to the lower appellate Court with a direction to re-admit the cross-objection under its original number and dispose of it in the manner provided by law. The costs here and hitherto will abide the result.

Appeal allowed; Case remanded.

(1) (1903) 25 All. 628.

(2) 8 W.R. 379.

1924 Allahabad 841.

KANHAIYA LAL, J.

Bajrangi Singh—Plaintiff-Appellant.

v.

Sheo Barat—Defendant-Respondent.

S. A. No. 786 of 1922, decided on 22nd November, 1923, against the decree of the first Additional Judge of Gorakhpore, dated 25th of January, 1922.

Agra Tenancy Act, (III of 1901), S. 20—Limitation—Agra Tenancy Act, S 31.

After the lapse of the period of limitation prescribed by S. 31, the transfer cannot be challenged but the land-holder has as against the transferee all the rights possessed by the transferor in case the latter dies without leaving any heirs. [P. 842, C. 1.]

Harnandan Prasad—for the Appellant.

Jang Bahadur Lal and *Shiva Prasad Singh*—for the Respondent.

Kanhaiya Lal, J :—The dispute in this appeal relates to an occupancy holding, which belonged to Bhukal, who died leaving a widow Musammat Lachminia. In 1314-F Musammat Lachminia mortgaged the said holding with possession in favour of the defendant respondent Sheo Bharat Ahir, for Rs. 49 on an agreement to redeem the same in *Baisakh* 1316-F. She did not, however, pay the mortgage money. In March 1913 Musammat Lachminia died. The plaintiffs and another person named Nath Bakhsh, who are the co-sharers of the village in which the occupancy holding in question was situated, then sued for the ejectment of the mortgagee in the revenue Court, alleging that the mortgage was invalid and that the mortgagee held the land as a non-occupancy tenant. The trial Court found that the mortgage in question was executed to pay arrears of rent due to the co-sharers by Musammat Lachminia, and that the mortgagee had paid the rent for three years as *nazrana* to Nath Bakhsh in order to obtain his consent to the mortgage. It was also found that Nath Bakhsh attested the mortgage in evidence of his recognition of its validity and that the then plaintiffs were estopped from suing for the ejectment of the mortgagee without paying the mortgage money. On appeal that decision was upheld. In the course of his judgment the learned Commissioner who heard the appeal observed that it was unlikely that the mortgagee would have paid the rent for three years in a lump sum to occupy fields on a tenure that was liable to be terminated at any moment by the death of Musammat Lachminia and that the view taken by the learned Assistant Collector as to the nature of the agreement entered into was reasonable. He further observed that the receipt of rent for three years by the zemindar carried with it an agreement that the position of the mortgagee should be that of a mortgagee holding on terms, which, although they did not actually confer occupancy rights precluded the zemindar from ejecting him.

In the present suit which has been filed by some of the then plaintiffs it is contended that they were not bound by the action of Nath Baksh and that the mortgage was invalid and not binding on them. An attempt is now being made to treat the mortgagee as a trespasser from the time of the death of Musammat Lachminia. The Court of first instance found that the plaintiff could not eject the mortgagee without paying the money due on the mortgage inasmuch as Nath Bakhsh had consented to the mortgage and the other co-sharers had allowed the mortgage to remain unchallenged for 7/8 years even after the death of the mortgagor. It awarded the plaintiff a decree accordingly for possession subject to the payment of Rs. 49 to the mortgagee on account of the money due on the mortgage. The lower appellate Court however treated the decision of the revenue Court as precluding the plaintiff altogether from seeking the ejectment of the mortgagee and estopping him from suing to eject the mortgagee as if he were a mortgagee or trespasser.

The latter view cannot, however, be upheld. The decision of the Revenue Court *qua* the status of a tenant is binding on the Civil Court ; but the effect of the decision of the Revenue Court was not to give the mortgagee a permanent tenure but to recognise his rights as such mortgagee in consequence of the consent, which Nath Bakhsh had accorded to the mortgage by the acceptance of the rent for three years from the mortgagee at the time of the mortgage. Section 20 of the U. P. Tenancy Act (Act III of 1901), declares that the interest of an occupancy tenant is not transferable except by a voluntary transfer between the co-sharers of the tenancy. Section 31 lays down that every transfer made by a tenant in contravention of that Act shall be voidable at the instance of the land-holder and the latter can sue for the cancellation of the same

and for the ejectment of the tenant and his transferee. The period of limitation provided for such a suit is one year from the date of such transfer. Nath Bakhsh, one of the co-sharers, is found to have expressly assented to the mortgage by accepting rent from the mortgagee and attesting the mortgage. He was probably acting on behalf of the entire co-parcenary body, even if he was not so acting, the right of the other co-sharers to challenge the validity of the mortgage expired with the lapse of the period of limitation provided for that purpose. The decision in the Revenue Court did not have the effect of investing the mortgagee with complete immunity from ejectment except for the period the mortgage subsisted. When Musammat Lachminia died without leaving any heirs, the co-sharers became entitled to resume the occupancy holding subject to such rights as had been created by Musammat Lachminia in her lifetime. They are not entitled to larger rights than those which Musammat Lachminia herself possessed at the time of her death and they can only get back possession on paying the money due on the mortgage, the validity of which they omitted to challenge during the time allowed by law. It is as little open to the co-sharers to treat the mortgagee as a trespasser in the face of the decision which was arrived at in the previous ejectment proceeding as it is for the mortgagee to set up adverse possession in the face of that mortgage.

The appeal is, therefore, allowed and the decree of the lower appellate Court set aside and that of the Court of first instance restored with costs throughout. The time for the payment of the mortgage money will be extended till the end of *Baisakh* miti.

Appeal allowed.

1924 Allahabad 842.

MUKHERJI, J.

Bishunath Ojha—Plaintiff-Appellant.

v.

Sheo Pragash Ojha and others—Defendants-Respondents.

S.A. No. 812 of 1922, decided on 11th December, 1923, against the decree of the District Judge of Ghazipur, dated the 20th April, 1922.

(a) *Evidence Act, S. 91.—Written agreement.*

Agreement not required by law to be in writing or to be registered need not be proved by production of written document but one the terms of which are reduced into writing should be proved only by the written document and not oral evidence. [P. 843, C. 1.]

(b) *Registration Act, S. 17—Petition of compromise evidencing title—Registration Act, S. 49.*

Where petition of compromise filed in Court is the only evidence of title to property worth more than Rs. 100, registration is necessary. [P. 843, C. 2.]

M.L. Agarwala—for the Appellant.

U.S. Bajpai—for the Respondent.

Mukherji, J.:—The question for determination in this second appeal is whether a certain petition filed in the Revenue Court on 22nd December, 1914, in a mutation proceeding is admissible in evidence, and if so, whether it gives the appellant the property which he claims.

The question has to be decided with reference to the peculiar facts of this case, having regard, of course, to the principles laid down in various cases by this High Court.

It appears that on the death of Musammat Udha, the widow of one Manohar Ojha certain persons including the appellant claimed title. Applications were made in the Revenue Court. It does not appear clearly on what ground the present appellant claimed. The compromise in question was filed. This compromise will be examined later on. It will be sufficient here to mention that by this compromise the parties to it asked the Revenue Court to record the names of themselves in certain shares. An order was made in accordance with the compromise. But it appears from the statement of facts made in the plaint that this order was set aside by a Court of appeal on the ground that the persons actually in possession were the Maharaja of Dumraon and another. Some of the defendants in this suit instituted a suit in the Civil Court for the ejectment of the Maharaja of Dumraon and others with respect to the property which belonged to Musammat Udha. That suit succeeded and on foot of the decree mutation orders were passed in favour of the contesting defendants. This fact constituted the cause of action of the plaintiff-appellant and he brought the suit for maintenance of possession.

It has been found by the Court of first instance that the plaintiff never got possession. The plaintiff based his claim on two

grounds. He contended that he was an adopted son of one Dhanai Ojha and as such was reversioner to the property. On this point the decision of the Courts below is against him. It has been found that Dhania Ojha never adopted him. The second point that was taken by him was that as the result of the compromise arrived at in the mutation proceedings he was entitled to the share now claimed by him. The Courts below negatived this ground of the claim. They held that the document by itself did not create any title for want of registration.

The Courts below have relied on the Full Bench case of *Jagrani* v. *Bisheshar Dube*(1). The learned Counsel for the appellant has sought to distinguish this case and has referred me to two cases decided subsequently, namely the case of *Baldeo Singh* v. *Udal Singh* (2) and *Salamat-ul-zamina* v. *Masha Alla Khan* (3).

In my opinion this case must be decided on the peculiar facts involved in it. The principles of law are perfectly clear. Where an agreement is not required by law to be in writing or to be registered it is not necessary to prove the agreement by the production of a written document. Now the question in this case is whether the petition of compromise filed in the Revenue Court is admissible to prove the plaintiff's title. I have already said that it has been found that the appellant has no title to the property independently of the compromise. His claim based on adoption by Dhanai Ojha has been negatived. But that fact alone does not show that there was not a *bona fide* contest in the mutation proceedings. But the question is, "the plaintiff having no initial title at all, what is that which gives him the title?" It is said that it is the agreement among the parties in the mutation proceedings by which they settled their dispute that the appellants' claim was recognised. Reading the petition of compromise I find the following sentence in it.

"*Hag O. Hissa har sulah Kunindgan hasb-i-Zail qarar paya.*"

Assuming that there was a *bona fide* dispute as to the property the terms of the settlement were reduced into writing and the petition of compromise purported to declare the rights of the several executants. As the terms of the compromise were reduced into writing, the writing alone is the evidence and no oral evidence can be adduced to prove the agreement. The writing being there and the property involved being worth more than Rs. 100, the provisions of section 17 of the Registration Act would apply and the document cannot be of any value to the appellant without registration. In fact the petition of compromise is the title-deed of the appellant. He has no title independently of this document. In this view I think the decision of the Courts below was perfectly right. I dismiss the appeal with costs including fees in this Court on the higher scale.

Appeal dismissed.

(1) (1916) 38 All. 366=35 I.C. 701=14 A.L.J. 449 (F.B.)
(2) (1920) 19 A.L.J. 877=58 I.C. 782.
(3) (1918) 16 A.L.J. 98=40 All. 167=43 I.C. 645.

1924 Allahabad, 843.

DANIELS AND NEAVE, JJ.

Mt. Lakhi—Plaintiff-Appellant

v.

Murat Tiwari and others—Defendants-Respondents.

S. A. No. 873 of 1922, decided on 15th May, 1924, from a decree of the First Additional District Judge of Gorakhpur, dated the 7th April, 1922.

Limitation Act—Art 99—Suit for contribution.

Where the plaintiff had paid the whole amount of a joint decree against him and the defendant.

Held that Art. 99 applied. [P. 844, C. 1.]

U.S. Bajpai—for the Appellant.

Mukhtar Ahmad for *Iqbal Ahmad*—for the Respondents.

Daniels, J.:—This was a suit by the plaintiff Mt. Lakhi for the recovery of money paid on behalf of the defendants under article 61 of the Limitation Act. The defendants contended that article 61 was not applicable, and that the cause of action arose much earlier and was barred under article 116. The trial Court held the claim to be within time; the lower appellate Court has dismissed it. The question of limitation is the sole question to be decided in this appeal.

The plaintiff Mt. Lakhi is the mother of Jagdeo Ram the original owner of certain zamindari property which he mortgaged to Ram Pat for a sum of Rs. 3,600 on 27th May, 1904. The only portion of the consideration money with which we are

now concerned is a sum of Rs. 100 which was left with the mortgagee for payment to one Ram Prasad under a hypothecation bond, dated 6th August, 1889. The bond in question was primarily a usufructuary mortgage of certain *sir* plots for the sum of Rs. 100, but it was agreed in the deed that if possession was not given to Ram Prasad, interest should run on the amount advanced and a one-anna share out of the zamindari property should stand hypothecated to secure re-payment of the advance with interest. Possession of the *sir* plots was not given to Ram Prasad, and the zamindari share therefore stood hypothecated in his favour. On 2nd August, 1905 Nakchhed, the predecessor in interest of the defendants-respondents, obtained a pre-mortgage decree in respect of the mortgage to Ram Pat. By that decree he stepped into the shoes of Ram Pat and became liable for the payment of the sum of Rs. 100 to Ram Prasad. Neither the original mortgagor nor Nakchhed paid this amount. On 30th August, 1911, Ram Prasad got a decree for sale of a one anna share for a sum of Rs. 441-3 which was by that time due to him. The decree was passed jointly against (1) Mt. Jagdei, the wife of Jagdeo, and (2) the heirs of Nakchhed, Mt. Jagdei subsequently died, and the property passed to Jagdeo Ram's mother, the present plaintiff. Ram Prasad having taken steps to enforce his decree by sale of the mortgaged property, the plaintiff on 27th August, 1916, paid up the amount due, which had by this time amounted to Rs. 608, and on 17th June, 1919, within three years of that date, but more than twelve years from the original mortgage and the pre-emption decree in favour of Nakchhed, she brought the present suit to recover this amount from the defendants. The Subordinate Judge who tried the suit came to the conclusion that Rs. 425-9 out of this amount was due from the defendants, and it is not now disputed that, if her suit is within time, this is the amount which the plaintiff is entitled to recover.

It appears to us that the fact of a joint decree having been passed against the parties, which the learned Judge has treated as of no importance, is the governing feature in the case. As soon as the plaintiff satisfied those decrees she became entitled to contribution from the defendants. Limitation is therefore three years under article 99 from the date when the decrees were satisfied and the suit was within time. The amount to which the plaintiff is entitled to be reimbursed has been worked out by the learned Subordinate Judge, whose decision on the point is not disputed.

We therefore allow the appeal with costs on the higher scale and setting aside the decree of the Court below restore that of learned Subordinate Judge.

Appeal allowed.

---

* 1924 Allahabad 844.

DANIELS, J.

Harpal Kurmi and others—Defendants-Appellants

v.

Mohan Kurmi and *others*—Plaintiffs-Respondents.

S. A. No. 1018 of 1922, decided on 1st April, 1924, against the decree of the Subordinate Judge of Jaunpur, dated the 24th of March, 1922.

Civ. Pro. Code, O. 21, r. 35—Adverse possession.

Delivery of actual possession under a decree interrupts adverse possession. (39 All. 460 ; 16 A. L J. 33. *Foll* ; 43 All. 520, *Dist.*) [P. 845, C. 1.]

P. L. Banerji and *Mushtaq Ahmad*—for the Appellants.

S N. Verma—for the Respondents.

Judgment:—The plot in dispute in this case originally formed part of an agricultural holding. The defendants took it on lease from the Maharaja of Benares to whom it belonged in the year 1887. During the currency of the lease the defendants built a house for agricultural purposes and they subsequently converted it into a residential house. In the year 1915 the Maharaja ejected them and on 9th July, 1915, delivery of possession was made to him through an amin. I have read the *dakhalnama* and it purports to convey actual possession. The finding is that notwithstanding this the defendants never really gave up possession of the house. The question for decision is whether delivery of possession under the decree interrupts adverse possession and gives a fresh starting point for limitation. The present plaintiffs are lessees from the Maharaja under a lease subsequent to the ejectment of the defendants. Both the Courts below have found in their favour and I agree with this finding. There is no doubt that delivery

of actual possession under a decree interrupts adverse possession. Indeed it has been held in *Rajendra Kishore Singh* v. *Bhagwan Singh* (1), that even delivery of formal possession in a proper case is sufficient to give a new starting point for limitation and this has been held also by the Privy Council in *Thakur Sri Radha Krishna Chanderji* v. *Ram Bahadur* (2). The appellants rely on the case of *Jang Bahadur Singh* v. *Hanwant Singh* (3). That case does not really assist them. It was a case in which the mode of delivery of possession appropriate to the circumstances was not resorted to and on this ground it was held that adverse possession was not interrupted. The person to whom possession was to be delivered was the auction purchaser. Where the judgment-debtor was in possession of the property the proper procedure was for the court to order actual delivery of possession to the auction purchaser. Where however the property from its nature was not capable of being actually delivered the mode of giving possession was by proclaiming the sale certificate and by beating the drum. The case with which the Full Bench had to deal was one in which the former method should have been but the latter method actually was adopted. The present case is entirely dissimilar. Here the *dakhalnama* puported to give actual possession, which was the appropriate mode of relief though in the sequel it proved that the procedure adopted was not really effective. This must often be the case. An amin goes down to the spot and hands over possession to the decree-holder, the judgment-debtor keeping away. As soon as the amin and the decree-holder have gone the judgment-debtor quietly resumes possession. It would be destructive of all respect for law and authority of the court if it were held that in such cases the judgment-debtor could treat the delivery of possession as a nullity and claim to be in adverse possession from the date of his original entry on the land. The suit has been rightly decided by the courts below and I dismiss the appeal with costs.

As there is a deficiency of Rs. 18—4—0 on the part of the plaintiffs respondents in the court below which has not so far been made good the decree passed in their favour will be subject to this condition that they will not be entitled to execute it until the deficiency has been paid.

Appeal dismissed.

(1) (1917) 39 All. 460=39 I.C. 745=15 A.L.J. 361.
(2) (1918) 16 A.L.J. 89=27 C.L.J. 191=34 M.L.J. 97=28 M.L.J. 26=7 L.W. 149=22 C.W.N. 980=(1918) M.W.N. 168=43 I.C. 268=20 Bom. L.R. 502=5 P.L.W. 9 (P. C.)
(3) (1921) 43 All. 520=63 I.C. 212=19 A.L.J. 469.

**** 1924 Allahabad 845.**

NEAVE AND DANIELS, JJ.

Radha Kishan—Defendant-Appellant.

v.

Kedar Nath—Plaintiff-Respondent.

S. A. No. 1033 of 1922, decided on 20th May, 1924, from the decree of the District Judge of Agra, dated 7th April 1922.

(a) *Civ. Pro. Code, S. 100—As a general rule inadmissibility of evidence should not be raised in second appeal.*

Questions of law dealing with the admissibility and the legal effect of evidence will not as a general rule be entertained in second appeal in the High Court if they have not been taken at least at the stage of the first appeal in the court below. [P. 846, C. 1.]

(b) *Evidence Act, S. 33—Conditions imposed by S. 33 may be dispensed with by consent of parties.*

Record of evidence in former judicial proceeding can be used as evidence without examining the witnesses directly though they are alive provided both parties to the suit consent to such a course. (24 Bom. 591 ; 43 Mad. 609, *Foll.*) [P. 846, C. 2.]

(c) *Malicious prosecution—Prosecution need not have been instituted on the deft's complaint but he is liable if he has taken an active part in the prosecution.*

Where the deft. had taken a most active part in carrying on the prosecution against the plff. engaging a pleader at great expense to assist the Prosecuting Inspector and through the pleader conducting the examination and cross-examination of witnesses and where the prosecution would not have gone so far as it had done without him.

Held that though technically the prosecution had not been started by him yet he was liable as the real prosecutor. (30 All. 525 P.C. *Foll.*) [P. 847, C. 2 and P. 848, C. 1.]

L. N. Banerji—for the Appellant.

Baleshwar Prasad—for the Respondent.

Neave, J.:—This appeal arises out of a suit for damages for malicious prosecution. The appellant Radha Kishan and one Ganeshi Lal were the proprietors of rival cattle markets in the same village. They were constantly quarrelling, and finally a riot took place which, according to the appellant, developed into an attack on his house, in which his property was stolen and members of his household beaten. This affair was reported at the police station by a constable. Radha Kishan was sent

for and his statement recorded by the Sub-inspector. In this he named a large number of persons including Kedar Nath as having taken part in the riot. The police not taking what Radha Kishan considered to be a sufficiently active interest in the matter, he went to the District Magistrate, who told him to file a complaint. This he did asking that a Deputy Superintendent of police might be sent to investigate. Some enquiries were made, and the District Mgistrate ordered that the case should be sent up for trial. The case was heard by a magistrate, who discharged all the accused sent up by the police. The District Magistrate, however, ordered a retrial, and some of the persons accused were ultimately committed to the Sessions Court for trial. Several of them were convicted, but Kedar Nath was acquitted, the Sessions Judge finding that he had successfully proved an *alibi*. Kedar Nath thereupon filed the present suit for malicious prosecution. The first Court granted him a decree for Rs. 500 as damages, and this decision has been upheld by the lower appellate court.

The learned counsel for the appellant has argued two points before us. The first is that the trial Court instead of recording the evidence of the parties' witnesses and allowing them to be examined and cross-examined in the ordinary way used as evidence in the case copies of the depositions of these witnesses made in the Sessions Court and has based its decision on that evidence. It is admitted that this was done with the consent of both parties, but it is contended that the procedure adopted was so irregular that it could not be validated by such consent, and that the appellant has been seriously prejudiced. It is to be observed that no objection to the lower court's procedure was taken at the time, nor was it made a ground of appeal before the District Judge. In the recent case of *Sat Narain Prasad* v. *Ram Autar* (1) it was remarked that "it would be in the interests of the administration of justice in this province if it were generally understood that questions of law dealing with the admissibility and the legal effect of evidence will not, as a general rule, be entertained in second appeal in this Court, if they have not been taken at least at the stage of the first appeal in the Court below." It does not appear to have entered the appellant's head to question the admissibility of the evidence relied on by the Courts below until he filed his appeal in this Court, and we should feel ourselves justified in refusing to consider this point at this late stage of the proceedings, but as this appeal has been referred for decision to a Bench by one of us with special reference to this question of law it will be well to determine it. There can be no doubt that as a general rule a record of evidence given by a witness in the previous judicial proceeding cannot be used as evidence in a subsequent judicial proceeding between the same parties unless the conditions which are specified in section 33 of the Indian Evidence Act exist. It is not suggested that any of those conditions are to be found in this case. It has, however, been, held both in Bombay and Madras that, when in a civil suit the parties have agreed to the admission of such evidence, the irregularity of procedure is cured. In *Lakshman Govind* v. *Amrit Gopal* (2) certain depositions recorded in a previous case were admitted in evidence by the trial Court though the witnesses who made them were alive and had not been examined as witnesses in the case under appeal. The District Judge excluded this evidence. The High Court in appeal held that though no doubt the evidence was not admissible in the present suit, because the witnesses who were alive ought to have been called and examined, yet, as it had been allowed to go in without protest on the part of the defendants, and as the plaintiff had consequently cancelled his application to have his witnesses summoned it was not fair for the Judge to question its admissibility. In *Jainab Bibi Saheba* v. *Hyderally Sahib* (3) a Full Bench of the Madras High Court held that evidence recorded in a previous judicial proceeding between the same parties is made admissible in a subsequent proceeding by the consent of both parties.

Krishnan, J., pointed out that the question was one of mode of proof of relevant facts and the rule that such facts must be proved by the evidence of witnesses examined before the trial Judge had several recognized exceptions, such as the examination of

(1) 1924 All. 709=22 A.L.J. 153=5 L.R.A. Civ. 44.

(2) (1900) 24 Bom. 591=2 Bom. L.R. 386.

(3) (1920) 43 Mad. 609=38 M.L.J. 532=(1920) M.W.N. 360=12 L.W. 64=56 I.C. 957=28 M.L.T. 23.

witnesses on commission, the use of affidavits as evidence and the use of evidence taken by one Judge by another, and that the limitations prescribed by section 33 of the Evidence Act to the use of the record of evidence taken in a former judicial proceedings were intended to protect the opposing party from being prejudiced by such admission. He went on to say that "if such evidence is to be admitted against the opposition of a party, the Judge should be satisfied that the conditions and restrictions imposed by section 33 are fully complied with; but I can see no difficulty in holding that a party may waive the benefit of those provisions which are intended for his benefit, at any rate in a civil suit where no question of public policy is involved whatever the position may be in a criminal trial. A civil suit is a proceeding *inter partes* and as parties can by consent settle its final result by having a consent decree passed, there is no reason why they should not be permitted to consent to treat something as evidence of a relevant fact which it may not otherwise be; and when the trial Judge has admitted and acted upon such evidence it is not only proper evidence but the parties ought not to be allowed to object to its admissibility in appeal." I agree with this view of the law, and consider that the Courts were justified in admitting the evidence taken in the Sessions trial.

The second argument advanced on behalf of the appellant is that, as a matter of fact, the prosecution complained of by the respondent was not instituted by him. The first report was not made by him, but by a constable, and it was only at the bidding of the Sub-Inspector of Police that he made the statement in which he named the respondent and others. The actual proceedings in Court did not originate on his complaint but were set on foot by the order of the District Magistrate. It was that officer's order again which gave rise to the second enquiry before the Magistrate which resulted in the commitment of the accused persons to the Court of Session. It is stated that neither the appellant nor any pleader on his behalf was allowed to conduct the proceedings either before the Magistrate or before the Sessions Judge. The witnesses were all summoned by the police and examined either by the Prosecuting Inspector or by the Government Pleader.

That these assertions are not all entirely correct is proved by the statement of a vakil who appeared on the appellant's behalf both in the Courts of the Magistrate and of the Judge. In this it is admitted that the witness himself, and from time to time four or five other vakils with him, appeared on behalf of the appellant in the Magistrate's Court. This vakil himself examined three witnesses on behalf of the prosecution and cross-examined all the witnesses produced by the opposite party and also addressed the Court acting under instructions given by the present appellant. The Prosecuting Inspector, he says, only worked for one or two days, and the rest of the time he himself did all the work in Court. He filed an application to the District Magistrate for revision of the order of the first Magistrate dismissing the case; and he received about Rs. 3,000 as remuneration for the work done by him in the case. The principles laid down by Their Lordships of the Privy Council in *Gaya Prasad* v. *Bhagat Singh* (4) evidently apply to this case. They said (p. 534). "The question in all cases of this kind must be—Who was the prosecutor?—and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown....." "The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry". In the present case it is clear that though technically the prosecution may not have been instituted on the complaint of the appellant, yet he took a most active part in carrying it on, engaging a pleader at considerable expense to assist the prosecuting inspector and through this pleader himself controlling the examination and cross-examination of

(4) (1908) 30 All. 525=35 I.A. 189=10 B.L.R. 1080=4 M.L.T. 204=18 M.L.J. 394=5 A. L.J. 665=14 Bur. L.T. 318=11 O.C. 371 =8 C.L.J. 337=12 C.W.N. 1017 (P.C.)

the witnesses in the case. It is extremely doubtful whether the prosecution would ever have started without his active assistance, and it would certainly never have gone the length it did. For all practical purposes he was the prosecutor.

The appeal fails on both the points and is dismissed with costs.

Daniels, J :—I concur. On the point on which the appeal was mainly pressed the rule laid down in *Sat Narain Prasad* v. *Rum Autar* (1) is applicable. It would be inequitable and improper to upset the result of four years of litigation on a ground of admissibility of evidence which was taken for the first time in second appeal. The suit was instituted in April, 1920. The parties, to save themselves trouble and expense, agreed that it should be decided on the evidence recorded in the criminal trial. There have been many instances of agreements analogous to this. Thus parties may agree that the case shall be decided on the evidence of a particular witness. They may agree, as they did in a recent case, that it shall be decided on the result of the Munsif's inspection of the locality. It is difficult to say that such agreements are unlawful. There is much force in the reasoning of Krishnan, J., in the Madras Full Bench case, that where the whole result of the trial can be determined by consent of the parties, it is equally open to them to agree to treat statements as evidence which might not otherwise be so. This forms a valid ground of distinction from criminal trials, where a stricter rule is applied because the public interest as represented by the Crown, is involved.

The decision of the trial Court was against the appellant. He filed seven grounds of appeal before the District Judge, but it never once occurred to him to suggest that the decision was bad *ab initio* because there was no legal evidence to support it. The learned subordinate judge to whom the appeal was made over reviewed the evidence in detail and came to the conclusion that the complaint against the plaintiff was false and malicious and made without reasonable and probable cause. The appellant's proceedings are too much like the game of "heads I win, tails you lose". So long as he had a chance of success on the facts he was quite content that the case should be decided on the evidence on which he had agreed to rest it. When a plea on the facts is no longer open to him he claims the right to repudiate his agreement. If we accepted his plea, no order which we might pass as to costs would suffice to put the plaintiff back into the position he would have occupied if the agreement had not been made. Evidence which was available in 1920 will no longer be available in 1924. Even if the witnesses are alive and subject to the process of the Court, their recollection of the events, to which they would be required to depose, will be vague and incomplete. I concur therefore in dismissing the appeal with costs.

BY THE COURT :—The appeal is dismissed with costs including in this Court-fees on the higher scale.

Appeal dismissed.

---

* 1924 Allahabad 847.

DANIELS AND NEAVE, JJ.

Subedar—Defendant-Appellant.

v.

Dubey Jagat Narain — Plaintiff-Respondent.

S. A. No. 1140 of 1922, decided on 15th May, 1924, from a decree of the District Judge of Mainpuri, dated 15th July, 1924.

(a) *Civ. Pro. Code, S. 100—Misconception in lower Court.*

A finding on an issue of a lower appellate Court which is based on a misconception of what the evidence is cannot be accepted in second appeal as a legal finding on it. (20 Bom. 753, *Foll.*) [P. 849, C. 1.]

(b) *Defamation—Malice.*

Statement must have been false to the knowledge of the defendant in order to give rise to the presumption of malice. [P. 849, C. 1.]

(c) *Defamation—Official duty.*

Where the defendant had made statements in the course of his official duty as to certain rumours against the plaintiff.

Held he was not liable. [P. 849, C. 2.]

P. N. Sapru and *S. K. Dar*—for the Appellant.

J. M. Banerji and *Saila Nath Mukerji*—for the Respondent.

Neave, J. :—This is a defendant's appeal arising out of a suit for damages for defamation. The undisputed facts are that the defendant is the *mukia* of village Bisalpur. About the 1st or 2nd of October one Ishura Banjara, who had been in the service of the plaintiff, disappeared from the village. Nothing was heard of him for a week or more

and his father was in great distress about him. The *mukhia* went to the Superintendent of Police and made a report about the disappearance. At the bidding of the Superintendant this report was taken down in writing, and it is in this that the defamation complained of is contained.

The report recited that it was rumoured that Ishura had stolen some gram belonging to the plaintiff, and that the plaintiff with two other men had beaten him till he fell down senseless. Since that time Ishura had disappeared, and it was rumoured in the village that he was dead. The *mukhia* had further been informed that the missing youth's parent had been warned to make no report on peril of a beating. He stated that he himself had made a search in the village, but could find no traces of the missing man, and he asked that enquiry should be made.

The Plaintiff brought this suit claiming Rs. 1,000 as special damages.

The trial Court in a long and careful judgment found that the libel alleged was true in substance, and that the report was made by the defendant in discharge of his duty as *mukhia* and not maliciously. It further found that no special damages had been proved, and that if the defendant were to be held liable for damages at all they should not exceed Rs. 200.

The lower appellate court in a very perfunctory judgment has stated that there is no evidence on the record that Ishura had ever been beaten by the plaintiff and that there is no evidence on the record that there was any rumour that Ishura had fallen down and had been removed, or that he was dead. The learned pleader for the appellant contends that both these statements are incorrect, and that the learned judge's findings though they purport to be findings of fact, for that reason are not binding on this Court in second appeal. He has taken us through part of the record and has shown that, as a matter of fact, there is evidence on the record to prove all these facts referred to. Two witnesses depose to the beating of Ishura by the plaintiff and six to the general rumour in regard to the other matters.

The learned Judge has wound up by stating, "when it is shown that the major portion of the report was false, malice would be implied." Before this can be accepted as correct statement of the law the words "to the knowledge of the person making the report" must be inserted after the word 'false.' It is clear that in arriving at the finding as to the falseness of the report the learned Judge was misled by his failure to realize the existence of evidence as to the rumours referred to by the *mukhia* in his report. It is to be observed that the *mukhia* made none of the statements in this report as of his own knowledge but only professed to give information which he had derived from general rumour. As is observed by the trial Court, it was part of his duty as *mukhia* to report to the police any mysterious disappearance, and failure to do so would have rendered him liable to punishment.

It has been held in *Govind* v. *Vithal* (1) that a finding on an issue of a lower Appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding on it. In the present case it is clear that the lower Appellate Court has completely misconceived the real nature of the evidence. We dissent entirely from its findings and allow the appeal. The plaintiff's suit is accordingly dismissed with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

(1) (1896) 20 Bom. 753.

1924 Allahabad 849.

DANIELS AND NEAVE, JJ.

Mangan Lal—Plaintiff—Appellant.

v.

G. I. P. Railway Company—Defendant-Respondent.

S. A. No. 1142 of 1922, decided on 19th May, 1924, from the decree of the Additional Subordinate Judge of Agra, dated 23rd April, 1922.

(a) *Civ. Pro. Code, S. 11—Res judicata.*

Where the defendant Railway Company had failed to deliver certain parcels consigned by the plaintiff and the plaintiff filed suits for damages for non-delivery which suits had failed.

Held that a subsequent suit for delivery of goods was barred. [P. 850, C. 1.]

(b) *Civ. Pro. Code, O. 2, R. 2—Two reliefs on same cause of action.*

Where it was open to the plaintiff to ask for two reliefs on the same cause of action and he chose only to ask for one he cannot bring a fresh suit for the other relief. [P. 850, C. 2.]

(c) *Civ. Pro. Code, S. 11—Different jurisdiction of courts.*

Where the value of the present suit was beyond the jurisdiction of the Court which tried the previous suits.

Held, that nevertheless the principle of *res judicata* applied as the increase in value was only due to the joining together of the subject matter of the previous suits. [P. 850, C. 2.]

N. P. Asthana—for the Appellant.

L. P. Zushi—for the Respondent.

Neave, J. :—The plaintiff appellant made over two parcels of goods to the G.I.P. Railway for despatch to Seoni. By mistake the goods were actually addressed to Samni, a station on the B.B. and C.I. Railway. The plaintiff brought two suits in the Court of Small Causes at Agra. The reliefs are not very clearly stated in the plaint, but they amount to a claim for damages for non-delivery calculated on the value of the goods despatched. Both suits were dismissed, the court holding that the plaintiff was himself to blame for having written the address in Hindi and not in English with the result that the Booking Clerk made a mistake. It also held that the plaintiff ought to have joined the B.B. and C. I. Railway as defendants to the suits.

The plaintiff then filed the suit out of which the present appeal arises in the court of the Munsif of Agra. In it he joined together both the causes of action of his previous suits and so brought the valuation well above the 500 rupee limit. In this suit there was a prayer for three reliefs :—(1) for delivery of the goods made over to the Railway Company (2) for compensation for wrongfully withholding the goods, and (3) for the price of the goods in case the defendants were unable to deliver them.

The principal defence taken in the Munsif's court was that the suit was *res judicata*. The Munsif held that it was not. On appeal, however, the Additional Subordinate Judge disagreed with the Munsif and dismissed the suit.

In this Court the only question discussed has been whether the suit has been rightly dismissed as *res judicata*. We have no doubt that it was. It has been contended that the Small Cause Court did not decide the point whether the plaintiff was entitled to have the goods themselves delivered to him or not, but this was merely because the plaintiff himself did not include in his plaint a prayer for that relief. Order 11, rule 2 of the Civil Procedure Code clearly applies to the case. It was open to the plaintiff to ask for two reliefs on the same cause of action. He chose only to ask for one.

The only reason which can be given for holding that this case is not covered by section 11 of the Civil Procedure Code is that the Court of Small Causes could not have heard the suit as now framed, because the valuation is beyond the limits of its pecuniary jurisdiction. But this increase in valuation has only been brought about by joining together the subject matter of the two previous suits. This is obviously no more than a device for evading the provisions of section 11 of the Code of Civil Procedure and cannot possibly be countenanced. The appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

1924 Allahabad 850.

DANIELS AND NEAVE, JJ.

Mt. Putli Kunwar—Defendant-Appellant

v.

Pt. Janki Das and others—Plaintiffs-Respondents.

S. A. No. 1176 of 1922, decided on 20th May, 1924 against the decree of the District Judge of Moradabad, dated 19th May, 1922.

Wakf—Constructions on wakf property—Suit by some members of public for demolition.

Where the defts. had raised some constructions which interfered with the exercise of certain rights to which the public were entitled.

Held, that a suit, by persons who were members of the public affected and some of whom were also trustees of the *wakf* to which the rights mentioned referred, for the demolition of the constructions should be decreed.

S. N. Sen—for the Appellant.

K. N. Katju—for the Respondents.

Judgment :—This appeal relates to a well and a temple in the Gujrati Muhalla of Moradabad City. It is now found as a fact that both the well and the temple are *wakf* property. The defendant, who claimed both the well and temple as their own, have roofed over the well and enclosed it by walls on three sides and by the

southern wall have also blocked the only access to the temple, which was through a covered passage called a *chhatta* to the south of where this wall has now been built. The plaintiffs sue for and have been granted a decree for the demolition of these constructions and an injunction preventing the defendants from making any encroachment or construction on the well or in the *chhatta* so as to prevent the plaintiffs or the Muhalla people from using the well or having access to the temple. The plaintiffs are residents of the Muhalla and two of them are trustees of the temple. Their case is that the well and platform have been from of old used by the Muhalla people who have also customary right of worship at the temple. In para 5 of the plaint it is stated that the Muhalla people have all along been drawing water from the well, have been using the platform for worship as well as for bathing and washing, have been utilising it on occasions of rejoicing and mourning and have been using the temple all along for worship. These rights have been interfered with by the defendant's constructions of which they complain.

The case was strenuosly fought in both the lower Courts on the question whether the temple and the well were private property and whether the plaintiffs had any right of suit. These points having been found against her, the defendant has now shifted her ground and in appeal to this Court her learned Counsel contends on her behalf that the reliefs granted by the Court below were not necessary in order to safeguard the rights of the plaintiffs. Her case as now put is that the plaintiffs still have access to the well from the west and that the roofing over of the well in no way interferes with its use or drawing water. As regards the wall to the south it cannot be denied that this at least does restrict the access of the public to the temple and that the use of the well is further interfered with by the aperture which the defendant had made in the roof. On behalf of the respondents it is replied that the constructions made by the defendant and the roofing over of the well do seriously circumscribe the plaintiffs' right to use the well and the *chabutra* not only for drinking water but also for purposes of worship and other occasions of festival and morning. We think that this contention is well founded, and it is supported by the decision in *Shankar Lal* v. *Motar Mal* (1) on which the Court below has relied. That was a very similar case to the present and it was held that the plaintiffs were entitled for the preservation of their rights to the removal of the constructions which had been made on the well and the *chabutra* in dispute. In our opinion the decree of the Court below is correct and we dismiss this appeal with costs including in this Court-fees on the higher scale.

Appeal dismissed.

(1) (1889) A.W.N. 133.

1924 Allahabad 851.

DANIELS AND NEAVE, JJ.

Abdul Rahim—Appellant

v.

Abdul Rahim—Respondent.

S. A. No. 1181 of 1922, decided on 5th June, 1924, from a decree of the Officiating District Judge of Budaun, dated 18th May, 1912.

(a) *Civ. Pro. Code, S. 80—Want of good faith.*

Notice should be given if act was done in official capacity whether or not in good faith. (13 A.L.J. 789, *Foll.*) [P. 852, C. 2.]

(b) *Precedent—Distinguishing.*

If a case is distinguished it is unnecessary to express any opinion as to its correctness. It is not serious that cases are sometimes distinguished on very slender grounds to avoid the responsibility of appearing to overrule them. [P. 853, C. 1.]

L.M. Banerji, Iqbal Ahmad and *P.N. Sapru*—for the Appellant.

B.E. O'Conor, S.N. Sen and *H.C. Desanges*—for the Respondent.

Judgment :—This second appeal arises out of a suit against a Sub-Inspector of Police for damages for libel. The cause of action is thus stated in para 2 of the plaint,

"The defendant taking undue advantage of his post as a Thanedar, through avarice, malice and enmity without any reasonable and sufficient ground and in order to cause loss to the plaintiff made some wrong entries on different occasions. Without the knowledge and information of the plaintiff, and eventually after secretly obtaining the permission of the higher authorities dishonestly misrepresenting facts, entered the name of the plaintiff in the register of *badmashes*."

The real name of the register thus described is a "History Sheet." These His-

tory Sheets are confidential documents of the police department, of which not even the persons regarding whom they are prepared are supposed to be aware.

The learned Judge of the Court below seems to have been in some doubt whether the suit was one for libel, or partly for libel and partly for some unnamed kind of tort, but, in this Court at any rate the latter contention has not been put forward. The learned Subordinate Judge who tried the case came to the conclusion that the defendant was not responsible for the plaintiff's name being entered in the History Sheet, that the plaintiff had therefore no cause of action and that in any case the suit was barred by limitation under article 24 of the Limitation Act. He was also of opinion that whatever part the defendant had taken in reference to the plaintiff had been taken in good faith. He omitted and this is the only flaw in his otherwise excellent judgment to consider an issue which lay at the threshhold of the proceedings and which had been raised before him, namely, whether the suit must fail on the ground of want of proper notice as required by section 80 of the Code of Civil Procedure. The case came in appeal before an Officiating District Judge who reversed the Subordinate Judge's findings on all points. The judgment of the learned Officiating District Judge is not a satisfactory one, and if this were a first appeal some of his findings might be difficult to accept even on the face of the judgment itself. As however this is a second appeal his findings of fact must be accepted unless it can be said that there was no evidence to support them or that they are based on some error of law. His principal findings are that it was the defendant who caused the history sheet to be opend, and that in doing so the defendant acted out of malice and from improper motives. The second finding is not open to attack in second appeal. The first finding can be and has been, attacked on the ground that it is based largely on a misreading of the pleadings. The learned Judge was under the impression that the defendant admitted in his written statement that the history sheet was opened at his instance. The defendant had in fact denied that he was in any way responsible for the entry. On the question of notice the learned Judge held that no notice was necessary because the defendant acted from improper motives, and on the question of limitation he held that article 120 of the Limitation Act was applicable and that in any case so long as the history sheet was in existence there was a continuing wrong which entitled the plaintiff to the benefit of section 23 of that Act. The history sheet was not closed till 1919 which was within one year of the filing of the suit.

The first question which we have to decide is whether the defendant was entitled to notice of the suit under section 80 of the Code of Civil Procedure. The plaintiff did in fact send a notice to the defendant, but it is admitted that he filed his suit without waiting for the expiration of the two months prescribed by the section. If, therefore, notice was necessary the suit must fail and should have been dismissed. The contention urged on behalf of the respondent in this Court is that which was adopted by the Court below, namely that section 80 has no application unless the act complained of was done in good faith. On the language of this section the question seems to us to admit of no doubt. The section does not require that the act should have been done in good faith, it merely requires that it should purport to be done by the officer in his official capacity. If the act was one such as is ordinarily done by the officer in the course of his official duties and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term purport. The motives with which the act was done do not enter into the question at all. Here the act complained of, namely causing of the plaintiff's name to be entered in the history sheet was an act which came within the scope of the ordinary function of a police officer, indeed it was one which could only be done by an officer of police acting in that capacity and there is no doubt that in reporting to his superiors with a view to the history sheet being opened he understood himself to be acting and would be understood by his superiors to be acting in the capacity of Sub-Inspector. We agree with the observation of the learned Chief Justice of the Calcutta High Court in *Dakshina Ranjan Omar Chand* (1) that if

(1) (1924) Cal. 145=50 Cal. 992=38 C.L.J. 104=28 C.W.N. 10.

the Courts would be satisfied to give effect to the natural meaning of the language used in the sections of the Code a great deal of time would be saved.

The view of the sections stated above was taken by the Calcutta High Court in the case just cited and was taken by a Full Bench of the Madras High Court in *Koti Reddi* v. *Subbiah* (2). It is suggested that the course of decisions in this Court is in favour of the opposite view, and reliance is specially placed on a decision of Mr. Justice Banerjee in *Muhammad Saddiq Ahmad* v. *Panna Lal* (3). That case certainly lends some support to the view put forward by the respondent. The case was one against a Sub-Inspector, and the acts alleged against him were that he wrongfully searched the plaintiff's house, kept him for some hours in confinement at the thana and publicly used abusive language to him. The first two of these acts were acts which came within the ordinary scope of a Sub-Inspector's duties, the third was one which was entirely outside them. That case was distinguished in two later cases to both of which the same learned Judge was a party *Bakhtawar Mal* v. *Abdul Latif* (4) and *Jugal Kishor* v. *Jugal Kishor* (5). It was argued before us that because *Muhammad Saddiq Ahmad's* case (2) was distinguished in the two later cases, it must be considered to have been accepted as good law. This argument cannot be maintained either as a general proposition or with reference to these particular decisions. If a case is distinguished it is unnecessary to express any opinion as to its correctness, and it is notorious that cases are sometimes distinguished on very slender grounds to avoid the responsibility of appearing to overrule them. In the very case with which we are dealing we find that in the case in 29 All. 567, Banerji, J. referred with approval to a Calcutta case *Jogendra Nath Roy Bahadur* v. *J. O. Price* (6) which is inconsistent with his own earlier decision. In the Calcutta case the defendant was alleged to have acted maliciously and the main defence was that this dispensed with the necessity of notice. The learned Judges say.

> "We are not aware of any instance, certainly no such case has been cited to us in which it has been held that the section does not apply to the case of a public officer charged with a tortious act done by him in his official capacity. The section does not seem to us to warrant the drawing of any distinction between acts of this kind done inadvertently or otherwise."

The most important of the latter cases for our purpose is however that of *Bachcha Singh* v. *Jafar Beg* (7). It was suggested that the decision in it is consistent with the rule laid down in *Muhamad Saddiq Ahmad's case* (2) but we have examined the paper book and we find that this was not the case. The suit was brought jointly against a Sub-Inspector and a private person, the allegation being that the Sub-Inspector at the instigation of the defendant and knowing full well that Bachcha Singh was innocent of the offence charged against him, had implicated him in a criminal trial in place of Bachcha Ahir the real accused. The case was actually decreed by the District Judge against the other defendant on the ground that he had acted maliciously and without reasonable and probable cause. It was dismissed against the Sub-Inspector solely on the question of want of notice, without determining whether the Sub-Inspector was actuated by malice or not. This decision was upheld by the High Court. The effect of the decision was therefore that the Sub-Inspector purported to act in his capacity of a public officer whether he was actuated by improper motives or not. It is unnecessary for us to consider the English cases which have been cited on this question because those decisions all proceed upon enactments the language of which is different from that of the section which we have to construe. It is further unnecessary to deal with other issues, though we think that the case would have failed on the ground of limitation if not on other grounds also. We are in complete agreement with the view laid down by the Full Bench of the Madras High Court 41 Mad. p. 792 and we accordingly allow the appeal and dismiss the plaintiff's suit with costs in all courts including in this court fees on the higher scale.

Appeal allowed.

(2) (1918) 41 Mad. 792=7 L.W. 686=34 M.L.J. 494=23 M. L. T. 357=46 I. C. 86=(1918) M.W.N. 414.
(3) (1904) 26 All. 220=(1904) A.W.N. 201.
(4) (1907) 29 All. 567=(1907) A.W.N. 170.
(5) (1911) 33 All. 540=10 Ind. Cas. 1=8 A.L.J. 509.
(6) (1897) 24 Cal. 584.
(7) (1915) 13 A.L.J. 788=30 I.C. 178.

1924 Allahabad 854 (1).

DANIELS AND NEAVE, JJ.

Multan Singh and others—Defts.-Applts.

v.

Pudhan Man Singh and others—Plaintiffs-Respondents.

S. A. No. 1193 of 1922, decided on 19th May, 1924, against the decree of the District Judge, Saharanpur, dated 29th April 1922.

(a) *Jurisdiction—Civil and Revenue Court—Partition.*

Civil Court can be allowed to partition the buildings before the Revenue Courts have first partitioned the sites on which they stand though the Revenue Courts alone can partition the sites.

(b) *U. P. Land Revenue Act—Partition.*

Revenue Courts cannot partition buildings but Civil Courts can, in proceedings under Land Revenue Act. [P. 845, C. 1.]

(c) *Partition—House and site.*

Partition of buildings is possible while the sites on which they stand remain joint. [P. 854, C. 1.]

Nihal Chand—for the Appellants.

P. L. Banerji and *C. Mithal*—for the Respondents.

Judgment:—This was a suit for partition of certain buildings. The buildings are in a village and the sites on which they stand are appurtenant to a Zamindari share and could only be partitioned by the Revenue Court. The sole ple apressed in appeal is that the Civil Court should not be allowed to partition the buildings until the Revenue Court have first parttioned the sites on which they stand. We agree with the court below that there is no force in this contention. There are a large number of cases such as *Ashiq Hussain* v. *Muhammad Jan* (1), in which it has been held that the Revenue Courts are incompetent to partition buildings in proceedings under the Land Revenue Act. It follows that the Civil Courts are competent to do so, and this is not denied. No authority has been quoted for the proposition that it is impossible for the buildings to be partitioned while the site on which they stand remains joint and we see no ground of principle on which this should be impossible. We think, therefore, that the contention of the applicants was rightly repelled by the court below and we dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) (1900) 22 All. 329=(1900) A.W.N. 116.

*1924 Allahabad 854 (2).

DANIELS AND NEAVE, JJ.

Ram Charan—Plaintiff-Appellant.

v.

Bulaqi—Defendant-Respondent.

S. A. No. 1278 of 1922, decided on 29th May 1924 from a decree of the Additional District Judge of Cawnpore, dated 20th January 1922.

Accounts—Suit for.

In a suit for accounts a decree can, if necessary, be given in favour of the defendant on payment of the necessary Court fees. (7 A.L.J. 543, *Foll.*) [P. 854, C. 2]

U. S. Bajpai—for the Appellant.

K. N. Katju—for the Respondent.

Daniels, J:—The point for decision in this appeal whether a decree can be passed in favour of the defendant on a suit for the taking of partnership accounts under Order 20, rule 15 of the Code of Civil Procedure, if it turns out on taking the account that there is a balance due to the defendant instead of to the plaintiff. Both the courts below have found that instead of there being any sum due to the plaintiff on taking accounts there is really a very considerable sum due to the defendants. On this finding the trial court dismissed the suit with costs. The plaintiff appealed and the defendant field cross-objection. The learned Additional Judge dismissed the plaintiff's appeal and gave effect to the cross-objection of the defendant by passing a decree in favour of the defendant for a sum of Rs. 1,230-3 0, The appellants contends that the only case in which a decree can be passed in favour of the defendant is when a set-off is claimed by Order 20, rule 19. The view of the court below is supported by the form of decree prescribed in the Code of Civil Procedure for a suit of this nature. The form is given as No. 22 in Appendix to the Code. It provides for either a decree in favour of the plaintiff against the defendant or in favour of the defendant against the plaintiff. There is a direct authority on the question that in a suit for an account a decree can, if necessary, be given in favour of the defendant on payment of the necessary Court-fees in the case of *Parmanand* v. *Jagat Narain* (1). This was a suit between principal and agent but the

(1) All. 525=6 I.C. 163=7 A.L.J. 543

same principle is applicable to a suit between partners whose partnership has been dissolved. In the case which was cited on the other side *Misri Lal* v. *Banarsi Lal* (2) the decision depended on the wording of section 215 of the Code of 1882 which did not apply to a suit for the taking of partnership accounts. On principle the appellant's contention would lead to very undesirable results. If the account is gone into by the Court it is for the purpose of finally settling up matters which were left outstanding between the parties. It would be most undesirable that if on an account being taken it turned out that there was a balance due to the defendant it should be necessary for him to file another suit in which the whole matter would have to be gone into again. We therefore reject the appellant's contention on this point.

The only other question is one of a clerical error which appears to have taken place in the statement of account at the conclusion of the learned Additional Judge's judgment. In the body of his judgment he accepted the report of the Commissioner appointed to enquire into the accounts so far as that reported was accepted by the trial Court. The trial Court found that the total loss was Rs. 1,039 and not Rs. 1,831 as originally found by the Commissioner. Half this loss was debitable to the plaintiff. After allowing for this mistake the amount due to the defendant is omitting the odd annas Rs. 834 instead of Rs. 1,230. We modify the decree of the Court below to this extent. In other respects the appeal is dismissed. The parties will pay and receive costs in proportion to success and failure. Costs in this Court will include fees on the higher scale.

Appeal dismissed.

(2) (1906) 3 A.L.J. 233 = 1906 A.W.N. 111.

---

* **1924 Allahabad 855.**

DANIELS AND NEAVE, JJ.

Uma Sankar—Defendant-Appellant.

v.

Gobind Narain and another—Plaintiffs-Respondents.

S. A. No. 1288 of 1922, decided on 6th June, 1924, from the decree of the District Judge of Cawnpore, dated 26th July, 1922

(a) *Deed—Execution.*

Semble. Mere name of firm in the heading of letter is good signature. (1 All. 683 ; 6 Cal. 340, *Foll.*) [P. 855, C. 2.]

(b) *Limitation Act, S. 19 — Expl. II—Mere writing letters on behalf of principal is no proof of due authority to acknowledge liability—Contract Act, S. 186.*

The mere fact that the defendant used to write letters on behalf of his principal is not sufficient in law to enable the Court to infer that he was an authorised agent for the purpose of making an acknowledgment of liability. [P. 855, C. 2.]

Iqbal Ahmad—for the Appellant.

K. N. Katju—for the Respondents.

Daniels, J.—The only question in this appeal is whether a certain letter, Exhibit 2, is a good acknowledgment of liability so as to extend limitation against the defendant-appellant within the meaning of section 19 of the Limitation Act. The letter purports to be from the defendant firm Ram Charan Jagdish Prasad to the plaintiff's firm Sheo Baksh Sri Narain. As far as the contents of the letter are concerned it contains an acknowledgment of liability sufficient to come within the section. It was written by Piyare Lal the Munim of the defendant. It bears no signature other than the name of the firm in the heading of the letter. Such a signature has however been held to be good in *Mathura Das* v. *Babu Lal* (1) and *Mohesh Lal* v. *Busunt Kumaree* (2). The question remains however whether there is proof that Piyare Lal was authorised to make an acknowledgment on behalf of his principal within the meaning of Explanation 2 of the section. The Court below holds that he was, on the ground of an admission made by the defendant that Piyare Lal used to write letters on behalf of his principal. No evidence was offered by the plaintiffs on this point. No question was put as to whether this particular letter was written by the authority of the principal or as to whether Piyare Lal was authorised to acknowledge debts on behalf of his principal. It was distinctly denied that he was authorised to execute a hundi. We think that the mere fact that the defendant used to write letters on behalf of his principal is not sufficient in law to enable the Court to infer that he was an authorised agent for the purpose of making an acknowledgment

(1) (1875-1878) 1 All. 683.
(2) (1881) 6 Cal. 340 = 7 C.L.R. 121.

of liability. On this ground we allow the appeal and as the suit apart from the acknowledgment was admittedly beyond time we dismiss the suit with costs in all Courts.

Appeal allowed.

---

* 1924 Allahabad 856

DANIELS, J.

Mukhtar Ahmad and others—(Defts.)-Appellants.

v.

Kabir Ahmad and others—(Plff.)-Respondents.

S. A. No. 1295 of 1922, decided on 11th February, 1924, against the decree of the Judge, Small Cause Court exercising the powers of a Subordinate Judge of Allahabad dated 17th July, 1922.

(a) *Execution sale—Sale certificate having two irreconcilable descriptions—Court can determine which description governs the case, by looking at decree in suit.*

Where there are in the sale certificate two descriptions of the property which cannot be reconciled it is open to the Court to look at the decree in the suit and to determine which of these descriptions really governs the sale. (19 C.L.J. 182 *Foll.*) [P. 857, C. 1]

(b) *Civ. Pro. Code, S. 47—Dispute between judgment debtor's representatives and auction purchasers—Remedy is not under S. 47 Civ. Pro. Code.*

Where the representatives of the judgment-debtors sued the auction purchasers on the ground that owing to mistake in sale certificate, land in excess of that decreed had passed to the auction purchasers.

Held that the latter's plea that the plaintiff's remedy was by application under S. 47 Civ. Pro. Code and not by suit was untenable. (31 All. 82 and 1923 All. 470 *Foll.*) [P. 857, C. 2]

Zafar Mehdi—for the Appellants.

Bhagwati Shankar, Sami-ud-din, Maheshwari Dayal and *Brij Behari Lal*—for the Respondents.

Daniels, J.:—The facts of this case are somewhat complicated and are stated in full in the judgment of the Court below. So far as they are necessary for the purposes of this appeal they are these.

One Mt. Zaiham Bibi owned a share amounting to 1 anna 6 pies 6 Krants 8 Jan in the village of Bharwari in the Allahabad district. She died in 1896 leaving two daughters Salim-un-nissa and Rahim-un-nissa as her sole heirs. Her brother-in-law Zia-ul-haq took possession of the entire property. Mt. Rahim-un-nissa filed a suit and obtained possession of her share of the inheritance namely 9 pies 3 Krants 4 Jan. Mt. Salim-un-nissa did not file a suit but on Ziaul-haq's death in 1902 she claimed her share in the mutation proceedings. A compromise was entered into by which she was awarded a 7 pies share and the remaining 2 pies 3 Krants 4 Jan remained in possession of the heirs of Zia-ul-haq. While Zia-ul-haq was in possession of the entire property he had mortgaged 9 pies of it to one Mukarram Hussain. Mukarram field a suit on his mortgage and obtained a decree for sale in respect of this 9 pies. In the meantime there had been a partition of the property and the 9 pies 3 Krants 4 Jan to which each of Zailam Bibi's daughters was originally entitled became after the partition a share of 2 annas 9 pies 1 Krant 2 Jan 11 Tond. In the auction sale which took place in execution of Mukarram Hussain's decree the property was purchased by the present appellants Mukhtar Ahmad and others. In the sale certificate the 9 pies share was correctly stated but it was incorrectly described as corresponding to 2 annas 9 pies 1 Krant 2 Jan 11 Tond which was really the equivalent of the entire 9 pies 3 Krants 4 Jan share as had existed formerly. The revenue of the share was however correctly given and was revenue corresponding to the original 9 pies share which the court was entitled to bring to sale under the decree. Both the courts below have held that the words "2 annas 9 pies 1 Krant 2 Jan 11 Tond" in the sale certificate are merely a misdescription due to a clerical mistake and that what really passed was the original share of 9 pies in respect of which the decree was granted. Two suits were brought, one by the heirs of Mt. Salim-un-nissa and the other by the heirs of Zia-ul-haq, against the representatives of the auction purchasers to recover the difference of 3 Krants 4 Jan. In connection with these two suits three appeals were filed to the Court below, two by the heirs of Zia-ul-haq and one by the defendants. The Court below has held that the 3 Krants 4 Jan share belongs to the plaintiffs in the two suits in proportion to their shares in the entire property. As between the two sets of plaintiffs there is no longer any controversy. The defendants have filed three connected appeals to this Court against the decrees passed by the Court below on the three appeals preferred to it.

Both suits were filed within 12 years of the date of the auction-sale so that no question of limitation arises.

Seven grounds are taken in the memorandum of appeal but the points which have been actually argued are three only. They are :—

1. That as the plaintiffs in the two suits were parties to the sale proceedings they are bound by the description of the property gives in the sale certificate.

2. That in any case their remedy was by application under section 47, C. P. C. and not by suit. If the remedy was by application under that section it would now be time-barred.

3. That the heirs of Mt. Salim-un-nissa are estopped by reason of a *kabuliat* executed by them in favour of the auction-purchasers in respect of ex-proprietary plots.

On the first question it appears to me clear law that where there are in the sale certificate two descriptions of the property which cannot be reconciled, it is open to the Court to look at the decree in the suit and to determine which of those descriptions really governs the sale. This has been expressly held in a Calcutta case *Barhamdeo Singh* v. *Ram Narain Singh* (1). The same principle is laid down in section 97 of the Evidence Act which says that where the language used applies partly to one set of existing facts and partly to another evidence may be given to show to which of the two it was meant to apply. In this case the finding of the Courts below is supported by the presumption that what the Court intended to sell was that which it was authorised by law to sell and there is no legal ground for disturbing that finding, which is clearly in accordance with the justice of the case.

The second point is concluded against the appellant by the Full Bench ruling in *Bhagwati* v. *Banwari Lal* (2), which has been followed in the recent case of *Munna Lal* v. *The Collector of Shahgahanpur* (3).

The dispute here, as the learned Judge of the Court below points out, is not between the parties to the suit but between the judgment-debtors and their representatives and the auction-purchasers.

As regards the third point I have examined the *kabuliat* in question. It says nothing whatever as to the extent of the share. It merely acknowledges the title of the auction-purchasers to specific *sir* plots in respect of which an ex-proprietary tenancy had arisen.

All the grounds of appeal which have been urged therefore fail and I dismiss the appeal with costs.

Appeal dismissed.

(1) (1914) 19 C.L.J. 182=22 I.C. 280.
(2) (1909) 31 All. 82=5 M.L.T. 185=1 I.C. 416=6 A.L.J. 71.
(3) 1923 All. 470=45 All. 96.

1924 Allahabad 857.

DANIELS AND NEAVE, JJ.

Sheo Ratan Singh (*minor through Musammat Sumitra*)—Plaintiff-Appellant.

v.

Karan Singh and others—Defendants-Respondents.

S. A. No. 1374 of 1922, decided on 29th May, 1924, from the decree of the District Judge of Budaun, dated the 8th August, 1922.

(a) *Contribution—Right to—Joint tort-feasors—Tort—Contribution.*

In cases of joint tort-feasors what Court has to see is whether there is anything in the circumstances of each case which would deprive the plaintiff of his right according to general equity. [P. 858, C. 2.]

(b) *Contribution — Decree for mesne profits against joint defendants would give rise to right of contribution as among them unless the conduct of the claimant for contribution stands too much in the way.*

It is obviously equitable in the case of a decree for mesne profits against parties who were in joint possession that a person who had to satisfy the entire decree should be able to recover his share from his co-defendants unless there has been something in his conduct to deprive him of this right. [P. 858, C. 2.]

(c) *English Law—English principles of equity are applicable generally but are subject to exceptions.*

The rule of justice, equity and good conscience is in general identical with the rule of English law, but there are exceptions.

(d) *Tort—Joint feasors—Suit for contribution between tort-feasors is not always bad.*

The rule in *Merryweather* v. *Nixon* that no suit lies for contribution between tort-feasors is not founded on any principle of justice, equity or even public policy which would justify its extension to the jurisprudence of other countries. [P. 858, C. 2.]

St. C. Thompson—for the Appellant.

B. E. O'Conor—for the Respondents.

Daniels, J. :—This was a suit for contribution in respect of a decree for mesne

profits and costs passed jointly against the parties in the year 1912. A pedigree is given in the judgment of the Court below. The parties are a son and grandsons of Daryao Singh, one of three brothers. The property in respect of which the decree for mesne profits was passed was that of a predeceased brother Puran Singh whose widow Mst. Sartaj Kuar held possession of it till 1912 when she died. The present parties claimed one-third share in the property on her death as collaterals, and obtained possession and got an order for mutation from the Revenue Court. The representatives of the other two branches filed a suit for possession and mesne profits and were successful. The plaintiff paid the entire decretal amount in 1918. Hence the present suit.

The property was originally held by Mst. Sartaj Kuar under a partition deed of 7th January, 1902. Under this deed the representatives of Daryao Singh's branch were given an equal share in the family property with the branches of Daryao Singh's brothers Girwar Singh and Narain Singh. Subsequently on the death of a collateral named Moti Singh litigation arose and Girwar Singh and Narain Singh denied the right of Daryao Singh's branch to any share on the ground that Daryao Singh was dead when the inheritance opened. The case went in appeal to the High Court where a compromise was arrived at. By this compromise certain property was granted to Daryao Singh's sons but the deed of 7th January, 1902 was declared to be cancelled. Mst. Sartaj Kuar was no party to this litigation and the compromise therefore did not affect her share.

It has been generally recognised that the doctrine of *Merryweather* v. *Nixon* (1), that no suit for contribution lies between tort-feasors does not apply in its full extent to India. A doubt has been expressed in some case whether it applies at all, but the point has never been decided nor is it necessary to decide it in this case. *Nihal Singh* v. *The Collector of Bulandshahr* (2), and *Bhagwan Das* v. *Rajpal Singh* (3), are cases in point. There is a long course of authority both of this Court and of other courts for the proposition that if it does apply it applies only where it must be presumed that the party in default knew that he was committing an unlawful act or the act is one of an obviously illegal character. This was laid down by the Madras High Court in *Shakul Kameed Sahib* v. *Syed Ebrahim Sahib* (4), by the Calcutta High Court in *Hari Saran Maitra* v. *Jotindra Mohan* (5), and by this Court in *Kishna Ram* v. *Rakmini Sewak Singh* (6). Even where the decree was one for damages for a directly tortious act, namely, the wrongful cutting of trees, a suit for contribution was allowed under this rule in *Suput Singh* v. *Imrit Tewari* (7), we have therefore only to see whether there is anything in the circumstances to deprive the plaintiff of his right to contribution. If the case has to be decided on grounds of justice, equity and good conscience it is obviously equitable, in the case of a decree for mesne profits against parties who were in joint possession, that a person who had to satisfy the entire decree should be able to recover his share from his co-defendants, unless there has been something in his conduct to deprive him of this right. The rule of justice, equity and good conscience is in general no doubt considered to be identical with the rule of English law, but there are exceptions and there is the high authority of Lord Herschell in *Palmer* v. *Wick* (8), for the view that the rule in *Merryweather* v. *Nixon* that no suit lies for contribution between tort-feasors is not founded on any principle of justice, equity, or even public policy which would justify its extension to the jurisprudence of other countries. Lord Watson, concurring, said that the merits of the rule were not such as to commend it to universal acceptation, and Lord Halsbury and Lord Shand concurred in these opinions.

The two facts relied on by the lower Court as destroying the plaintiff's cause of action are that after the partition-deed of 1902 a judgment had been passed holding that the parties to this suit were not entitled to a third share in the property, and secondly that the High Court compromise declared the partition-deed of 1902 to

(1) (1799) 8 T.R. 186=16 R.R. 810.
(2) (1916) 38 All 237=33 I.C. 165=14 A.L.J. 275.
(3) (1921) 24 O.C. 148=63 I.C. 276.
(4) (1906) 26 Mad. 373.
(5) (1901) 5 C.W.N. 393.
(6) (1886) 9 All. 221=1887 A.W.N. 31.
(7) (1880) 5 Cal. 720=6 C.L.R. 62.
(8) 1894 A.C. 318=6 R. 245=71 L.T. 163.

be cancelled. It is, however, important to notice that Mst. Sartaj Kuar's share under the partition-deed was not affected by the compromise, and the parties might therefore very well be under the impression that the compromise held good in respect of it and that they were entitled to claim their share in it. It is even stated in the judgment of the lower appellate Court, on what evidence we do not know, that the mutation which the present parties obtained in respect of Mst. Sartaj Kuar's share was apparently given on the strength of the partition-deed of 7th January, 1902, that is, on a ground of right and not on the ground of mere possession. If that is so the case in favour of the plaintiff is still further strengthened. The mere fact that a decree for mesne profits implies that the possession of the parties was unlawful is not sufficient in itself to do away with the right to contribution. In our opinion the suit should have been decreed and we accordingly allow the appeal, set aside the decrees of both the Courts below and decree the suit for the amount claimed in the plaint against the first two defendants only. The appellant will get his costs in all Courts against the first two defendants. The other defendants are the representatives of Girwar Singh and Narain Singh and are in no way liable to the plaintiff's claim. So far as the decrees of the Courts below award costs in favour of the defendants Nos. 3 and 4 the decrees will stand good.

Appeal allowed.

1924 Allahabad 859.

SULAIMAN AND KANHAIYA LAL, JJ.

Beni Madho Tewari and others—(Defendants.)—Appellants.

v.

Ram Sunder Tewari and others—(Plaintiffs.)—Respondents.

S. A. No. 1382 of 1922, decided on 23rd May, 1924, from the decree of the Subordinate Judge of Jaunpur, dated 17th July, 1922.

Pre-emption—Custom—Wajib-ul-arz.

The presumption raised by the entry in a *wajib-ul-arz* is not rebutted by the circumstance that more than 100 years ago the villages were owned by a single proprietor. [P. 859, C. 2.]

Harbansahai and *K. N. Katju*—for the Appellants.

P. L. Banerji—for the Respondents.

Kanhaiya Lal, J.:--This is a defendants' appeal arising out of a suit for pre-emption. The claim related to shares in four villages. With the fourth village we are not now concerned in appeal. Both the Courts below have decreed the claim in respect of the whole share sold in Hasanpur and half of the shares sold in Pauni and Walipur. They have however found that the consideration of Rs. 7,000 mentioned in the sale-deed was not the true consideration and have fixed it at Rs. 3,000.

As regards the village Walipur we are of opinion that the claim cannot be decreed. The plaintiffs in order to prove that custom of pre-emption exists in the village relied upon a *wajib-ul-arz* of the year 1881 which contains a pre-emption clause similar to the clause in the *wajib-ul-arz* which was before the Full Bench in the case of *Randhir Singh* v. *Rajpal Misir* (1) decided on the 18th of December, 1923. It was held therein that such a clause furnished an internal evidence negativing the existence of a custom. We must therefore hold that no custom of pre-emption has been proved to exist in Walipur. The claim as regards the share sold in Walipur must be dismissed.

As to Hasanpur and Pauni the first point raised on behalf of the defendants-appellants is that the *dakbandi* shows that in the year 1201 Fasli corresponding to 1796 A. D. the villages were owned by a single proprietor named Subsa Tewari. It has also been proved by the plaintiffs' witnesses that at the present moment it is only the descendants of Subsa Tewari who are co-sharers in these villages. The plaintiffs relied on the *wajib-ul-arz* of 1881 which is still the *wajib-ul-arz* of the current settlement, the district of Jaunpur being permanently settled, and which *wajib-ul-arz* contains a clear entry of a record of custom. We are of opinion that the presumption raised by the entry in the said *wajib-ul-arz* has not been rebutted by the circumstance that more than 100 years ago the villages were owned by a single proprietor. The Court below has pointed out that the two sales which are known to have taken place are such that the first one had taken place

---

(1) 1924 All. 321=46 All. 478=22 A.L.J. 561=5 L.R.A. 151 (F.B.)

in favour of a co-sharer and as to the second one, though it had taken place in favour of a stranger, ultimately a part of the property was returned to the vendors. It was of opinion that these two instances furnished proof that the custom was at least being observed in the villages. Whether this is so or not we are of opinion that the ordinary presumption which arises from the entry in the *wajib-ul-arz* has not been rebutted.

As regards the village Hasanpur there can be no doubt that there is a clear preference given to co-sharers in the same patti as against the co-sharers in the other patti. Defendants Nos. 4 to 7 are co-sharers in the village but they are not co-sharers in the same patti in which the vendors and the plaintiffs own shares. Defendants Nos. 1 to 3 are perfect strangers. The plaintiffs have therefore a preference as against all the vendees.

In the village Pauni the *wajib-ul-arz* gives the right of pre-emption to two categories of pre-emptors. The first is an *ekjaddi* co-sharer and the other is a co-sharer in the village. The Courts below have found that the plaintiffs cannot bring themselves within the first category of the *ekjaddi* co-sharer. They are therefore merely co-sharers in the village. Defendants Nos. 4 to 7 also are co-sharers in the same village while defendants Nos. 1 to 3 are not co-sharers at all. The plaintiffs' claim as against defendants Nos. 1 to 3 must therefore be decreed but should be dismissed as against defendants Nos. 4 to 7. We find it however that there is a clear specification in the sale-deed that each set of vendees has taken only one-half of the share sold. The plaintiffs' claim therefore with regard to Pauni must be decreed for the half of the property sold as against defendants Nos. 1 to 3. It is necessary to clear the point as the decree which has been passed by the Court below is not very clear.

There was a dispute as to the price in the Courts below. The bulk of the sale consideration recited in the sale-deed was shown before the Sub-Registrar, but the Courts below were not satisfied that it represented the true consideration and were of opinion that the consideration had been immensely inflated. They then proceeded to work out the true value of the property sold. The Court of first instance thought that inasmuch as 11 bighas 85/13 biswas of *sir* land has been sold, the price at the rate of Rs. 250 per bigha came to Rs. 2,955. It then added to this sum Rs. 45 as representing the value of the *sir* income. The total in its opinion came to Rs. 3,000. The lower appellate Court has accepted that figure and said that this seems to be correct, if the area of *sir* land sold is taken to be about 12 bighas and the rental Rs. 8 per bigha. As we are now dismissing the claim with regard to a part of the property it is apparent that the value of the portion decreed will have to be calculated afresh. We are not satisfied that the way in which the Courts below have arrived at the figure of Rs. 3,000 is necessarily correct. They appear to have ignored the areas of uncultivated land, about which only Rs. 45 had been allowed. We are not in a position to ascertain and apportion the sale consideration or the market value of that portion of the property, in regard to which the claim of the plaintiffs is to be decreed. It is therefore necessary that the market value of the shares in respect of Hasanpur and Pauni with regard to which the claim of the plaintiffs is being decreed should be ascertained with due regard to the profits derivable from the same. We direct the lower appellate Court accordingly to determine after taking such additional evidence as the parties may adduce.

(1) What is the market value of the share sold in Hasanpur? and

(2) What is the market value of half the share sold in Pauni?

Two months' time will be allowed for return of the findings and ten days will be allowed from the date of receipt of the findings to file objections.

Case remanded.

---

* 1924 Allahabad 860.

SULAIMAN AND KANHAIYA LAL, JJ.

Bhorey Akhey Ram—Plaintiff-Appellant.

v.

Basant Lal and others—Defendants-Respondents.

S. A. No. 1386 of 1922, decided on 11th June, 1924, from the decree of the District Judge of Agra, dated the 14th September, 1922.

(a) *Civ. Pro. Code, O. 21; r. 57—Attachment before judgment.*

O. 21, r. 57 does not apply to attachment before judgment. (14 I.C. 345; 26 I.C. 81; 26 M.L.J. 215; 42 Mad. 1, *Foll.*; 33 Cal. 639, at P. 643; 63 I.C. 712, *Dist.*) [P. 861, C. 2.]

(b) *Civ. Pro. Code, O. 38, r. 7—Scope.*

R. 7, O. 38 clearly refers to the mode of attachment and not to the way in which attachment ceases. [P. 861, C. 2.]

(c) *Civ. Pro. Code, O. 21, r. 57—Attachment before judgment.*

Attachment before judgment continues till decree-holder's remedy becomes completely barred and it does not cease on dismissal for execution. [P. 861, C. 2.]

Narain Prasad Asthana—for the Appellant.

P. L. Banerji—for the Respondents.

Sulaiman, J.:—This is a plaintiff's appeal arising out of a suit for sale on the basis of a mortgage-deed, dated the 8th of January, 1909.

It appears that Basant Lal respondent brought a suit for recovery of a money debt against Khwaju and others, and while that suit was pending he applied for attachment of the defendants' house before judgment. It is not disputed that the house was so attached. While the suit was pending and this attachment was in force the defendants mortgaged it on the 8th of January 1909 in favour of Bhore Akhey Ram the present appellant. On the 5th March 1909 Basant Lal's suit was ultimately decreed. He put in an application for execution on the 14th of April 1909 which, however was dismissed on the 22nd July 1909 on the ground that the decree-holder had not deposited the process-fee necessary for the issue of the proclamation of sale. A second application for execution was made on the 19th July 1909 which also was dismissed on the 23rd December 1909 on apparently not very clear grounds. In pursuance of a third application for execution a share of the house was put up for sale and purchased at auction by Basant Lal, the decree-holder, on the 1st June 1910.

The courts below have dismissed the plaintiff's claim on the ground that his mortgage deed was executed while the attachment of Basant Lal was subsisting and that therefore it is absolutely void as against the latter.

On behalf of the plaintiff it is contented that as soon as the first application for execution was dismissed for default of the decree-holder on the 12th July 1909, the previous attachment ceased to exist. In support of this contention it is urged that Order 21, rule 57, C.P.C. applies not only to attachment in execution of the decree but also to attachment before judgment, and that under that rule, upon the dismissal of an application for execution, the attachment ceased *ipso facto*.

It is to be noted that prior to the coming in force of the new Act there used to be some doubt as to the continuance of an attachment when the execution cases were struck off or removed from the file. In order to put an end to such doubts rule 57 has been added in Order 21. As the rule stands it professedly applies to a case where a property has been attached *in execution of a decree*. Unless therefore there is some other provision in the Code which makes this rule applicable to attachments before judgment this new rule would not be applicable to such attachments. It is therefore contended on behalf of the plaintiff that by virtue of the provisions contained in rule 7 of Order 38 the above mentioned rule is applicable to attachments before judgment also. This contention we are not prepared to accept. Under Order 38, rule 7 the attachment before judgment is to be made in the manner provided for the attachment of property in execution of a decree. That rule clearly refers to the mode of the attachment and not to the way in which that attachment ceases. It is rule 9 of Order 38 which provides as to how and when the attachment before judgment is to cease. Under that rule if a suit is dismissed or if the defendant furnish security the court is to withdraw the attachment. We are, therefore of opinion that it is not possible to extend the provisions of Order 21, rule 57 to cases of attachment before judgment.

The attachment before judgment would have been subsisting, even though no application for execution had been made up to the date when the mortgage was effected. The attachment was clearly to enure for the benefit of the plaintiff decree-holder till his remedy became absolutely barred. Under the circumstances we see no good ground for holding that the attachment which had been subsisting prior to the application necessarily came to an end when that application was dismissed.

There are several cases in support of the view which we have taken. We may refer to the cases of *Ganesh Chandra Adak* v. *Banwari Lal Roy* (1) *Kosuri Surparaju* v. *Mandapaka Narasimhom*, (2) *Babuddin Saheb* v. *Arunchla Mudali*, (3) and lastly the Madras Full Bench case of *Venkatasubbiah* v. *Venkata Seshaiya*, (4). In all these cases it has been laid down that Order 21, rule 57 does not apply to attachments before judgment but its operation is confined to attachments in execution of a decree. With that view we fully agree.

The learned Advocate for the plaintiff appellant has relied on the case of *Sewdut Roy* v. *Sreecantu Maity* (5). That case however is clearly distinguishable because in the first instance it was a case under the old Act which contained no express provision like the one contained in Order 21, rule 57. The remark of Woodroffe, J. has to be understood with reference to the facts of the case as were then before him, and cannot be said to have decided the point which arises in the present case. The second case on which reliance is placed is the case of *Ganpati* v. *Makunda* (6). This case is certainly a direct authority in favour of the plaintiff. The learned Judicial Commissioner came to the conclusion that there was no good reason for not applying Order 21 rule 57 to attachments before judgment. The main ground relied upon by him was that as rules like 55 and 56 of Order 21, did apply, there was no justification for not applying rule 57. We have, however, already pointed out that under Order 38, rule 7, the mode of attachment before judgment has to be the same as that for the attachment in execution of a decree, but that rule does not refer to the way in which attachments come to an end. There is no doubt that there is a clear preponderence of authority in favour of the view we have taken. We accordingly uphold the decree of the court below and dismiss the appeal with costs.

Appeal dismissed.

---

(1) (1912) 16 C.L.J. 86=14 I.C. 345=16 C.W.N. 1097.
(2) (1915) 1 L.W. 932=26 I.C. 81.
(3) (1914) 26 M.L.J 215=22 I.C. 351.
(4) (1918) 42 Mad. 1=24 M.L.T 346=35 M.L.J. 387=(1918) M.W.N. 606=48 I.C. 232=8 L.W. 369.
(5) (1906) 33 Cal. 639=10 C.W.N. 634.
(6) (1921) 17 N.L.R. 121=63 I.C. 712.

1924 Allahabad 862.

MUKERJI, J.

Mt. Durga Kunwar—Plaintiff-Appellant.

v.

Mt. Chunna Kunwar and others (Defendants)—Respondents.

S. A. No. 1448 of 1922 decided on 15th February 1924 from the decree of the District Judge of Farrukhabad, dated 20th May, 1922.

(a) *Evidence Act, S. 115—Change of allegation.*

Where the plaint allegtion was that the position of K under a certain award was that of a truetee for the plff. but in appeal the plff's. counsel urged that K had only a life interest in the property but the other allegations were stuck to.

Held that the plff. did not change her case so completely as to be estopped from urging what were the positions of the respective parties under the award. [P. 864, C. 1.]

(b) *Deed—Construction of.*

Where among other terms the award of arbitration between D and K declared that K should be in possession of property in dispute but should not alienate it that he should pay maintenance to D and that so long as he did so D could not have the arrangement set aside and where K alienated in spite of the award.

Held that D's cause of action arose only after K's death. [P. 864, C. 2.]

Baleshwari Prasad—for the Appellant.

K. N. Katju and *A. P. Dube*—for the Respondents.

Mukherji, J.:—The plaintiff in the Court of first instance is the appellant here. She brought this suit for recovery of certain property on the following allegations. Raj Bahadur and Kunwar Bahadur were two first paternal cousins. Raj Bahadur was the sole owner of the property in dispute. In the lifetime of Raj Bahadur there was a litigation between him and Kunwar Bahadur in which Kunwar Bahadur lost. On the death of Raj Bahadur, however, Kunwar Bahadur again laid claim to his property. The dispute was referred to three arbitrators on the 15th of August, 1895, and they made an award, the next day. (This is a registered document a copy of which is on the record). By this document Kunwar Bahadur was to remain in possession of the property as a trustee for the plaintiff and was to pay her a certain amount of maintenance. On the death of Kunwar Bahadur the plaintiff

became entitled to the possession of the property. But in his lifetime, Kunwar Bahadur made a transfer and his transferees made further transfers. The widow of Kunwar Bahadur and the present holders of the property are the defendants in the suit.

Both the Courts below dismissed the suit on the ground of limitation. The learned Munsif decided certain other points raised by the defendants but the learned District Judge did not enter into those matters. The lower appellate Court held that either Kunwar Bahadur was a full owner or was a trustee as is stated by the plaintiff herself. In either view, the alienation having taken place so far back as in 1897, the suit could not be treated as being within time.

In this Court it has been urged that under the terms of the award the right to recover actual possession accrued to Mussammat Durga Kunwar, the appellant, only after the death of Kunwar Bahadur and that the suit was not barred by time. It is common ground that Kunwar Bahadur died on the 31st of May, 1916.

The learned Counsel appearing for some of the respondents has urged that to allow the appellant to argue this point would be to allow her to set up a new case altogether. He has cited several cases but I do not propose to notice all of them, for the simple reason that each of these cases was decided on its own facts. In the case of *Ilahi Khan* v. *Sher Ali Khan*, (1), two sets of plaintiffs brought a suit for recovery of their respective shares in a house by means of partition. It was found that one of the defendants and one set of the plaintiffs had been out of possession. The set of plaintiffs who were found to be in possession asked that their share should be augmented by reason of the fact that the other parties to the suit had lost their share by adverse possession on the part of the co-owners. It was held that this was a new case and it could not be urged. The Full Bench case of *Balmukund* v. *Balu* (2) was distinguished. The Privy Council case of *Sayedani Mahud Khatun Chowdhurani* v. *Mohammad Elahabad Khan Pani* (3) is also distinguishable. In that case a lady claimed the setting aside of a deed of gift and asked for an account in respect of the profits of the entire property covered by the gift. It appears that she was going on a pilgrimage and before doing so she transferred the entire property to her nephew by way of a gift and the nephew executed an agreement that in case she came back alive, he would give her one-quarter of the income from the property. The plaintiff's suit for the setting aside of the gift failed. Then she said that she ought to get at least one-quarter of the income from the property. Their Lordships of the Privy Council said that the general issue as to whether the defendant was liable to render an account of the entire property did not cover the case for rendition of account in respect of the quarter share. This case also is quite distinguishable.

For the appellant the case of *Radha Mohan Mundal* v. *Jadoomonee Dossee* (4) decided by their Lordships of the Privy Council has been cited. In that case a lady sued for possession of certain property as an heir to her late husband. It was found that the property was an endowed one but her husband was one of the *Shebaits*. It was found that even if she could not succeed as an heiress she could certainly succeed as a *shebait*, on succession to that title on the death of her husband. She was allowed to succeed on the latter title. In the Full Bench case of *Balmakund* v. *Dalu* (2) the plaintiff brought a suit for recovery of property on the ground that he had leased it out to the defendant. The lease was not proved, then the plaintiff asked to be allowed to succeed on the ground of his title to it. It was held that he was entitled to succeed. It will thus be seen that each case must be decided on its own facts. In the case before me, the plaintiff set up specifically her title and her right to possession under the award. The only point on which she differs from her allegations made in the plaint is this. In the plaint she said that, the position of Kunwar Bahadur was that of a trustee for herself. Now her learned Counsel urges that Kunwar Bahadur had only a life interest in the property and no more. Can we then say that the plaintiff is really so changing her case that it would be a just and proper act to estop her from urging what were the positions of the respective party under the award. Construction

(1) (1904) 26 All. 331.
(2) (1903) 25 All. 498=(1903) A.W.N. 112 (F.B.)
(3) (1914) 17 O.W.N. 427=28 I.C. 332 (P.C.)

(4) 22 W. R. 369=3 Sar. 493 (P.C.)

of a document is not an easy matter. Eminent Judges have taken different views of the same document. Examples need not be quoted. The plaintiff is a woman who probably does not even know the characters in which the award is drawn up. She was acting only on legal advice in saying that the position of Kunwar Bahadur was that of a trustee. Under the advice of other Counsel she is now saying that under the same award Kunwar Bahadur's position was that of a life tenant only. She distinctly based her claim on the award and she distinctly stated that her cause of action arose on the death of Kunwar Bahadur. She is not altering or amending any of these allegations. In my opinion, the plaintiff is entitled to urge the new view and it is open to this Court to look into the award and to find for itself what were the legal positions of the parties to the award.

The award has been read out more than once and it has been commented upon. It appears that several cases were instituted by the appellant and Kunwar Bahadur against each other, on the death of Raj Bahadur, the husband of the appellant. The arbitrators decided that these cases should be withdrawn. They said Durga Kunwar should have possession over the moveables, that her name should be recorded in the revenue papers and that she should get a substantial amount of maintenance namely Rs. 800 and odd a year. The arbitrators decided that Kunwar Bahadur was to be in possession and to manage the property but must not have any power of alienation. This is very important. They further decided that on the death of Kunwar Bahadur if any son survived him that son should get the property, and in default of the son, the property should go to the two widows namely the appellant and the widow of Kunwar Bahadur in equal shares. Whether we regard the award as the handiwork of the three arbitrators or as an agreement between the two claimants, there can be no two opinions about its binding character. If Durga Kunwar's statement in the plaint be true that there was a litigation between Raj Bahadur and Kunwar Bahadur in respect of this property and Kunwar Bahadur lost, the property in suit was the absolute property of Raj Bahadur and Durga Kunwar was the only heir. Kunwar Bahadur would be the reversioner. The reversioner and the life owner Durga Kunwar could certainly agree between themselves as to how the property was to be enjoyed. The only limitations to their agreement were those that are imposed by the provisions of Chapter II of the Transfer of Property Act. I have carefully examined the award and I do not find that any of the provisions of Chapter II of the Transfer of Property Act have been contravened. It was open to the parties or the arbitrators to decide that Kunwar Bahadur would have a life interest and that on his death the property would go to his son, if one survived him and in default it would go to the persons living at the death of Kunwar Bhadur. This was perfectly a legal arrangement. It was distinctly stated in that award that so long as Durga Kunwar got her maintenance she had no right to have the arrangement set aside. The mere fact that Kunwar Bhadur sold the property could not give her any right to bring a suit for setting aside the award and recovery of possession. Even if she could not bring such a suit there was no bar to her suing now on the death of Kunwar Bahadur. The cause of action for the suit arose on the death of Kunwar Bahadur and not earlier. It will, however be a matter to see whether Durga Kunwar is entitled to the entire property or to only half the property the other half going to respondent No. 1 Chunna Kunwar, the widow of Kunwar Bahadur.

Such being my opinion the appeal succeeds. I set aside the decree of the Court below which was on the preliminary point of limitation. I remand the appeal under Order 41, rule 23, C.P.C. to the Court below with the direction that it will re-enter it on the register and dispose of it according to law. Costs here and hitherto will abide the result.

Appeal allowed:—*Case remanded.*

1924 Allahabad 865 (1).

MUKERJI AND DALAL, JJ.

Baldeo Prasad—Plaintiff-Appellant.

v.

Ram Autar and another—Defendants-Respondents.

S. A. No. 1381 of 1922, decided on 2nd July, 1924, from a decree of the Subordinate Judge of Jaunpur, dated the 9th August, 1922.

Evidence Act, S. 92—Want of consideration may be proved as against a written agreement.

By proviso of S. 92, it is open to a party or his representative to show that there is no consideration for the agreement which may have been reduced into writing and which may have been even registered. (22 All. 370, *Foll.*) [P. 866, C. 1.]

Ram Numa Prasad—for the Appellant.

Haribans Sahai—for the Respondents.

Mukerji, J.:—Two points have been urged in this appeal It appears that the appellant purchased a bond from one Ghulam Mohi-ud-din and brought the suit, out of which this appeal has arisen, on foot of it. The bond was given on the 6th of October, 1914, by the father of the respondents. The defence was that there was no consideration for the bond, that it had been agreed between the parties that Ghulam Mohi-ud-din who was the landlord of the executant would lease out certain lands to the executant and the executant would pay the consideration money of the bond as a premium or *nazrana* No such lease having been executed, the bond was without consideration.

The learned Judge of the lower appellate Court found that the allegation of the defendants was correct and dismissed the suit.

In appeal it is contended that it was not open to the respondents, being the representatives of the late executant of the bond, to set up a plea that the bond was executed under circumstances other than those mentioned in the deed itself. This argument is not sound. The plea taken by the respondents was to the effect that there was no consideration for the bond. By proviso of section 92, it is open to a party or his representative to show that there is no consideration for the agreement which may been reduced into writing and which may have even been registered. The learned counsel for the appellant takes his stand on the case of *Sri Ram* v. *Firm Sobha Ram Gopal Rai* (1). In that case a party sued on an unconditional promissory note given by the opposite party and it was held that the executant of the promissory note could not show that the money was not to be paid on demand, but was meant to be paid under other circumstances. It is not necessary to express any opinion as to the correctness or otherwise of the ruling, simply because the facts of the two cases are entirely different. In this case, as I have already stated, all that the respondents seek to establish is that there is no consideration for the bond. This they could do, not only under the express provision of law, but also under their Lordships of the Privy Council's ruling reported in case of *Sah Lal Chand* v. *Indarjit* (2). The same view was adopted in this Court in case of *Chunni Bibi* v. *Basant Bibi* (3).

There is nothing in this appeal and it is hereby dismissed with costs which will include counsel's fees on the higher scale.

Appeal dismissed.

(1) 1922 All. 213=44 All. 521=20 A.L.J. 315.
(2) (1900) 22 All. 370=27 I.A. 93=4 C.W.N. 485=2 Bom. L.R. 553=7 Sar. 702 (P.C.).
(3) (1914) 36 All. 537=24 I.C. 661=12 A.L.J. 969.

1924 Allahabad 865 (2).

SULAIMAN, J.

Basdeo Pande and others—Plaintiffs-Appellants.

v.

Mohan Pande—Defendant-Respondent.

S. A. No. 1415 of 1922, decided on 11th February, 1924, against the decree of the Additional District Judge of Gorakhpur, dated the 14th July, 1922.

(a) *Occupancy holding—On abandonment of occupancy holding land enures for the benefit of all co-sharers.*

When land occupied by a tenant is given up by him it enures for the benefit of all the co-sharers entitled to it. [P. 866, C. 1.]

(b) *Jurisdiction, Civil and Revenue Court—Abandonment by tenant followed by joint cultivation by co-sharers—Plaintiff subsequently dispossessed—Suit for joint possession lies in Civil Court.*

Where upon abandonment of a holding by a tenant it has been jointly cultivated by the co-sharers, subsequent dispossession of the plaintiff by the defendant would entitle the plaintiff to maintain a suit for recovery of joint possession in the Civil Court. It is not at all incumbent on the plaintiff to have recourse to the Revenue Court.

There is no law which restricts his right to a claim for a share in the profits only. He is entitled to obtain joint possession of the land which is the joint property of the parties. The case would be different if by some sort of arrangement between the co-sharers each had been in separate possession of a plot of land for a length of time, which separate possession could not be disturbed until an actual partition took place. [P. 866, C. 2.]

Sankar Saran—for the Appellants.

M. L. Sandal—for the Respondent.

Judgment:—This is a plaintiff's appeal arising out of a suit for declaration of title and in the alternative for a decree for joint possession to the extent of a two-thirds share in plot No. 939.

The plaintiff's allegations in the plaint were that this plot appertained to a 3 pie share which had belonged to the plaintiff under some sort of a private partition and a one-third share which had been subsequently sold to the defendant, that Kuber dhobi was the occupancy tenant of this plot and that he left the village and vacated the land. After he had gone away both the plaintiff and the defendant took joint possession of it and had shown crops in it in the *kharif* of 1329 F. that the defendant had without the plaintiff's knowledge got his name alone entered in the *patwari's* papers on the strength of which he has since been denying the plaintiff's title.

There were a number of pleas taken in the written statement one of which was that the suit was not cognisable by the Civil Court at all. The Court of first instance found that Kuber dhobi had not surrendered the field to the defendant alone but that he had simply left the village, and after he had left the parties began to cultivate it jointly and the defendant has been cultivating it for only three or four years. The Court of first instance granted the plaintiff a decree for joint possession. On appeal the learned District Judge, without disagreeing with any of the findings of fact arrived at by the Court of first instance, came to the conclusion that the suit was not maintainable in the Civil Court at all. He has accordingly dismissed the suit without going into the merits.

In my opinion the view taken by the learned Additional District Judge was entirely erroneous. When a land occupied by a tenant is given up by him it enures for the benefit of all the co-sharers entitled to it. There can therefore be no doubt that if the allegations contained in the plaint are correct then the plaintiff and the defendant became jointly entitled to this field in the proportion of 2 : 1. The first Court also found that after the tenant had left the village both the parties began to cultivate it jointly which finding implies that the joint cultivation continued for some length of time. If that finding is correct then subsequent dispossession of the plaintiff by the defendant would entitle the plaintiff to maintain a suit for recovery of joint possession in the Civil Court. It is not at all incumbent on the plaintiff to have recourse to the Revenue Court. There is no law which restricts his right to a claim for a share in the profits only. He is entitled to obtain joint possession of the land which is the joint property of the parties. As was pointed out by the learned Munsif it was not a case where by some sort of an arrangement between the co-sharers each had been in separate possession of a plot of land for a length of time which separate possession could not be disturbed until an actual partition took place. I am therefore of opinion that the suit as brought was certainly maintainable in the Civil Court and was cognisable by it. The preliminary ground on which it has been thrown out cannot be sustained. The case of *Ram Charan Rai* v. *Kauleshar Rai* (1) is no authority for saying that a suit of this kind is not maintainable in a Civil Court. On the other hand, it clearly laid down that the dispossessed co-owners were entitled to a decree that they should be restored to joint possession of the joint property. The questions of fact raised by the defendant in the appeal before the learned District Judge have not been gone into. I allow this appeal, set aside the decree of the lower appellate Court and remand the case for disposal according to law. The plaintiff will be entitled to the costs of this appeal including fees on the higher scale.

Case remanded.

(1) (1904) 27 All. 153 = 1904 A.W.N. 199.

* 1924 Allahabad 867.

DANIELS, J.

Parbhu Dayal—Defendant-Appellant.

v.

Murli Dhar—Plaintiff-Respondent.

S. A. No. 1453 of 1922, decided on 26th February, 1924, from the decree of the Additional Subordinate Judge of Bareilly, dated the 13th October, 1922.

(a) *Civ Pro. Code, O. 41, r. 22—Respondent cannot take cross-objection which he has already taken by way of appeal and which had been decided against him.*

The rule allows a respondent to take any cross-objection which he could have taken by way of appeal; it does not allow him to take an objection which he has already taken by way of appeal and which has been decided against him. [P. 868, C. 1.]

(b) *Limitation Act, S. 5—Review—Limitation Act, S. 14.*

The time spent in prosecuting with due diligence a proper application for review of judgment can be deducted under S. 5. [P. 868, C. 2.]

(c) *Limitation Act, S. 5—Mistake.*

The fact of the plaintiff having made a mistake of law does not necessarily preclude him from obtaining the benefit of the section. (45 Cal. 94) *Foll.*, [P. 868, C. 2.]

(d) *Civ. Pro. Code, S. 11—Cross objections dismissed as being filed after dismissal of appeal and without going into merits—Appeal on the same points is not barred.*

Where the cross-objections filed by one party were dismissed without going into the merits of the case on the ground of their being filed after the dismissal of the appeal and an appeal was filed on the same points as the cross objections.

Held, that the appeal was not barred. [P. 868, C. 2.]

(e) *Civ Pro Code, O. 41, r. 22—Cross-objections filed after dismissal of appeal should also be dismissed.*

The very word "cross-objections" used in Order 41, rule 22 implies that the objections are taken in answer to a pending appeal. Clause (4) cannot be invoked against this view. It lays down that where after the respondent has filed a memorandum of objection under the rule the appeal is subsequently withdrawn or dismissed for default such withdrawal or dismissal shall not prevent the objections being heard and decided. The rule clearly implies that the objections have been filed prior to the appeal being dismissed or withdrawn. [P. 868, C. 2.]

U. S. Bajpai—for the Appellant.

G. Agarwala—for the Respondent.

Daniels, J.:—This is an appeal by the defendant arising out of a suit for specific performance of a contract. As the appeal raises a question of limitation both as to the plaintiff's suit and as to the plaintiff's appeal to the Court below and involves a question of *res judicata* as to the defendant's cross-objections in the Court below it will be necessary to set out the material facts and dates in some detail. The contract of which specific performance is sought was made on 1st April, 1915. By it the defendant appellant Parbhu Dayal agreed to sell to his nephew, the plaintiff, Murli Dhar one-fourth of a house whenever the plaintiff should pay him the sum of Rs. 200. Shortly after this the defendant mortgaged the house to a third party and I am informed that the mortgagee has filed a suit on his mortgage and has obtained a decree. On 4th November, 1921, the plaintiff filed the present suit for specific performance alleging that on 21st September he had tendered the sum Rs. 200, to the defendant and asked him to carry out the contract and transfer the house to him and that the defendant had refused. The learned Munsif passed a decree in favour of the plaintiff on 18th March, 1922, subject to his paying to the defendant a sum of Rs. 300, and one-fourth of the decree obtained by the mortgagee. The sum of Rs. 300, included the original Rs. 200, stipulated in the contract and a further sum of Rs. 100, on account of one-fourth share of the improvements to the house made by the defendant since the date of the contract. The plaintiff on 29th March, 1922, filed an application for review objecting to this condition. His application was dismissed on 6th May, 1922.

In the meanwhile on 24th April, 1922, the defendant had appealed to the District Judge. On 15th May, 1922, he applied to the Court below to withdraw the appeal and the appeal was dismissed on his application. On the next day that is one day after the appeal had been dismissed the plaintiff filed cross-objections under Order 41, rule 22. The Court below dismissed those objections on the ground that there was no appeal pending before it and therefore no cross-objection under Order 41, rule 22 could be preferred or entertained and that the plaintiff's remedy was to file an appeal. On the same date namely the 18th May, 1922, the plaintiff filed the appeal against the judgment in which the present second appeal has been brought. The defendant thereupon filed cross-objections raising the same points which he had raised in his appeal of 24th April. The Court below has dismissed those objections as barred by the rule of *res judicata*. It has allowed the plaintiff's appeal by deleting the condition

requiring the plaintiff to pay one-fourth of the decree obtained by the mortgagee. The defendant has preferred a second appeal to this Court and has urged in support of it the following grounds :—

1. That the plaintiff's appeal to Court below was time barred.

2. That as the plaintiff's cross objections to the defendant's appeal had previously been dismissed it was not competent to the plaintiff to file a separate appeal on the same points.

3. That the Court below was wrong in dismissing the defendant's cross-objections on the ground of *res judicata*.

4. That the plaintiff's suit was barred by limitation under article 113.

5. That the plaintiff by his own laches had disentitled himself to equitable relief by way of specific performance.

6. That instead of relegating the defendant to a separate suit for contribution in case the mortgage amount should be realised for him, the equities should be adjusted now by requiring the plaintiff to pay one-fourth of the mortgage money. In other words the decree of the trial Court should be restored.

I take the third plea first. The plea is wholly untenable The dismissal of an appeal on withdrawal has the effect of a decision on the merits. It leaves the finding of the trial Court final against the appellant and the rule of *res judicata* applies. The language of Order 41, rule 22 is to the same effect. The rule allows a respondent to take any cross-objection which he could have taken by way of appeal ; it does not allow him to take an objection which he has already taken by way of appeal and which has been decided against him. The point was expressly decided against the appellant in *Ramji Das* v. *Ajudhia Prasad* (1), and there is nothing in the alteration in the wording of the rule under the new Code which renders this decision inapplicable. The result is that the appellant cannot now raise any point which was decided against him by the trial Court. His fourth and fifth pleas are therefore not maintainable and it is unnecessary to go into them.

It remains to consider his objection to the appeal filed by the plaintiff in the Court below. His first contention is that that appeal was time-barred. This depends on whether the plaintiff can be allowed the benefit of the time occupied in prosecuting his application for review. It is pointed out that neither the first nor the second para of section 14 of the Limitation Act applies to appeals and that in other cases, *e.g.*, in section 12 where it was intended that the provision should apply to appeals the word "appeal" has been separately mentioned. In dealing with this question it is however necessary to consider not merely section 14 but also section 5. The Privy Council in *Brij Indar Singh* v. *Kanshi Ram* (2), have laid down that time spent in prosecuting with due diligence a proper application for review of judgment can be deducted under section 5. It is also now settled that the fact of the plaintiff having made a mistake of law does not necessarily preclude him from obtaining the benefit of the section. In this case there is a finding of the Court below that the plaintiff was prosecuting his application with due diligence and it appears to me that I should accept that finding.

The second objection is that the dismissal of the plaintiff's cross-objections to the defendant's appeal precluded him from appealing on his own account. If those objections had been dismissed on the merits this plea would have been unanswerable. The record shows quite clearly that they were not dismissed on the merits. Indeed they appear to have been dismissed on an office report without even hearing the parties. They were dismissed on the view that it was not competent to a party to file cross-objections after the appeal of the other side had been dismissed. Even if the view of the Court below was incorrect I must look to the ground on which the objections actually were decided and not to what in the view of the appellant the Court ought to have done. In my opinion however the view taken by the Court in dismissing them was correct. The very word "cross-objections," used in Order 41, rule 22 (and introduced, I may note, for the first time in the present Code) implies that the objections are taken in answer to a pending appeal. Clause (4) of the rule has been referred to by the appellant but that clause is really against him. It lays down that where after the respondent has filed a memorandum of objection under

(1) (1903) 25 All. 628.

(2) (1917) 45 Cal. 94=44 I.A. 218=127 P.L,R. 1917=33 M L.J. 486=22 M.L.T 362=6 L. W. 692=126 P.W.R 1917=15 A.L.J. 777= (1917) M.W.N. 811=19 Bom. L.R. 866= 3 Pat. L.W. 313=42 I.C. 43=26 C.L.J. 572=104 P.R. 1917=22 C.W.N. 169 (P.C.).

the rule the appeal is subsequently withdrawn or dismissed for default such withdrawal or dismissal shall not prevent the objections being heard and decided. The rule clearly implies that the objections have been filed prior to the appeal being dismissed or withdrawn. I know of no reported decision on the point but I am informed that there is an unreported decision of Mr. Justice Banerji in which the same view has been taken.

On the sixth plea I do not consider that I should be justified in interfering with the decree of the Court below. It is not yet certain that the mortgagee will realise any portion of his security from the share of the house which is in dispute in this case.

The result is that the appeal fails on all points and it is accordingly dismissed with costs.

Appeal dismissed.

---

* 1924 Allahabad 869.

MUKERJI, J.

Ramachari and another—Plaintiffs-Appellants.

v.

Sadho Saran Tewari and others—Defendants-Respondents.

S.A. No. 1455 of 1922, decided on 13th February, 1924, against the decree of the District Judge of Ghazipur, dated 6th October, 1922.

Evidence Act, S. 90—Mortgage dsed more than fifty years old and produced from proper custody was presumed to be genuine and authority to make mark was presumed.

In a redemption suit plaintiff's ancestor was shown to have been in possession in 1840 and the mortgage deed was executed in 1872 and was registered. It was produced by a person who was admittedly one of the alleged mortgagees. The mark of the executant was made by the village *patwari* who also signed before the Sub-Registrar. An old witness examined to prove the execution of the deed was discredited. *Held* that still the deed should be deemed to be genuine and that the presumption mentioned in S. 90, Evidence Act, should be used in its favour. [P. 869, C. 2.]

M. L. Agrawala—for the Appellants.

K. N. Katju—for the Respondents.

Judgment:—This is an appeal by the plaintiffs. They instituted the suit out of which this appeal has arisen, for recovery of property, being a fixed rate tenancy by way of redemption. They succeeded in the court of first instance; but the learned District Judge in appeal held that the mortgage had not been proved.

It appears that there were ten defendants in the case and out of them only five are in possession. The defendants are admitted by the only contesting defendant (No. 3) to be the descendants of the persons in whose favour the alleged mortgage was executed. The evidence was that the lands were the fixed rate tenancies of defendants Nos. 1 to 5 and that, although the plaintiffs were the descendants of the alleged mortgagor, there being no mortgage, the suit must fail.

The court of first instance pointed out that in the settlement of 1840, the name of the grandfather of the plaintiffs was recorded as the fixed rate tenant. The alleged mortgage was executed in 1872. The original deed has been produced by one Badri Tewari, who is admittedly one of the alleged mortgagees. The deed, therefore, comes from proper custody. The plaintiffs examined an old man to prove the execution of the deed, but his evidence has been disbelieved by the learned District Judge. It has been urged for the contesting respondent that the finding of the lower court is really a finding of fact and this Court cannot go behind that finding. I accept the argument in so far as the learned Judge says that the old witness is not reliable. But then the question remains whether the presumption mentioned in section 90 of the Evidence Act should not be applied to the mortgage deed in question. As I have said, the deed is a registered one. We have found that the ancestor of the plaintiffs was the original tenant of the property. We have found that the deed comes from proper custody. Under the circumstances it would be very unfair with respect to any transaction so old as 1872 not to apply the presumption of law in favour of the proper execution of the deed. It appears that the executant was illiterate and the patwari of the village, one Sheoraj Das, signed the name of the executant, not only on the deed but also before the Sub-Registrar. The practice of taking thumb impressions was not in vogue in 1872. Sheoraj Das is one of the witnesses who identified the executant before the Registering Officer. The learned Judge remarked that there was a ruling of this Court under which he was prohibited from

presuming that Sheoraj Das had signed the document under authority from the mortgagor Ram Autar. He does not quote the case and it has not been quoted on either side before me. But I presume the learned Judge had in his mind the case of *Sheonandan Ahir* v. *Ram Lagan Singh* (1) decided by Tudball, J. There is, no doubt, some observation of the learned Judge to the effect that there is no presumption as to the authority of the person signing for the executant. But the observations were made having regard to the peculiar facts of that case. The deed in the case before the learned Judge was unregistered. It was written throughout in the pen of one man. The signature of the executant and those of the witnesses were all in the pen of the same man. There was nothing to show that the lands mortgaged ever belonged to or were ever held by the alleged mortgagor. The facts, in this case, are all in favour of the appellants. The deed is a registered one. It has been found that in 1840 the plaintiffs' ancestor was the recorded tenant. The transfer of possession to the defendants has not been accounted for and can be accounted for only by the mortgage deed. The person who signed the deed for the illiterate executant is the person who signed before the Sub-Registrar for him. So far as the signature before the Sub-Registrar goes we can surely presume that the Sub-Registrar accepted the patwari's signature simply because the executant authorised him to sign the endosement before the Sub-Registrar. The law in 1872 did not require that the mortgagee should put his mark on the deed. The case of *Sheo Nandan Ahir* has therefore no application to the facts of this case. The document, in my opinion, should have been accepted as sufficient evidence of the mortgage.

I allow the appeal, set aside the decree of the court below and restore the decree of the court of first instance. Costs in this Court and in the lower appellate will be paid by the answering respondent.

Appeal allowed.

(1) (1915) 13 A.L.J. 921 = 30 I. C. 908.

* 1924 Allahabad 870.

MUKERJI, J.

Mt. Zaitun and another—Defendants-Appellants.

v.

Shaikh Kommal and another—Plaintiff- and Defendant-Respondents.

S. A. No. 1516 of 1922, decided on 28th February, 1924, from the decree of the Subordinate Judge of Jaunpur, dated 26th September, 1922.

(a) *Mahommadan Law—Shia Law—Marriage with consent of girl's grandfather but without her consent, she not having attained puberty at time of marriage—Marriage is valid.*

Where a Shia girl had been married with her paternal grandfather's consent but without her consent and where she had not attained puberty at the time.

Held the want of her consent did not affect the validity of the marriage.

(b) *Mahommadan Law—Shia Law—Marriage—Conflicting authorities as to age of consent—Attainment of puberty is the test of attainment of majority for consenting to marriage.*

In the Shia Law of marriage, the authorities are conflicting as to the age of consent for the girl and the attainment of puberty is the test for her having reached the age of majority for consenting to her marriage. [P. 871, C. 2.]

J M. Banerji—For the Appellants.

S. A. Haider—for the Respondents.

Judgment:—This appeal arises out of a suit for restitution of conjugal rights. The respondent No. 1 was the plaintiff in the Court of first instance and the defendants were three; the defendant No. 1 Musammat Zaitun was the alleged wife, the defendant No. 2 her paternal uncle and the defendant No. 3 her paternal grandfather.

The father of the girl is dead. The plaintiff's case was that he married the girl on the 21st of September, 1918, and went away to Calcutta. On coming back, he wanted that his wife should come and live with him but her uncle and grandfather prevented her from coming to him.

The uncle of the girl did not enter appearance. The defendant No. 1 was described in the plaint as a major and her age was given as 19 years. It was objected to on her behalf that, she was a minor and thereupon, the plaintiff obtained the appointment of her grandfather as her guardian for this suit. Two written statements were filed, one on behalf of the defendant No. 1 and the other on behalf of her grandfather. In both the written

statements it was denied that there was any marriage and it was further stated that the plaintiff was in collusion with the girl's uncle who wanted that the girl should marry the plaintiff. The Court of first instance dismissed the suit holding that the marriage had not been proved.

There was an appeal and it was heard by the learned Subordinate Judge of Jaunpur. It appears that evidence was led on behalf of the plaintiff to show that the girl also had consented to the marriage, besides evidence showing that the marriage had taken place with the consent of her grandfather. The learned Subordinate Judge remarked that in most cases, the taking of consent was really a matter of form and this formality had been gone through, whether or not the consent was required under the law. He further found that the girl was of 12 years of age at the time of the marriage and that, the marriage had been performed with the consent of her grandfather. He also found that the story of the girl having consented to the marriage was not established.

In this Court only one plea has been urged and it is this. Under the Shia Law a girl is supposed to have attained puberty or majority for the purpose of marriage, at the age of 9 and that, therefore, as the finding of the Court below was that the girl did not consent to the marriage and she was 12, the marriage was invalid. On the question as to what is the Shia law on the point, two authorities have been relied upon, namely, Baillie's Digest, Volume II, page 96 and Tyabji's Mohammadan Law, 2nd edition, page 99.

On behalf of the respondent it has been urged that according to the written statements of the defendant No. 1 and her grandfather she was only 10 at the date of the filing of the written statements and that therefore she must have been below 9 at the date of the marriage. Reliance has also been placed on the evidence of the Assistant Surgeon who examined the girl and stated that she was 12 in March 1922. That gentleman, it appears, also said, that the signs of puberty were just coming out. The learned Counsel for the respondent relies on the statement of law to be found in Amir Ali's Mohammadan Law, page 323, 4th edition, Volume II. There, it is stated that, both among the Hanafis and Shias alike, the girls attain majority on the completion of 15th year, unless there is any evidence to show that puberty has been attained earlier.

It appears to me that, it is not necessary for me to decide which of the two kinds of opinion is the more authoritative on the point. It appears to me that, the rule relates to 'presumption' and nothing more. All authorities are agreed that it is really the appearance of signs of puberty that is the determining factor and in the absence of evidence to the contrary, the presumption of law has to be given effect to. In Baillie's Digest the footnote says " Puberty is established by natural signs, which it is unnecessary to mention, or by age, which is fifteen years in males, and nine in females." As I have said, the determining factor is puberty and in the absence of evidence, the age has to be considered. The Assistant Surgeon found in 1922 that, the signs of puberty were *just appearing*. This would clearly mean that three years earlier the girl had not attained puberty. This is something which is very very definite and can be acted upon. There is no finding by the learned Subordinate Judge that the girl had or had not attained puberty. It is open to me to come to a conclusion on the point, on evidence, under section 103 of the Code of Civil Procedure. When you have got a solid fact no question of presumption arises. It follows that Musammat Zaitun had not attained puberty when she was married and therefore the question of her consent was immaterial.

I hold that the marriage is valid according to Shia Law. The appeal therefore fails and is hereby dismissed with costs which will include counsel's fee on the higher scale.

Appeal dismissed.

** 1924 Allahabad 871.

DANIELS AND NEAVE, JJ.

Narain—Defendant-Appellant.

v.

Ram Saran Das and another—Plaintiffs-Respondents.

S.A. No. 1537 of 1923, decided on 3rd July, 1924, from a decree of the Subordinate Judge of Muzaffarnagar, dated the 11th July, 1922.

Hindu Law—Joint family—Alienation.

Where a member of a Hindu joint family mortgaged his undivided share and in the subsequent

partition the property to which the mortgage related was allotted wholly to another member of the family but was sold in execution of the mortgage decree obtained by the mortgagee.

Held—he (the member to whom the property had been allotted in partition) could recover the property sold.

(b) *Evidence Act, S. 115—Silence.*

Non-intervention in mortgage suit by A against B regarding property which, subsequent to the mortgage, was allotted in partition to C does not estop C from recovering the property when it has been sold in execution of mortgage decree.

A. Sanyal—for the Appellant.

M. L. Agarwala—for the Respondents.

Daniels, J.:—The plaintiff Ram Saran Das and the second defendant Shadi Ram were two undivided brothers. Shadi Ram in 1913 executed a mortgage of his undivided share in favour of the father of the appellant. Subsequently a partition took place between the two brothers and the particular property to which the mortgage related was assigned wholly to the plaintiff. After the partition the appellant's father brought a suit for sale on his mortgage, but did not implead the plaintiff. He obtained a decree against Shadi Ram and the appellant, his father having died, bought the property in execution proceedings. The plaintiff subsequently brought the present suit to recover the property, and under the rule laid down in *Bhup Singh* v. *Chheda Singh* (1), his right to do so cannot be disputed. Narain has put forward three grounds of appeal. The first is that Shadi Ram should be treated as having executed the mortgage in the capacity of manager of the joint family. This is a plea which was never raised in either of the Courts below, and it is too late to put it forward now. The second plea is that the plaintiff is estopped from bringing the suit, because he did not intervene in the suit brought by the appellant against Shadi Ram. This plea is obviously without force. The third plea is that the partition between the two brothers was fraudulent. This is a plea which was raised and decided in the Courts below and the finding of both Courts is that no fraud is established. The appeal therefore fails and it is hereby dismissed with costs. Under all the circumstances of the case we refrain from allowing fees on the higher scale.

Appeal dismissed.

(1) (1920) 42 All. 596 = 58 I.C. 171 = 18 A.L.J. 807.

* 1924 Allahabad 872.

DANIELS AND NEAVE, JJ.

Har Prasad and another—Defendants-Appellants.

v.

Firm Ram Sarup Radha Kishen—Plaintiff-Respondent.

S. A. No. 1542 of 1922, decided on 1st July, 1924, from the decree of the District Judge of Mainpuri, dated the 20th May, 1922.

(a) *Civ. Pro. Code, O. 8, r. 6—Suit for accounts.*

Where what the defendants say is that there were definite sums of debit and credit between the parties and that on the date of suit a definite known balance, the amount of which is given in the written statement, was due to the defendant from the plaintiff and this balance is shown in their account books as due on the date of suit.

Held it was not a claim for accounts and that defendant could claim set off. [P. 873, C. 1.]

(b) *Civ. Pro. Code, O. 8, r. 6—Ascertained sum.*

A sum can be treated as ascertained though it has been neither been admitted by plaintiff nor decreed by the Court. (14 C.W.N. 170, *Foll.*) [P. 873, C. 1.]

(c) *Civ. Pro. Code, O. 8, r. 6—Claim for accounts.*

No claim for accounts can be made by defendant but a claim for set off can be made. [P. 873, C. 1.]

K. N. Katju—for the Appellants.

Nehal Chand and *S. N. Sen*—for the Respondent.

Daniels, J.:—The sole question in this appeal is whether the defendants are entitled to claim a set-off under Order 8, rule 6 of the Code of Civil Procedure. The Courts below have declined to go into the merits of the set-off claimed on the ground that the sum claimed is not an ascertained sum and therefore does not fall within the provisions of the rule. In the Courts below the question of equitable set-off was also discussed, but in this Court the argument has been confined to the legal set-off provided by rule 6. The suit was one for the balance of the price of castor seed sold by the plaintiff to the defendants. The defence, so far as we are now concerned with it, substantially was that this transaction formed one of the number of transactions between the parties in which there were payments to be credited on both sides and that on these other transactions on the date of suit a definite sum of Rs. 1,126 was due to the

defendants from the plaintiff. There were also certain minor ascertained sums as to one of which the claim of set-off has been allowed. If this were a claim for accounts in the sense that the defendants were asking the plaintiff to render an account and the sum due to the defendants could only be known to the latter when the accounts were rendered, there might be great force in the view taken by the courts below. This, however, is not the nature of the claim. What the defendants say is that there were definite sums of debit and credit between the parties and that on the date of suit a definite known balance, the amount of which is given in the written statement, was due to the defendants from the plaintiff and that this balance is shown in their account books as due on the date of suit. In any ordinary meaning of the term, the sum so claimed is an ascertained sum. The learned counsel for the respondent has argued that a sum can only be treated as ascertained when it has been either admitted by the plaintiff or decreed by the court. None of the authorities to which he has referred, supports this proposition, and the case of *Edward Dalgleish* v. *Ramdin Singh Chowdhry* (1) definitely contradicts it. The commentators on the Code are also all agreed that the words 'ascertained sum' are used to exclude such items as unliquidated damages and mesne profits the amount of which is not ascertainable until the court determines them. Here the sum claimed is a definite ascertained amount and we think that the courts below were wrong in refusing to go into the defendants' claim. We accordingly set aside the decrees of both the courts below and remand the case through the lower appellate court to the court of first instance with directions to enquire into the set-off claimed and to modify its decree accordingly if anything is found to be due to the defendants on account of set-off. The appellants will get their costs of this appeal including in this court-fees on higher scale. Other costs will abide the result. It will not be open to the parties to reagitate any question already decided except the questions which arise on the claim of set-off.

Appeal allowed.

(1) (1910) 14 C.W.N. 170=5 I.C. 67.

1924 Allahabad 873.

DANIELS, J.

Balkaran Lal and others—Plaintiffs-Appellants.

v.

Malik Nandar and another—Defendants-Respondents.

S. A. No. 1551 of 1922, decided on 18th February, 1924, from the decree of the Second Additional Judge of Gorakhpur, dated 5th May, 1922.

(a) *Civ Pro Code, O 41, r. 4—Plffs. in Court of first instance included on behalf of several persons—Only one appealed in lower Court—Other plffs. were not impleaded as respondents—Other plffs. have no locus standi to appeal to High Court.*

Where only one of many plaintiffs appealed in the lower Court on behalf of all and other plaintiffs were not impleaded as respondents and where there was a second appeal to the High Court,

Held, the other plffs. had no *locus standi* to appeal to the High Court as they could not be deemed to be parties to the decree in the lower appellate Court. (1923 All. 211, *Foll.*) [P. 874, C. 2.]

(b) *Evidence Act, S. 115—Estoppel by conduct.*

Where two members of a Hindu joint family mortgaged property and there was a mortgage decree after which one of the mortgagors died without issue and in the proceeding for final decree one of his brothers not a party to the mortgage had been made a party.

Held that as it was legally open to him to plead that he claimed under independent title and should not be made a party to the final decree and as he had not done so he was bound by the decree and could not be plff. in a subsequent suit to set aside the decree. [P. 875, C. 1.]

(c) *Civ. Pro. Code, S. 53—Mortgage by member of joint family—Mortgagor's death without issue after mortgage decree—His brother made party to proceeding for final decree—He can plead that he should not be joined as party.*

Where after mortgage decree had been passed on a mortgage by two members of a Hindu joint family one of the mortgagors died without issue and in the proceedings for final decree one of his brothers was made party,

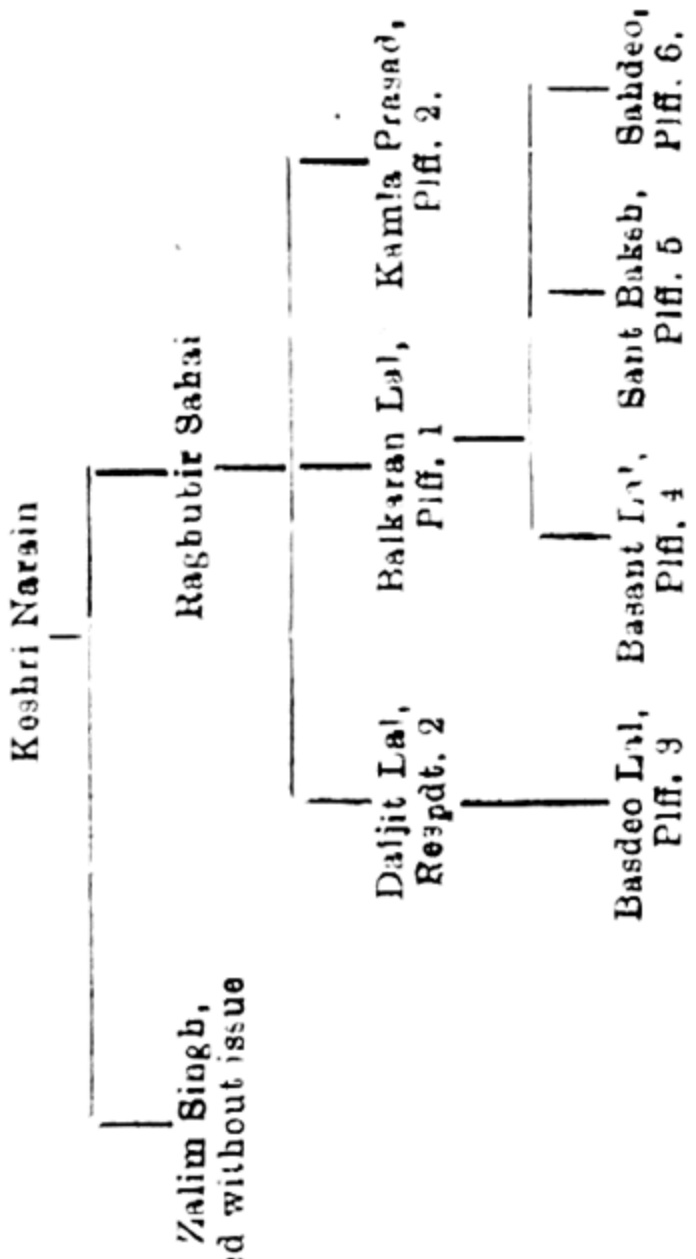
Held, he could resist this as it is only in case of son or other descendant that a person taking property by survivorship can be joined as legal representative under S. 53 (45 All. 455, *Foll.*) [P. 875, C. 1.]

Jang Bahadur Lal and *Sinha*—for the Appellants.

S. D. Sinha—for the Respondents.

Daniels, J.:—The relationship of the

parties to this suit would appear from the following pedigree :—



Daljit Lal and Zalim Singh mortgaged the suit property in the year 1898 to the defendant Malik Namdar. Malik Namdar subsequently brought a suit on his mortgage impleading the mortgagors and Daljit Lal's son Basdeo Lal. The suit was compromised and resulted in a decree for sale of the property. This decree was made absolute in the year 1912 in a proceeding to which the principal appellant Kamala Prasad was also a party as was also the first appellant Balkaran Lal. The plaintiffs in the suit out of which this appeal arises were :

(*a*) Basdeo Lal,

(*b*) Balkaran Lal and his three sons, and

(*c*) Kamala Prasad.

Their claim is to recover the property on the ground that the decree absolute for sale obtained by Malik Namdar in 1912 is not binding on them, the property being joint family property which was mortgaged without legal necessity.

The learned Subordinate Judge held that there was legal necessity for the sale and dismissed the suit on this ground. Kamala Prasad alone appealed but stated in his memorandum of appeal that he was appealing on behalf of all the plaintiffs under Order 41, rule 4. The learned Additional Judge has dismissed the appeal on two grounds.

First, that Kamala Prasad was bound by the final decree of 1912 to which he was a party, and

second, that he was not entitled to appeal on behalf of the other plaintiffs.

Before dealing with the other points I may note that the view was expressed by two Judges of this Court in *Ambika Prasad* v. *Jhinak Singh* (1) that a plaintiff professing to appeal under Order 41, rule 4 is not entitled to proceed with his appeal without making the other plaintiffs parties thereto as respondents. The passage is on page 289. The learned Judges say :

"This objection is sufficiently met by another case, that of *Balaram Pal* v. *Kanydha Majhi* (2). This case seems to us to be absolutely in point. It was laid down there that where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, rule 4 of Order 41 of the Code of Civil Procedurs does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto."

In this view it does not appear what *locus standi* the remaining plaintiffs have, to appeal to this Court against a decree to which they were not parties. In his appeal to the Court below Kamala Prasad joined no one as a respondent except the defendants Malik Namdar and Daljit Lal.

In answer to the first finding of the learned Judge it is argued on behalf of Kamala Prasad that he must have been joined in the appeal in his capacity of a member of the joint family as legal representative of Zalim Singh. I have not been referred to any judgment to show how he came to be joined but as Zalim Singh had died before the final decree was passed it may be taken as probable that this was correct. It is, therefore urged that it was not open to him to urge any plea which Zalim Singh himself could not have urged, and Zalim Singh being one of the original mortgagors could not have pleaded that the mortgage was without legal necessity. It was, however, open to Kamla Prasad to plead that he was not the legal representative of Zalim Singh and that the decree was not binding on him as he

(1) 1923 All 211=45 All. 286=21 A.L.J. 91=4 L.R.A Civ. 92.

(2) (1919) 53 I.C. 548.

claimed under an independent title. It is only in the case of a son or other descendant that a person taking property by survivorship can be joined as a legal representative under section 53 of the Code of Civil Procedure and it has recently been held by a Bench of this Court that the section does not apply to a nephew (*Jagannath Singh* v. *Moti Lal* (3)). Kamla Prasad was the nephew of one of the mortgagors and the brother of the other. It appears to me therefore that it was open to him to plead that he held under an independent title and could not be joined as a party in the proceedings for preparation of the final decree. Not having done so he must be held to be bound by the decree. If he was bound by the decree he was not entitled to appeal from it under Order 41, rule 4, on behalf of plaintiffs who were not parties to the decree, *e g.*, Sant Bakhsh and Sahdeo, while those who were parties are equally bound by it. In this view the decree of the Court below is correct and I accordingly dismiss the appeal with costs.

Appeal dismissed.

(3) 1923 All 539=45 All. 455=21 A.L.J. 353.

---

* 1924 Allahabad 875.

DANIELS AND NEAVE, JJ.

Buddhoo alias *Gulab Das*—Defendant-Appellant.

v.

Sheo Charan (plaintiff) *and Bhagwan Das*—(Defendant)-Respondents.

S. A. No. 1565 of 1922, decided on 2nd July, 1924, from a decree of the District Judge of Benares, dated the 9th May, 1922.

(a) *Guardians and Wards Act, S 31—Creditor can rely on Court's sanction as evidence that the Court has satisfied itself as to the propriety of the transaction—Guardians and Wards Act, S. 29.*

It is the duty of the Court to which an application is made under S, 29 of the Act for sanction of the sale of a minor's property, to satisfy itself by enquiry that the transaction is necessary and is for the minor's benefit and a creditor is entitled to rely on an order of sanction as evidence that the Court has satisfied itself on this point and that the transaction is a proper one. (1922 Mad. 135, *Rel. on*; 11 Cal. 379 at 393, *Foll.*) [P. 875, C. 2.]

(b) *Guardians and Wards Act. S. 31 (2)—Omission to recite in order the necesssity does not make sanction illegal.*

The mere omission to recite the necessity in the order is no more than an irregularity and it does not render the sanction altogether illegal. (11 Cal. L.J. 197, *Foll.*) [P. 876, C. 1.]

Harnandan Prasad—for the Appellant.

K. N. Katju—for the Respondent.

Daniels, J.:—This appeal arises out of a suit brought by the plaintiff to enforce a mortgage of a house belonging to the appellant Buddhoo. The appellant impeaches the sale on the ground that it was made by his father as his guardian without legal necessity. It was also suggested that his father was spendthrift and an immoral person, but this plea has now disappeared. The appellant's father Bhagwan Das was the certificated guardian of his son, and the mortgage was made with the sanction of the District Judge recorded under section 31 of the Guardians and Wards Act. Both the Courts below have held that this sanction is *prima facie* evidence that the transaction was justified and that it was sufficient to relieve the creditor of the necessity of making any further enquiry. We think that this view is correct. It is the duty of the court to which an application is made under section 29 of the Act for sanction of the sale of a minor's property, to satisfy itself by enquiry that the transaction is necessary and is for the minor's benefit, and a creditor is entitled to rely on an order of sanction as evidence that the Court has satisfied itself on this point and that the transaction is a proper one. This view has quite recently been taken by the Madras High Court in *Nallaka Venkatasami* v. *Rajam Virranna* (1). It is also in accordance with the observations of Their Lordships of the Privy Council in *Gangapershad Sahu* v. *Maharani Bibi* (2), where they say:—

"Their Lordships think that when an order of the Court has been made authorising the guardian of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order and that he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him that would be a different matter; but, apart from any charge of that kind, their Lordships think he is entitled to rest upon the order".

Two other points have been raised by the appellant in argument. The first is that the sanction is not a legal sanction because

(1) 1922 Mad. 135=45 Mad. 429=42 M.L.J. 393=16 M.L.W. 373=(1922) M.W.N. 357=31 M.L.T. 484.

(2) (1885) 11 Cal. 379=12 I.A. 47=4 Sar. 621 (P.C.).

the necessity for the mortgage was not recited in the order as required by section 31 (2) of the Act, and the other, that the reasons given by the plaintiff's father in his original application are not sufficient to justify the transaction.

As to the second point, it is sufficient to say that the question is one which might have involved the taking of evidence, and that it was never raised in either of the Courts below. We, therefore, decline to enter into it. The first question also was not raised in either of the courts below, and we need not therefore go into it, but in any case we consider that the mere omission to recite the necessity in the order is no more than an irregularity and that it does not render the sanction altogether illegal. In this respect we prefer the view of the Calcutta High Court in *Maharaja Sir Rameshwar Singh Bahadur* v. *Dhunpat Singh* (3), to that taken by the Judicial Commissioner of Oudh in *Bankey Lal* v. *Swami Dayal* (4). Except for the omission to recite the necessity the order appears on the face of it to have been passed with due care, for the learned Judge has been careful to lay down the condition that the interest on the mortgage to be effected should not exceed 12 per cent. For these reasons we dismiss the appeal with costs including in this Court fees on the higher scale.

Apepal dismissed.

(3) (1910) 11 C.L.J. 197 = 5 I.C. 334.
(4) (1920) 23 O.C. 72 = 56 I.C. 328 = 7 O.L.J. 207.

1924 Allahabad 876.

NEAVE, J.

Krishna Misir—Defendant-Appellant.

v.

Dwarka Pandey and others—Plaintiffs-Respondents.

S. A. No. 1635 of 1922, decided on 9th May 1924, against the decree of the Subordinate Judge of Azamgarh, dated 9th September, 1922.

Limitation Act, S. 19—Admission as to third party's right in plaint in one's suit may be valid acknowledgment of such right within the section.

In a suit for redemption of a mortgage a statement in the plaint made by some of the mortgagors that certain other mortgagors who did not join in that suit as plaintiff had a right to redeem the mortgage was an admission in respect of the latter's right with regard to the mortgaged property and is an acknowledgment within the meaning of S. 19 of the Limitation Act and gives a fresh start to limitation. [P. 876, C. 2 and P. 877, C. 1.]

Iqbal Ahmad—for the Appellant.

N. Upadhiya—for the Respondents.

Judgment:—This is a defendant's appeal arising out of a suit for redemption. On the 21st January, 1852, plaintiffs' ancestor Mst. Gaura Kuar mortgaged a one anna 13 gandas share to three persons: Behari Pande, Durga Pande and Bisheshar Pande. The mortgagees were put in possession. Later on one of them, Behari, realised his share of the mortgage money by sale of 13 gandas. The remaining two mortgagees were thus left in possession of one anna.

On the 11th June, 1892, the plaintiffs' ancestor sold 16½ gandas out of the remaining one anna to the defendants' ancestor, who on the 20th December, 1911, brought a suit for redemption of the whole one anna. He pleaded that he was owner under the sale-deed of a 16½ ganda share and was in adverse possession of the remaining 3½ gandas. The suit was decreed and on payment of the decretal amount the defendants got possession of the whole one anna.

On the 20th January, 1921, the plaintiffs brought the present suit for redemption of 3½ gandas. Admittedly more than 60 years have elapsed since the original mortgage of 1852, but it has been found that the defendant's plaint in his suit of 1911 contains an acknowledgment of the present plaintiff's right to redeem, which operates under section 19 of the Limitation Act to give a fresh starting point of limitation, and that the present suit, which has been brought within 12 years of the filing of that plaint, is within time.

The only question for decision in this appeal is whether the defendants' plaint in their suit of 1911 contains such an acknowledgement as will give a fresh point of limitation for the present suit.

The learned Subordinate Judge has relied on the ruling of this Court in *Baleshwar* v. *Ram Deo* (1), in which it was held that in a suit for redemption of a mortgage a statement in the plaint made by some of the mortgagors that certain other mortgagors, who did not join in that suit as plaintiff,

(1) (1914) 36 All. 408 = 24 I.C. 104 = 12 A.L.J. 674.

had a right to redeem the mortgage was an admission in respect of the latter's right with regard to the mortgaged property, and was an acknowledgment within the meaning of section 19 of the Limitation Act.

On the other side a Full Bench decision, *Ashfaq Ahmad* v. *Wazi Ali* (2) is cited in which it was held that where one of several co-mortgagors redeems the whole mortgage, he thereby puts himself into the position of the mortgagee as regards that portion of the mortgaged property which represents the interest of the other co-mortgagors and the period of limitation applicable to a suit for redemption brought by the other co-mortgagors is provided for in Article 148 of Schedule 1 of the Limitation Act. Such period begins to run from the date when the original mortgage was redeemable and not from the date of its redemption by the aforesasid co-mortgagors.

It is contendad that in a suit for redemption the names of any co-mortgagors who did not join in the suit must be included in the array of defendants and mention made in the plaint of the right to redeem. There must, therefore, have been such a reference to the co-mortgagors in the suit out of which the appeal arose in 14 All. 1, and the effect of the decision in 12 A.L.J., 674 is practically to overrule the Full Bench decision of 14 All. 1. There is nothing to show whether the plaint in that case contained any of the names of the co-mortgagors who had a right to redeem, and the point was certainly not taken in the appeal.

Following the ruling in 12 A.L.J. 674, I hold that the admission in the redemption suit brought by the defendants in 1911, that Bhagwan Pande had a right to redeem, amounts to an acknowledgment of the liability of the defendants themselves to be redeemed in the event of their succeeding in their suit, and that this gives rise to a fresh period of limitation. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(2) (1891) 14 All. 1=1891 A.W.N. 211 (F.B.)

1924 Allahabad 877.

DANIELS, J.

Ram Karan Singh and anohert—Defendants-Appellants.

v.

Raja Ram and another—Plaintiff and Defendant-Respondents.

S. Appeal No. 1688 of 1922, decided on 23rd April, 1924, from the decree of the Sessions and Subordinate Judge, Jaunpore, dated 21st June, 1922.

(a) *Civ. Pro. Code, S. 100—Whether arrears accrued owing to default of usufructuary mortgagee is a question of law and fact—Transfer of Property Act, S. 76.*

The question whether, the arrears of rent accrued owing to the default of the mortgagee himself is a mixed question of law and fact, and cannot be raised for the first time in the second appeal. [P, 878, C. 1.]

(b) *Transfer of Property Act, S. 69—Section applies even when mortgagee retains possession of part of the mortgaged property.*

Where section 68 of the Transfer of Property Act has become applicable the mere fact that the mortgagee still retains possession of some part of the hypothecated property is no ground for refusing him his remedy for recovery of the mortgage money. [P. 878, C. 1.]

(c) *Civ. Pro. Code, O. 34, r 6—Right to personal decree is different from the right given by covenant in deed to recover money by sale—Transfer of Property Act, S. 68.*

A covenant contained in a mortgage deed giving the mortgagee a right to recover the mortgage money by sale of the mortgaged property is certainly binding on any person claiming title from a mortgagor and stands on an entirely different footing from the right to a personal decree. (34 All. 63 (P C.), *Dist.*) [P. 878, C. 2.]

(d) *Occupancy Holding—Mortgage of one executed before Agra Tenancy Act is valid.*

Mortgage of an occupancy holding is not void if the mortgage had been executed before the passing of the Agra Tenancy Act of 1901 (37 All. 270, *Ref.*; 39 A. 539 *Rel. on.*) [P. 878, C. 2.]

S. P. Sinha—for the Appellant.

H. Mushtaq Ahmad—for the Respts.

Judgment:—In the year 1898 Sheo Dutt Lonia the husband of the defendant Mst. Munia executed a usufructuary mortgage in favour of the plaintiff's ancestor of two plots Nos. 219 and 221 in *Mauza* Kalyanpur in the Jaunpur district. The mortgagor was occupancy tenant of No. 219 and fixed-rate tenant of No. 221. After her husband's death Mst. Munia relinquished No. 219 to the zamindar and the mortgagee lost possession of it. The rent of No. 221 fell into arrears. The

zamindar got it put up for sale in execution of a decree for those arrears and it has been purchased by the defendants-appellants Ram Karan Singh and Har Karan Singh. The plaintiff-mortgagee brought the present suit on the basis of section 68 of the Transfer of Property Act and of a covenant contained in the mortgage for recovery of his mortgage money by sale of plot No. 221. His suit has been decreed by the Court below and the auction-purchasers appeal.

Three pleas have been urged before me.

1. That the arrears of rent accrued owing to the default of the mortgagee himself, and therefore he cannot enforce his mortgage against the purchasers of the plot.

2. That the mortgagee has not relinquished posession of No. 221 and therefore he cannot claim to recover any part of his mortgage money from this plot. In the alternative it is urged that he can only recover a proportionate part of it.

3. That because part of the mortgaged property consisted of an occupancy holding the entire mortgage is invalid and unenforceable.

The first question is a mixed question of law and fact. The respondent takes a preliminary objection that it is raised for the first time in appeal to this Court. The objection is correct. The plea was not taken in the written statement. It is not to be found in any of the eight issues framed by the learned Munsif. There is no discussion of it in the judgment of the court below. Under these circumstances this Court is not in a position to say whether the arrears of rent were due to any default of the mortgagee or not, and the respondent is fully entitled under the rulings of this Court and of the Privy Council to object to the point being taken for the first time in second appeal.

The second plea consists of two alternatives which are quite distinct from each other. As regards the first alternative, where section 68 of the Transfer of Property Act has become applicable the mere fact that the mortgagee still retains possession of some part of the hypothecated property is no ground for refusing him his remedy for recovery of the mortgage money. No authority has been shown to me in support of the appellants' contention and it is untenable. With reference to the second alternative the learned Subordinate Judge has discussed at considerable length the question whether a decree for sale or only a personal decree can be passed in the absence of a covenant to the contrary under section 68 and has held that only a personal decree can be passed. He holds however that the question is not really material in the present instance because there is a covenant in the mortgage deed which justifies the mortgagee in getting a decree for sale.

The mortgage deed has been read to me and there is a covenant in it by which the mortgagee is entitled in the event of dispossession from the whole or any part of the property to recover his mortgage money from any moveable or immoveable property belonging to the mortgagor whether forming part of the mortgaged property or not. This covenant is not disputed by the appellants, but they contend that it is not binding on them as transferees from the mortgagor. In support of this proposition they really on *Jamna Das* v. *Ram Autar Pande* (1). That case is not however in point. It merely holds that a purchaser of the mortgaged property is not under a personal liability to pay the mortgage money under section 90 of the Transfer of Property Act corresponding to Order 34, rule 6 of the present Code of Civil Procedure. A covenant contained in a mortgage deed giving the mortgagee a right to recover the mortgage money by sale of the mortgaged property is certainly binding on any person claiming title from a mortgagor and stands on an entirely different footing from the right to a personal decree.

The third plea is that a mortgage of an occupancy holding is void, and that the inclusion of this holding in the deed invalidates the whole transaction. If the mortgage had been executed, after the passing of the Agra Tenancy Act of 1901, there would have been much force in this plea. Under the previous law it was however held that such a mortgage was not absolutely void—vide *Rang Lal Kunwar* v. *Kishori Lal* (2). In another case which was very similar to the one before me it was held by Richards, C. J., and Walsh, J., that a mortgage of both occupancy and fixed

(1) (1912) 34 All. 63=39 I A. 7=16 C.W N. 97=11 M.L.T. 6=9 A.L.J. 37=1912 M.W.N. 32=15 C.L.J. 63=14 Bom. L.R. 1=13 I.C. 304=21 M.L J. 1158 (P.C.).

(2) (1915) 37 All. 278=28 I.C. 278=13 A.L.J. 300.

rate holdings executed prior to the passing of the Agra Tenancy Act could be enforced by sale of the fixed-rate holding: *Rajendra Prasad* v. *Ramjatan Rai* (3). These two cases are decisive against the plea put forward by the appellants.

The result is that the appeal fails. It is accordingly dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

(3) (1917) 39 All. 539=15 A.L.J. 544=39 I.C. 785.

1924 Allahabad 879.

NEAVE, J.

Kedar Nath and others—Defendants-Appellants.

v.

Jagan Nath Singh and others—Plaintiffs and Defendant-Respondents.

S. A. No. 1716 of 1922, decided on 24th April, 1924, from the decree of the District Judge of Bareilly, dated the 26th July, 1922.

U. P. Land Revenue Act (1901), S. 233 (k)—Suit to challenge partition on the ground of fraud is not maintainable.

Where the plffs. were parties to a partition and the property in dispute was the subject-matter of that very proceeding the case is a very clear instance to which S. 233, Cl. *k* applies and the suit is barred by reason of the prohibition contained in that section. Partition record is analogous to a decree defining the rights of parties, given *inter partes*. [P. 880, C. 1.]

P. L. Banerji—for the Appellants.

N. P. Asthana—for the Respondents.

Judgment:—The facts out of which this appeal arises are as follows:—

In 1913 the plaintiffs were recorded as co-sharers of 1 biswa, 3 biswansis odd. Jagan Nath and others, the *pro forma* defendants, were recorded as co-shares of 18 biswansis odd. Partition proceedings were instituted in 1913 at the instance of another co-sharer, but the plaintiffs and Jagan Nath both applied to have their shares made into separate *pattis*. It is not now disputed that in drawing up the partition proceeding a mistake was made and that the share of the plaintiff was wrongly diminished by six biswansis which were added to the share of Jagan Nath. The partition was confirmed in 1914, and a new *khewat* prepared in accordance with it. The *pro forma* defendants have since sold their share to the defendants appellants, including the six biswansis wrongly added to it. The present suit was brought by the plaintiffs in 1921, after the defendants appellants had obtained mutation, on the allegation that owing to a fraud committed by the *patwari* and Jagan Nath and others, the *fard taqsim* had been wrongly drawn up. The plaintiffs had not discovered the mistake till the mutation proceedings were begun.

Both the Courts have found that there was no fraud. The partition proceeding, in which the mistake occurred, was signed by all the co-sharers including the present plaintiff.

The main defence set up was that the suit was barred by section 233 (*k*) of the Land Revenue Act. This was repelled by both the Courts below, who found that this section had no application.

In appeal the same plea is taken and the learned Counsel for the appellant relies on several rulings of this Court and in particular *Raghubir Singh* v. *Tulshi Ram* (1), in which it was held that a suit for correction of mistakes made in a partition *khewat* was barred by the principle of *res judicata*, as the plaintiff ought to have raised this question in the partition proceeding. One of the main grounds on which the decision was based was that the appellant had had ample opportunity for putting forward any objections, but did not do so.

Section 233 (*k*) of the Land Revenue Act provides that no person shall institute any suit in the Civil Courts with respect to partition or union of *Mahals*, except as provided in sections 111 and 112, that is, unless he has already made an objection before the Collector, who has directed him to proceed to the Civil Court, or unless the Collector has decided such an objection himself. It is contended that in the present case the partition proceeding must under section 114 of the Land Revenue Act have been submitted to the Collector for confirmation and that before it was finally confirmed the plaintiffs had the opportunity of discovering the mistake and applying for its correction.

The learned Advocate for the respondents contends that the plaintiffs had no reason to suppose that any mistake had been

(1) (1915) 13 A.L.J. 548=29 I.C. 22.

made. Their own application and that of Jagan Nath each contained a correct discription of the respective shares. He further relies on two Full Bench rulings of this Court: *Shambhu Singh* v. *Daljit Singh* (2) and *Kalka Prasad* v. *Man Mohan Lal* (3). In both of these the facts were similar but one important detail, which distinguishes the case of *Shambhu Singh* v. *Daljit Singh* (2) from the present case, is that it was found that no notice had been given of the partition to the rightful owner of the land. Both these cases were considered later by a Full Bench of this Court in *Bijai Misir* v. *Kali Prasad* (4). In this latter case it was held by a majority of the Judges that, where the appellants were parties to a partition and the property in dispute was the subject-matter of that very proceeding, the case was a very clear instance to which section 233, clause *k* applied and that the suit was barred by reason of the prohibition contained in that section.

It seems to me that the present suit is an attempt to set aside the partition and is barred by section 233 (*k*). The plaintiffs were evidently guilty of extreme carelessness at the time of partition and the error, which has occurred in the partition proceeding, is due to their lack of attention at the proper time. As has been pointed out by the Board of Revenue in *Select Decision* No. 6 of 1913, the partition record is analogous to a decree defining the rights of parties, given *inter partes*. The plaintiffs' case is a hard one, but they have no one but themselves to thank for the position in which they find themselves.

The appeal is allowed with costs in all Courts including in this Court costs on the higher scale.

Appeal allowed.

(2) (1916) 38 All. 243=33 I.C. 19=14 A.L.J. 293.
(3) (1916) 38 All. 302=33 I.C. 86=14 A.L.J. 373. (F.B.)
(4) (1917) 39 All. 469=41 I.C. 912 =15 A.L.J. 496 (F.B.)

1924 Allahabad 880.

NEAVE, J.

Babu Ram—Defendant-Appellant.

v.

Yasin and another—Plaintiffs-Respondents.

S. A. No. 1744 of 1922, decided on 9th May, 1924, against the decree of the Subordinate Judge of Meerut, dated the 16th September, 1922.

Co-sharers—Sale of specific plot—Purchaser from co-sharer in.

The purchaser of specific plots from a co-sharer in an undivided Mahal where the purchaser has never has been in actual possession cannot resist a suit for declaration of title by the other co-sharers to those plots. [P. 881, C. 1.]

Kailas Chandra Mital—for the Appellant.

M. A. Aziz—for the Respondents.

Judgment:—This is a defendant's appeal. A suit was brought by the plaintiffs for a declaration that they were in possession of the plots in suit as co-sharers. The first Court dismissed the suit but the lower appellate Court has decreed it.

The plaintiffs and one Chheda are co-sharers in a certain khewat. Admittedly no formal partition has taken place but it has been found by the court below that the co-sharers long ago divided up the land among themselves by a private arrangement for facility of cultivation. In this khewat the shares are described in terms of bighas and biswas instead of the more usual annas and pies. Chheda's share was 7 bighas, 7 biswas and 10 biswansis. In 1900 he usufructuarily mortgaged the 7 plots in suit of a total area of 3 bighas, 4 biswas to the father of the defendant Babu Ram, and under a *kabuliat* of the same date became tenant of the plots, which were his *kudkhast*. In 1914 Chedda executed a fresh usufructuary mortgage in favour of Babu Ram and also another *kabuliat*. Babu Ram then had rent assessed on the 7 plots as the ex-proprietary holding of Chedda and later on sued him for arrears of rent and obtained a decree. On the 2nd of November 1917 Chedda sold the equity of redemption of these plots to Babu Ram, who now proceeded to execute his decree for arrears of rent against Chedda and got him ejected obtaining formal possession himself through an Amin on the 4th of June 1918. Very soon after this the plaintiffs themselves took possession of the plots. Babu Ram brought a suit in the Revenue Court for their ejectment treating them as tenants or trespassers. They pleaded that they were in possession as proprietors and were directed by the Revenue Court to have their rights determined by a

Civil Court. They consequently brought the suit out of which this appeal arises.

It is argued on behalf of Babu Ram that he is entitled to whatever rights his vendor Chedda had in the plots in suit, and to be left in peaceful possession of them till a suit for partition is brought. A reference is made to *Ram Peare Lal* v. *Nageshar* (1) where it was held that where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the other co-sharers, the latter have no right to eject him or his transferee or to disturb his possession or enjoyment otherwise than by seeking partition. In the present case, however, the appellant Babu Ram was never in actual possession of the plots and both the mortgage and the sale of these plots in an undivided khewat were unquestionably illegal. The lower appellate court have found that the plaintiffs had no notice of either the mortgage or the sale until the defendant obtained formal possession. Chheda had continued uninterruptedly in possession and the plaintiffs were not to know what transactions he might have been entering into with the defendant. The plaintiffs took possession of the plots very soon after the delivery of formal possession to Babu Ram, for they are shown in the *khatauni* for 1327 Fasli as having been in possession for two years.

In all the rulings relied on for the defendant it was either found that actual possession was proved or that a proprtionate share in the mahal had been acquired. In the present case both these conditions are wanting. The defendant has never been in actual possession and he purchased only specific plots from a co-sharer in an undivided mahal. The plaintiffs are co-sharers in the mahal and though it would seem that in taking possession of these plots they have obtained possession of more than their proportionate share of land it was certainly as co-sharers that they took possession. Any excess can be recovered either in a suit for profits or for partition, but their claim for a declaration such as they pray for cannot be contested by the appellant whose only title is a sale deed recording an illegal transfer.

The appeal fails and is dismissed with costs on the higher scale.

Appeal dismissed.

(1) (1918) 21 O.C. 214=5 O.L.J. 613=48 I.C. 91.

1924 A/111 & 112

1924 Allahabad 881.

MUKERJI AND DALAL, JJ.

Saiyid Ismial Hasan — Defendant—Appellant.

v.

Saidid Mahdi Hasan and others—Plaintiffs—Respondents.

F. A. No. 52 of 1921 decided on 12th June, 1924.

(a) *Transfer of Property Act, S. 76—Interest on surplus usufruct is not payable.*

No interest is payable by mortgagee in possession to mortgagor on surplus of the income from the property remaining after the deduction of expenses with interest mentioned in cls. (c) and (d). 7 Bom. 155, 34 Chancery Division 462, *Foll.* [P. 884, C. 1].

(b) *Interest—Damages—Contract Act, S. 73.*

Interest by way of damages can only be claimed under Contract Act, S. 73. [P. 884, C. 1].

(c) *Interest—When claimable.*

Interest could ordinarily be allowed either under the Interest Act or where there is a stipulation.

Interest cannot be claimed simply because some money is due. [P. 884, C. 1].

M. Wali Ullah and *S. Raza*—for the Appellant.

Iqbal Ahmad—for the Respondents.

Mukerji, J.—The suit out of which this appeal has arisen was originally instituted by Saiyid Mehdi Hasan, respondent No. 1, for the redemption of a mortgaged property and for the recovery of the surplus usufruct realized by the mortgagee from the plaintiff. In the course of the trial other plaintiffs were added mainly because the original plaintiff's property had been transferred to them.

The original mortgagor was one Muhammad Zahur Hasan, whose son is the plaintiff No. 1, and whose widow was the defendant No. 5. The original mortgagee was one Muhammad Sadiq, whose desendants are the defendants Nos. 1 to 4. The other defendants are subsequent transferees.

The original mortgage was made for the sum of Rs. 5,500. It appears that at the date of the mortgage, which is the 7th of February 1895, the properties mortgaged, nine in number, were all held by prior mortgagees. It was agreed that the mortgagee Muhammad Sadiq should advance a sum of Rs. 900 in cash and should keep the balance of the consideration money to redeem the prior mortgages. It was also

agreed that till the mortgages were redeemed the mortgagee Muhammad Sadiq should recover from the prior mortgagees sums of money payable by them to the mortgagor on account of certain stipulations contained in the mortgage-deeds. It appears that the prior mortgages were in the shape of *zar-i-peshgi* leases, by which the mortgagees advanced a sum of money and agreed to take a part of the usufruct of the property to compensate them for the money advanced and to pay to the mortgagor a portion of the usufruct. It was this portion that was originally payable to the mortgagor and was made payable to Muhammed Sadiq.

There is no longer any dispute about the original plaintiff's right to redeem. The lower court has decreed the suit, and has granted a decree for Rs. 13,000 and odd to the plaintiffs as surplus usufruct payable to the mortgagor. A substantial portion of this amount consists of interest.

It appears that the mortgagor died shortly after the mortgage, and his son Mahdi Hasan put as much obstruction as possible in the way of Muhammad Sadiq in obtaining possession. Muhammad Sadiq had to bring several suits, which will be mentioned in detail where necessary, and ultimately he succeeded in receiving a portion of the profits (*zar-i-nankar*) payable to the mortgagor, and later on, he succeeded in redeeming three of the nine properties and in obtaining possession thereof. It is in respect of these three villages, namely, Imamnagar, Rahmatpur and Bhainsara, that the present suit has been brought.

Only two points have been argued before us. It has been urged for the defendant No. 1 (appellant) Ismail Hasan that, the lower Court was not justified in awarding interest on the surplus amount, and that it was wrong in finding what was the money actually received by the mortgagee.

The account which was prepared in the court below is printed at pages 28 and 29 of the printed record. It will be noticed that at page 29 in column one are the items which the mortgagee is supposed to have received since the execution of the mortgagee. We have been told that the mortgagee never received anything out of the property, for years prior to 1307 Fasli, and that in 1307-F and in subsequent years running up to 1311 Fasli the mortgagee received only a sum of Rs. 176 a year. It is further stated that in the year 1312 F. the mortgagee received only a sum of Rs. 376. The learned Subordinate Judge in the account has allowed for the years 1302, 1303 and 1306 F. different items as having been received by the mortgagee; and for subsequent years he has allowed a much larger amount than is admitted by the mortgagee.

There is not much of oral evidence in the case. The judgment at page 59 of the printed record will show that the plaintiff Mahdi Hasan started denying the title of the mortgagee Muhammad Sadiq almost immediately after his father died. Muhammad Sadiq had accordingly to bring a suit against Mehdi Hasan to obtain a declaration that his mortgage was a valid transaction. In the course of the trial Mehdi Hasan was examined, and his deposition is to be found printed at page 55 of the record. In it he clearly stated that he instituted a suit against the prior mortgagee Muhammad Ali, and he received the money which was payable by him. Again, at page 56 he said that all the properties which should have been in the possession of the mortgagee were really in his possession and he was realizing all the profits which were to go to Muhammad Sadiq by agreement. It is clear, therefore, that on the date of the deposition, namely, 26th September 1898, Mehdi Hasain was in possession of all the properties, and the mortgagee Muhammad Sadiq had not succeeded at this date in realizing anything. September 1898 would correspond to 1306 Fasli agricultural year. Thus it is clear that the first three items shown at page 29 of the printed record as the receipts by the mortgagee must go.

It appears that there was further litigation with the plaintiff. But this did not prevent the mortgagee Muhammad Sadiq from suing the previous mortgagees for redemption and for recovery of *zar-i-nankar* or profit money which was to go to him under the terms of the lease of 1895. The decree at page 79 of the printed record shows that Muhammad Sadiq sued the prior mortgagees and obtained a decree for arrears of profits at the rate of Rs. 323-8 (which sum is admittedly the profits recoverable from the villages Rahmatpur and Bhaisara) for the years Rabi 1308 to Kharif 1311 F. Thus for at least a part of 1308 to a part of 1311 F. the mortgagee succeeded in realizing in the

absence of evidence to the contrary, the money payable to him. It follows that for the years 1308 F. to 1311 F. he must be credited with the receipt of the profits as shown in the account framed by the Court below. It is admitted by the mortgagee that for the years 1307 to 1311 he received a sum of Rs. 176 from the village of Imamnagar. This sum, with Rs. 46, the amount of cess payable by Muhammad Sadiq would make up the profits from Imamnagar which is about Rs. 214 a year. If we add this sum to the sum decreed, the full amount debited to him for the years 1308 to 1311 would be debitable against him. There remains the year 1307. There is nothing to show that the mortgagee received anything from the property beyond the sum of Rs. 176 as admitted by him. It was, indeed, the duty of the mortgagor to put the mortgagee in possession, but he having failed to perform this duty the mortgagor cannot debit the mortgagee with any amount which is not shown to have been actually received by him. As regards the year 1312, it appears that the mortgagee obtained possession of the villages Rahmatpur and Bhainsara in the year 1904 A. D., that is to say, he actually got possession after the redemption of the property. It is admitted by the parties that the actual profits of the three villages are to be taken at the figure Rs. 950. Thus the lower Court was right in debiting the mortgagee with the sum of Rs. 950 from 1312 onwards.

The next question is one of interest. The question is whether a mortgagor who sues for redemption is entitled to any interest on the surplus mortgage-money that is found with the mortgagee, after the satisfaction of his mortgage. It is admitted (and we have gone through the deed itself) that there is no express stipulation as to payment of any interest on the surplus mortgage-money. There is a stipulation that interest at 12 per cent. per annum would be paid on the money advanced by the mortgagee. The law on the subject would be found in section 76 of the Transfer of Property Act (IV of 1882). Sections 72 and 76 lay down the duties of the mortgagee in possession of the mortgaged property, and as to how he is to keep accounts. Under section 72 a mortgagee is given the right to spend money for the preservation of the mortgaged property, for making his own title good against the mortgagor and so forth, and is permitted to charge interest on the money so expended at the rate of nine per cent. per annum where no interest is fixed to be payable on the principal amount. In section 76, the mortgagee is directed as to how he is to keep accounts, and it is mentioned that as against the receipts from the mortgaged property he is to deduct the expenses mentioned in clauses (*c*) and (*d*) and *the interest thereon*. Further on, it is stated that the surplus, if any, shall be paid to the mortgagor. It is not mentioned that the surplus is to be paid with interest. It does not seem likely that the framers of the Code overlooked the fact that interest might be payable. They made an express mention of the term 'interest' in section 72 and also in section 76 itself. So it is not probable that the non-mention of the word 'interest' in connection with surplus usufruct was due to any oversight. Coming to cases decided in India, we find that the Bombay High Court in the case of *Ja'noji* v. *Ja'noji* (1) awarded interest on the surplus profits only from the date of the institution of the suit. This was a suit decided in accordance with English practice and Seton on Decrees was quoted. In the English case of *Lake* v. *Bell* (2) interest was allowed at 4 per cent. from the date of the claim. In the case of *Haji Abdul Rahman* v. *Haji Nur Muhammad* (3) Mr. Justice Telang allowed interest from the date of the surplus money coming into the hands of the mortgagee. But it was an entirely different case. In that case the mortgagee exercised his private right of sale given him under the mortgage, and it was on the surplus amount that remained in his hands after the sale that the interest was allowed. This case is different in principle from the case reported in 7 Bom. 185 referred to above. In deciding this case the learned Judge purported to follow an English case, namely, *Charles* v. *Jones* (4). In that case, too, it was on the surplus money that remained in the hands of the mortgagee after the exercise of the right of private sale that the interest was allowed. On a consideration of the language of the Transfer of Property Act and on the authorities

(1) (1883) 7 Bom. 165.
(2) 34 Ch. D 462=56 L.J. Ch. 307=55 L.T. 757=35 W.R. 212.
(3) (1894) 16 Bom. 141.
(4) 35 Ch. D. 544=56 L.J. Ch. 745=56 L.T. 848 =35 W.R. 645.

quoted we are of opinion that no interest is payable on the surplus mortgage money till the date of the institution of the suit. The institution of the suit is really a notice to the mortgagee calling upon him to hand over the surplus money. Form that date the mortgagor will be entitled to interest. Before leaving the point we may mention here that the mortgagor was being paid annually the sum of Rs. 333 and he never told the mortgagee that his money had been paid up out of the usufruct of the property and it was time that he handed over the property to him. It has not been urged before us that interest might be allowed on the surplus mortgage-money by way of damages. But we have considered the point and we think that it is not proper to allow interest by way of damages. Interest by way of damages can be allowed only under section 73 of the Contract Act. In most of the cases for redemption usually it is not till an account has been taken that it is discovered on what date there was a surplus in the hand of the mortgagee. Under section 73 of the Contract Act the party who suffers from a breach of contract is entitled to compensation for any loss or damage caused to him thereby. In the case of surplus profits coming into the hands of the mortgagee, it cannot be said that any contract has been broken especially where there is no express contract. Further, damages can be awarded only when they are not too remote. Only those damages which naturally arise in the usual course of things from such breach can be allowed. It is not in all cases where a sum of money due to one party is in the hands of another that interest may be allowed by way of damages. In a recent case decided by us we held that interest could ordinarily be allowed either on the Interest Act or where there is a stipulation. We have quoted authorities for our opinion. We have shown in that case that in every case, interest cannot be claimed simply because some money is due. We, therefore, do not think it possible to award interest by way of damages.

The result is that the appeal succeeds to the amount of Rs. 6,278-1 interest and Rs. 1,701-12 principal amount. Deducting these two sums from the sum decreed by the Court below as surplus amount the plaintiffs would be entitled to the sum of Rs. 5, 914-1. The appeal is allowed as stated above for the sum of Rs. 7,979-13 with proportionate costs to parties which will include counsel's fees in this Court on the higher scale.

It appears that the appeal has been valued at the surplus amount plus a sum of Rs. 5,100, the valuation of the claim as made in the Court below. The total valuation, therefore, was at Rs. 18,000 and odd. The appellant challenged the right of the plaintiff to redeem. This part of the appeal was not pressed and has been disallowed. In calculating the proportionate amount of costs the total amount of the value of the appeal will be taken to be Rs. 18,000 and odd.

Appeal allowed.

1924 Allahabad 884.

MUKERJI AND DALAL, JJ.

Behari Lal—Appellant

v.

Shiv Narain and others—Respondents,

F.A. Nos. 131 and 204 of 1921, decided on 9th July, 1924, from a decree of the District Judge of Farrukhabad dated the 23rd February, 1921.

(a) *Limitation Act, S.* 10—*Trustees.*

There is no limitation for suits for recovery of property from trustees. [P. 887, C. 1.]

(b) *Trustee* de son tort—*Definition.*

Person in whom the trust property never vested and who was never given possession as trustee but who as manager of the property took upon himself the position and duties of trustee was held to be only trustee *de son tort.* [P. 887, C. 1.]

(c) *Limitation Act S.* 10—*Applies only to express trust and not to trustees* de son tort.

To a suit for accounts against a trustee *de son tort* section 10 will not apply, for it applies to cases of express trust. 44 Mad. 277 ; 45 Mad. 419 *Foll.* 24 C.W.N. 752 *Not. Foll.* [P. 887, C. 1.]

(d) *Limitation Act, Art.* 120—*Trustee* de son tort

Article 120 applies to a suit for accounts against a trustee *de son tort.* [P. 887, C. 2.]

(e) *Civ. Pro. Code, S.* 92—Semble.

Per Dalal, J.—Suit lies against trustees *de son tort.* [P. 890, C. 2.]

(f) *Civ. Pro. Code S.* 92—*Express trustees.*

A suit is maintainable under Section 92 against express trustees. [P. 890, C. 2.]

(g) *Civ. Pro. Code, S.* 11—*Mere opinion of Court not arising out of issues before it for decision is not binding.*

Observation not arising out of the issues which were before the Court for decision are not binding as *res judicata.* [P. 890, C. 1.]

K.N. Katju—for the Appellant.

Iqbal Ahmed and *Panna Lal*—for the Respondents.

Mukerji, J:—These two appeals arise out of the same suit No. 1 of 1920-instituted in the court of the District Judge of Farrukhabad under section 92 of the Code of Civil Procedure.

One Narain Das was the owner of a large property, consisting of zamaindaris, bonds, moveables etc. These were all his self-acquired properties. He executed a will on the 11th of September, 1901, the effect of which will have to be considered in greater detail later on. Suffice it to say for the present that, thereby, he gave one-half of the property to his wife absolutely and he directed that the income from the other half should be spent on certain charities connected with the Arya Samaj religious rites and education of boys and girls. He had a wife's brother in Behari Lal, the appellant in appeal No. 131 of 1921. He directed by the will that Behari Lal, should manage the property and render accounts to his wife. He also desired that a party of five gentlemen, including Behari Lal himself, should form an advisary board for the carrying out of these charities. Narain Das died soon after the execution of the will. His wife Musammat Chironja died on the 20th of June 1903. Their daughter Musammat Shushila died on the 19th of April, 1907. Narain Das had a brother Parmanand, whose sons Badri Prasad and Lakhmi Chand the appellants in the connected appeal No. 204 of 1921 are. On the death of Musammat Chironja, Behari Lal applied for the issue of a probate of the will of Narain Das and in spite of objections filed on behalf of Narain Das's daughter and his nephews Badri Prasad and Lakhmi Chand by order, dated the 14th of August 1903, a probate was issued. On the death of Musammat Shushila, a suit was instituted by Badri Prasad and Lakhmi Chand in the Court of the Subordinate Judge for recovery of the entire property of Narain Das against Behari Lal. They claimed as the lawful heirs of Mst. Chironja and Narain Das. The half-share given to Musammat Chironja was claimed, by way of defence by Behari Lal on the allegation that Musammat Chironja had not been married in one of the approved forms and therefore the property, being her *stridhan*, went to the heirs of her father and therefore to Behari Lal himself. The suit was, however, compromised on the 16th of April 1908 and it was agreed that Badri Prasad and Lakhmi Chand should pay to Behari Lal a sum of Rs. 6,000 and Behari Lal should hand over the property to the then plaintiffs and the plaintiffs should maintain the charities. We however find that subsequently this compromise was not carried out and a further suit was brought by Badri Prasad and Lakhmi Chand on the 21st of April 1910 against Behari Lal for recovery of possession of the property of Narain Das. There was again a compromise on the 8th of February 1911. The property was divided between the parties 23rd going to Badri Prasad and his brother and 1-3rd to Behari Lal. It was also agreed that the properties divided between the parties should continue to be liable for the payment of certain specified debts and *such other liabilities to which they might be subject.* Mutation of names followed this compromise and parties were recorded as in possession of their respective shares under the compromise. Three years later, in 1914, Badri Prasad applied for perfect partition of his share. Behari Lal objected and he said that he was in possession of one-half of the property for the administration of charities and that it was the other half of the property that had been divided among the parties in the ratio of 2 to 1. It seems that he was in possession as a *lambardar.* He contended that, in this view of the compromise, the applicant had not got sufficiently large area to allow of a perfect partition being effected. The Deputy Collector conducting the partition held that the objection did not raise any question of title such as had not already been settled between the parties by a decree of the competent court and he dismissed Behari Lal's objection. An appeal was filed by Behari Lal to the court of the District Judge and to the High Court and the appeals were dismissed. The High Court in their judgment (at p. 175 of the printed record), dated the 12th of April 1917, made certain remarks which will be noticed later on. Three years after the High Court had decided the case the suit, out of which this appeal has arisen, was instituted by three Hindus, being members of the Arya Samaj of Farrukhabad, with the permission of the Legal Remembrancer claiming the administration of the property which they alleged had been endowed by Narain Das by his will.

Several defences were separately taken by Behari Lal and by Badri Prasad and his brother. The suit has been decreed by the

learned District Judge and he held that as to half the property of Narain Das, Badri Prasad and Lakhmi Chand should have it and they should disgorge 1/6th out of the 2/3rd share taken by them and Behari Lal should give up his entire 1/3rd share received by him under the compromise. The learned judge also directed accounts to be taken. He also directed that such properties as had been acquired out of the property of Narain Das should also be given up by the defendents. Hence the appeals.

On behalf of Behari Lal, it has been urged that he should not be called upon to give up the entire 1/3rd share taken by him, but he should give up only 1/6th share. He also contends that the suit for accounts was baired by three years,rule of limitation. The point was also taken that in the circumstances of the case the appellent was not liable to be removed from the trusteeship. But this last mentioned point was not seriously pressed. On behalf of Badri Prasad and Lakhmi Chand, the argument was that the lower court was right in calling upon Behari Lal to give up the entire property that had fallen into his share under the compromise decree, that they were mere trespassers and the suit was not maintainable against them and lastly the suit was barred by limitation against them. It was also urged that the liabilites of the several defendants should separated.

It will be noticed that some of the points urged on behalf of Badri Prasad and his brother were not taken in the memorandum of appeal. But as the points were those of law they were allowed to be urged.

The points for determination therefore in these appeals are :—

(1) Whether the suit against Badri Prasad and Lakhmi Chand is maintainable

(2) Whether Behari Lal should give up the entire 1-3rd property or he should give up only half of 1-3rd, that is 1-6th ?

(3) What is the position in law of Behari Lal ?

(4) Whether the claim for accounts is barred by time as against him ?

(5) What is the position of Badri ;Prasad and Lakhmi Chand and whether the suit for accounts is barred against them

(6) Whether the liabilities of the several defendants should be separated, if so, what are the liabilities of the defendants.

Point No. 1, It is urged that Badri Prasad and Lakhmi Chand were mere trespassers, so far as the endowed property went and the suit against them under section 92 of the Civil Procedure Code was not maintainable. There are two answers to this argument. First, they are, on their own showing and on subsequent admission of Behari Lal, the heirs of Narain Das and they are therefore the heirs of the founder of the trust. In this capacity they are themselves express trustees since the death of Musammat Shushila, which occured on the 19th of April 1907. Under the will which is printed at p. 59 of the record half the property was given to the wife Musammat Chironja and as to the other half it was dedicated to certain charities. It was mentioned that only the income from half the property would be devoted towards the expenditure for the maintenance of charities and the corpus of the property, the subject matter of the endowment, should remain in the charge and custody of the wife and after her death, in the charge and custody of such person as might receive the property from the wife Musammat Chironja. Musammat Chironja did not execute any will or gift and did not nominate any successor to her for the purpose of holding the trust property. According to established principles, therefore, the persons who were the heirs of the creator of trust became the party entitled to administer it. In this view Badri Prasad and Lakhmi Chand became the express trustees and they were bound to administer the trust. Indeed, under the compromise of 1907 printed at p. 113 of the record these men took upon themselves the charge and custody of the property impressed with the charities. They are therefore liable as trustees and the suit against them is a proper one.

Further, these men, namely Badri Prasad and Lakhmi Chand even if they were not trustees, as heirs of the founder of the trust, they took upon themselves the duties of the discharge of the trust and became liable as trustees *de son tort*. As I have already stated they took upon themselves the duties of trustees in express terms by the compromise of the 16th of April 1908 (p. 113). In the subsequent compromise no mention of the trust was made, but it was expressly stated that the property in the hand of both the parties would continue to be liable for such charges for which they might be reasonable liable. The compromise is printed at p. 155 of the record. The 'charges' besides those of the debts, could only mean the charges attributable to the endowment.

I hold that the defendants are liable as trustees and the suit is rightly maintained against them.

This finding disposes of the issue No. 5 as well.

The defendants Badri Prasad and Lakhmi Chand are express trustees and the suit against them is maintainable under section 10 of the Limitation Act without being barred by any length of time.

Point Nos. 2 & 3—Behari Lal admitted in paragraph 2 of the written statement filed in the suit (see p. 14) that Badri Prasad and Lakhmi Chand were the reversioners to the estate of Narain Das and his wife. He has no right to the property as an heir although he laid a claim to it during the litigation of 1907. His title to the property is only what he gets by the compromise of 1911. Although Behari Lal was directed by the will to manage the property, he was given no position as a trustee and the trust property never vested in him. He was to keep an account and render it to his wife. It is true that either as one of the members of the committee or as the manager of the property Behari Lal took upon himself the position and duties of a trustee. But he thereby, became only a trustee *de son tort* and that is his position under the law. I find accordingly.

Before leaving this issue I may point out that in the judgment of the High Court in the partition case, Behari Lal was described as the trustee of the 1/3rd property given to him. That was a statement contrary to the evidence adduced in this case and the remarks of the High Court have not the effect of *res judicata*. They had no bearing on the case. That being the case, Behari Lal is entitled to retain half of 1/3rd which he got by the compromise. There seems to be no reason why he should give up the entire 1/3rd share while the other defendants Badri Prasad and his brother should keep half and give 1/6th only. I find that Behari Lal is liable to give up only 1/6th share and his position is that of a trustee *de son tort*.

Point No. 4. Behari Lal being a trustee *de son tort*, to a suit for accounts against him section 10 of the Limitation Act will not apply, for it applies to cases of express trust. The Madras High Court in the cases reported in 44 Mad. 277 and 45 Mad. 419, appears to have taken the same view as myself. A contrary opinion was expressed by the Calcutta High Court in 24 C.W.N. 752 but no reasons were given. There can be no question about the liability of Behari Lal. The only question is what rule of limitation would be applicable. The learned Counsel appearing for him could not point out any appropriate article. The result is that article 120 would apply and Behari Lal must render accounts of the properties received by him for the period of six years prior to the suit.

Point No. 6. The liabilities of the defendant should be separated simply because they did not act anywhere in consert except for depriving the charities of their source of income. I have already stated that Behari Lal is responsible to render accounts for only six years prior to the suit. The suit was instituted on the 9th of April, 1920 and Behari Lal must render accounts from the 9th of April, 1914. The property which was in his hands on or subsequent to this date must be accounted for and the income from these properties must also be accounted for. It is to be mentioned that after the compromise, dated the 8th of February, 1911, Behari Lal had in his possession only 1-3rd of the immoveable property.

As regards Badri Prasad and his brother they became the heirs to the property on the death of Musammat Shushila, that is 19th of April, 1907. Any property that came into their hands on or after this date must be accounted for.

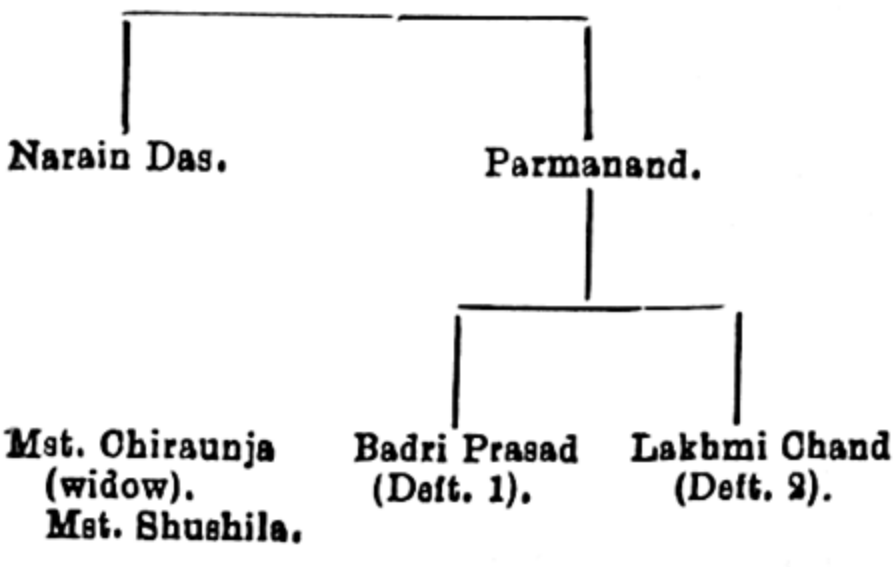
The result is that I would modify the decree of the Court below as indicated above. The learned Judge's order in other respects must stand.

Dalal, J.:—These are two appeals from different sets of defendants in a decree passed by the learned District Judge of Farrukhabad in a suit under section 92 of the Code of Civil Procedure. The plaintiffs were the President, Treasurer and a member of the Arya Samaj in city Farrukhabad and desired certain directions of the Judge to remove trustees, to appoint other trustees, to obtain from the defendants details and particulars relating to the trust property any to obtain accounts from the defendants. It was further prayed that a scheme relating to the trust property may be prepared and an order for the purpose of enforcement of the trust may be passed. The defendants were represented to be trustees of the property in suit under the will of one Narain Das. The learned Judge ordered the removal of

the defendants from the position of trustees of half the property of Lala Narain Das and directed that the defendant Behari Lal shall make over possession of the entire one third property in his possession and the defendants Badri Prasad and Lakhmi Chand of one-sixth out of the two-third in their possession. He further appointed the president and treasurer of the Arya Samaj, Farrukhabad to be ex-officio trustees of half the property. The property covered both zamindari and moveable property of every kind. The defendants were directed to give details of the property making up the trust and to furnish an account. They were further directed to pay to the new trustees the arrears of net income of the trust property with simple interest at 6 per cent per annum from the end of each year in which the income accrued till the date of payment. The three defendants were held to be jointly and severally liable to pay these arrears of income. Though it was not specifically mentioned from what date the accounts were to be rendered, it appears from the Judge's reference to the period of limitation that there was none, that accounts were to be rendered from the date of the death of Narain Das. A scheme of management was laid down with which we are not concerned in these appeals.

The decree therefore amounted to a decree for possession of zamindari properties and a preliminary decree for accounts and for a determination of what may be found due on account of arrears of profits and of moveable property and cash.

The facts giving rise to the litigation may be summarised. The following pedigree shows the relationship of defendants 1 & 2 to Narain Das :



Defendants 1 and 2 are Narain Das brother's sons. Defendant No. 3 Behari Lal is brother of Musammat Chiraunja, wife of Narain Das. We shall examine the terms of the will of 11th September, 1901 when we come to determine the nature of the possession of the different defendants. For the present it is sufficient, to say that Narain Das made a trust of half his property for charitable purposes connected with the Arya Samaj. He left half his estate absolutely to Musammat Chiraunja as he was entitled to do, being a separated Hindu. On his death, his widow Musamat Chiraunja took possession of the property. Narain Das, died in November 1901 and his widow on 28th June, 1903 intestate. Behari Lal then applied for probate of the will as executor appointed by the will and probate was granted to him on 20th July, 1903 (page 73 of the record). The daughter and officials of the Arya Samaj objected, but their objection was dismissed and the order granting probate was upheld by this Court (page 175). Musammat Shushila died on 19th April, 1907. On 7th October, 1907, Badri Prasad and Lakhmi Chand filed a suit against Behari Lal for recovery of the entire estate of Narain Das (plaint page 99). In the plaint they mentioned the will of Narain Das in para. 3. In his written statement (page 111) Behari Lal pointed out that Narain Das had made a charitable trust of half his estate. He contested the claim of Badri Prasad and Lakhmi Chand to succeed to the property of Narain Das. That point is immaterial here. The suit was compromised on 16th April 1908 (page 113).

Under the compromise the plaintiffs of that suit were declared to be owners of the entire property but liable to pay Rs. 6,000 to Behari Lal. They did not ask for further accounts from Behari Lal and it was further agreed.

"That portion of the property which has been dedicated to religious objects under the will shall remain in the charge and custody of the plaintiffs who shall act upon the directions given in the will."

Behari Lal and Lakhmi Chand then obtained a succession certificate from the District Court (pages 125 and 129) and recovered some of the moveable properties. Behari Lal however did not make over the zamindari property, so another suit was brought by them on 21st April, 1910 for the zemindari property and some other property. In the plaint of this suit also (page 137) the will executed by Narain

Das is mentioned in para. 3. In his written statement (page 147) Behari Lal contended that a suit regarding endowed property should have been instituted in the Court of the District Judge. It is clear that in this suit also the trust was brought into issue. This suit was also compromised on 8th February, 1911 (page 155).

The terms important for the purpose of these appeals are the first two :—

(1) The claim was decreed in favour of the plaintiffs in respect of two-third and was to be dismissed in respect of one-third which was to remain with the defendant. The plaintiffs were to obtain mutation of names of the zamindari property to the extent of two-third.

(2) The plaintiffs and the property were to remain liable for the debts specified in the compromise and *also for other charges* on the property in dispute to the extent of two-third and the defendant and his property was to be liable for the same to the extent of one-third. The whole property was thus to be liable for the said debts and other charges.

These terms indicate that as regards the trust Badri Prasad and Lakhmi Chand rendered themselves liable to the extent of two-third and Behari Lal to the extent of one-third. Mutation of names was obtained accordingly.

On 25th June, 1914 Badri Prasad applied to the Revenue Court for a partition of his one-third share. Behari Lal objected on the ground that the applicant was in possession not of one-third but of one-sixth of the property under the compromise of 8th February 1911, because the compromise related only to half the property, the other half being trust property, in the custody of Behari Lal. If this were the case Badri Prasad would not possess a sufficiently large area of land, to obtain a partition. The objection was dismissed by the Revenue Court and also by the District Judge. On appeal by Behari Lal this order of the District Judge was confirmed by this Court on 12th April 1917. In this judgment occur the following observations of a Bench of this Court :—

" It seems that the appellant has undoubtedly been guilty of breach of trust so far as the Arya Samaj is concerned, but there can be also no doubt that he entered into that compromise as representing the Aya Samaj or rather the interest which they had obtained under the will. What possible right the appellant could have to any portion of the estate except in his capacity as trustee or *quasi* trustee for the Arya Samaj we fail to see. It seems quite clear that any part of the property which the appellant holds is held by him as trustee and that he is liable to account for the same ".

After the partition the present suit was instituted on behalf of the Arya Samaj, on 9th April, 1920.

In these appeals the learned Counsel for Behari Lal pressed only half-heartedly that his client should be appointed trustee of the charities. On behalf of Badri Prasad and Lakhmi Chand also a plea for their appointment was not pressed here. So far as these appeals are concerned it may be taken as conceded that the plaintiffs were entitled to sue and that they were fit persons to be appointed trustees.

The questions at issue are (1) what is the share of the property which the two sets of defendants must severally make over to the new trustees to make up half the property of Narain Das and (2) how far the several defendants are liable to render accounts and from what years.

We think that the learned Judge was not correct in holding that Behari Lal held the entire one-third share as trustee either expressed or by his own wrong. In the first compromise the trust was specifically mentioned and Badri Prasad and Lakhmi Chand undertook to manage it and to spend the profits of half the property to carry out the objects mentioned in the will. To avoid litigation they undertook to pay Rs. 6,000 to Behari Lal. In the second compromise the trust was not specifically mentioned but it was definitely stated that Badri Prasad and Lakhmi Chand were liable for debts and other charges to the extent of their two-third share. The other charges can mean nothing else than the trust charges.

It was not likely that Behari Lal who insisted on the payment of Rs. 6,000 under the first compromise and refused to make over the property on non-receipt of that money would consent to give over the property to Behari Lal and Lakhmi Chand without getting anything for himself. If he wanted to keep the trust property he would have kept half the property and not one-third.

It is clear to us that under the compromise of 8th February, 1911, Badri Prasad and Lakhmi Chand consented to make over one sixth of the property free from trust to Behari Lal. They are bound by the decree of 8th February 1911 and cannot go behind it. Much stress was laid by their counsel on the observations already quoted of this Court in the Bench judgment of 12th April, 1917.

In our opinion those observations did not arise on the issues which were before this Court for decision. The question for decision there was whether Badri Prasad and Lakhmi Chand had received two-third of the whole property or two-third of the half under the compromise of 1911. The question of the trust was not before it, because the Arya Samaj officials were not parties. It was merely an opinion of this Court that Behari Lal entered into the compromise as representing the Arya Samaj. There was no such plea on behalf of Badri Prasad and Lakhmi Chand in the partition suit. On the contrary Badri Prasad in his partition application made no mention whatsoever of the trust.

We are of opinion that the observations in the judgment of this Court of 12th April 1917 are not binding by way of *res judicata*. We hold that Behari Lal is liable to make over one-sixth of the entire property of Narain Das and Badri Prasad and Lakhmi Chand one-third to make up the one-half property decreed to the plaintiffs.

We must now come to the terms of the will in order to decide the question relating to the accounts. In the will Narain Das has made the following specific directions about his property :—

"My wife is the owner of a moiety of the property and each including the outstanding debts amounting to Rs. 50,000, while the other moiety, *i.e.* Rs. 25,000 should be spent for the undermentioned religious objects with the advice and sanction of a *sabha* of five members whose names are given below".

"below." (Behari Lal is one of the five members).

Then he describes how the trust should be carried out. The words are :—

"The principal amount should not be spent for religious objects, only the profits should be utilised. As long as my wife is alive, she is the absolute owner of her moiety share ; towards the close of her life she has power to give in consultation with her brother Lala Behari Lal, her property to her daughter or for such religious objects as she chooses. The moiety share of my property which I have dedicated for religious objects shall remain in the charge and custody of my wife and after her death the person to whom she gives her own property shall have the same power as she had. My wife or her successor shall not have power to spend anything out of the property dedicated by me for religious objects without the advice and sanction of the *sabha*."

He then describes what the religious objects are and gives the names of the members of the *sabha* and a list of religious objects according to him. A consideration of these clauses of the will is not necessary here.

Finally Behari Lal is appointed manager to manage the property after his death. He is directed to manage honestly, without oppressing any one and to render accounts to his wife.

The question then is who are the express trustees under the will. It was argued strenuously on behalf of Badri Prasad and Lakhmi Chand that they were mere trespassers and a suit under section 92 did not lie against them. It was suggested that they should be removed from the array of defendants and the plaintiffs after they were appointed trustees should bring a separate suit against Badri Prasad and Lakhmi Chand for recovery of possession from the trespassers.

In our opinion these defendants are express trustees. They are certainly not trespassers. Under the compromise of 1911 they took over the property burdened by the trust to the extent of two-third, so at the very least they would be trustees *de son tort*. It was held by this Court in *Ram Bilas* v. *Nityanand* (1) that a suit under section 92 of the Code of Civil Procedure did lie against such persons.

We are of opinion however that Badri Prasad and Lakhmi Chand are express trustees. Behari Lal was appointed manager but not trustee. He was directed to render accounts to the testator's wife after the testator's death. The *sabha* was only to give advice as to the disposal of the profits and was not put in possession of the corpus of the trust property. The person placed in possession of the trust property was the testator's widow. The words are definite and may be repeated.

"The moiety share of my property which I have dedicated for religious objects shall remain in the charge and custody of my wife, and after her death the person to whom she gives her own property shall have the same power as she had."

Obviously then the successor in interest to the property unburdened with the trust was the trustee of the other half of the property. Badri Prasad and Lakhmi Chand are successors in interest and are therefore trustees of half the property which was burdened with the trust. They have now rightly been removed by the order of the lower Court, but until they were removed they were express trustees. No period of

(1) 1922 All. 542=44 All. 652=21 A.L.J. 105.

limitation bars a claim for accounts, profits and recovery of moveable properties from them. They are therefore liable to render accounts of every class of property from the time when they came into possession thereof. They will be liable to refund to the plaintiff to the extent of one-half of what they received, because they received two-third and are liable to give back one-third to the plaintiffs. Accounts shall be taken from them on that footing.

Behari Lal was not an express trustee under the will, but he acted throughout as trustee and there can be no doubt of his being a trustee *de son tort*. He was rightly made a party in the present suit.

Unfortunately however section 10 of the Limitation Act does not appear to apply to any one other than an express trustee. A Bench of the Madras High Court held in *Krishna Pattar* v. *Lakhshmi* (2) that only an express trustee came within the meaning of section 10 of the Limitation Act. The learned Judges in that case were not called upon to decide whether the three years rule or the six years rule of limitation applied to a suit brought against a person who was neither a trustee nor a trespasser. It will be necessary for us to decide that point. On behalf of the plaintiffs-respondents was quoted the Calcutta case of *Dhanpat Singh* v. *Mahesh Nath Tewari* (3) where section 10 was held to be applicable to a trustee *de son tort*. The learned Judges had given no reasons for their opinion in that case and we agree with the Madras opinion.

It was argued on behalf of Behari Lal that the period of limitation applicable was one under article 109 of three years. That article relates to profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant. In the present case, however, the property did not belong to the plaintiffs nor can it be said that the defendant who put himself forward as a trustee received the profits wrongfully. We are of opinion that the general article of limitation, article 120 will apply here. Behari Lal must therefore render accounts from 9th April, 1914, six years prior to the institution of the suit and give restitution of all monies of whatever kind received by him from that period to the extent of one-half.

We think we have dealt with all the grounds of appeal in both the appeals. As to appeal No. 131 Behari Lal succeeds on 1st, 2nd and 4th grounds of appeal. The third ground of appeal was not argued. The 5th was not pressed and we have dealt with the 6th and 7th, as regards accounts and the period from which they should be taken from Behari Lal. The 8th ground of appeal is only argumentative.

Turning to appeal No. 204 the appeal was not argued in accordance with the grounds of appeal. We put it to the learned Counsel Dr. Sen and he agreed that his grounds were that Badri Prasad and Lakhmi Chand were trespassers and should be discharged from this suit, that failing that they were trustees *de son tort* and should not be called upon to render account beyond three years prior to the suit or at the worst six years. We have dealt with those contentions. We questioned Dr. Sen and he said that his clients had no desire to be appointed trustees. As to ground of appeal No. 6 we shall separately specify in the decree, the liability of the two sets of defendants.

By the Court:—In the result we amend the lower Court's decree as to property and direct that the paintiff shall recover one-sixth of the entire property from Behari Lal and one-third from Badri Prasad and Lakhmi Chand. As to zamindari property there is no difficulty as to limitation. As regards other property Badri Prasad and Lakhmi Chand shall restore half of whatever property of Narain Das they received, while Behari Lal shall restore whatever property other than landed property he received on and after 9th April 1914. As regards profits Badri Prasad and Lakhmi Chand shall refund half of all the profits received by them, while Behari Lal shall refund half of what he received on and after 9th April 1914. Accounts shall be made up on that footing.

The decree of the lower Court as regards the scheme of management and the directions to defendants to give details of the property bequeathed are maintained and also the order as regards interest at 6 per cent. per annum.

In this Court parties shall bear their own costs. Behari Lal has made a good business out of the trust on account of the

---

(2) 1922 Mad 57=45 Mad. 415=16 M.L.W. 886=42 M.L.J. 119=(1922) M.W.N. 117=30 M.L.T. 138.

(3) (1920) 24 C.W.N. 752=57 I.C. 805.

bar of limitation, so we wont allow him costs here. The same decree shall be passed in appeal No 204.

Decree amended.

1924 Allahabad 892.

MUKERJI and DALAL, JJ.

Mt. Chambi and another—Appellants.

v.

Tara Chand and others—Respondents.

F. A. No. 386 of 1921, decided on 12th May, 1924 from the Subordinate Judge of Meerut, dated 22nd August, 1921.

Civ. Pro. Code, O. 22, r. 6—Defendant dying after hearing but representative brought on record before decree—Rule 6 does not apply.

Where after the hearing of suit a defendant died and his representative was brought on record before the decree was passed:

Held, that r. 6 has no application as the decree as passed was not against a dead man but against a living person. O. 22, r. 6, prevents abatement when death takes place between conclusion of the hearing and the pronouncement of the judgment and the decree is passed against a dead man ; this provision of law covers cases where the Court is unaware of the death of a party and proceeds on the supposition that the parties are alive. The rule deals with a decree against a dead man and not with one against living persons. It indicates how a decree against a dead man is to be construed and can have no reference to a decree, passed against living person. [P. 893, C. 1.]

(b) *Majority Act S. 3—Person cannot be major with respect to one and minor with respect to another property.*

Where minor was adopted after 18 but before 21 years of his age and a guardian had been appointed before his 18th age.

Held, that he cannot be minor with respect to the property of his natural father and major with respect to the property inherited by him from his adoptive father. [P. 894, C. 1.]

(c) *Civ. Pro. Code, O. 32, r. 3—Decree against unrepresented minor defendant is nullity though prejudice not alleged—Minor—Decree—Nullity.*

A minor who was unrepresented in the suit by any guardian cannot be held to be bound by the decree passed against him although he neither alleges nor proves that the decree passed against him is unjust or to his prejudice and though he regarded himself as major throughout the whole proceeding. 17 C.W.N. 549, *Appr.* Case law discussed. [P. 894, C. 1.]

Nihal Chand and *Harendra Krishna Mukerji*—for the Appellants.

K. N. Katju and S. B. Johri—for the Respondents.

Dalal, J.:—The plaintiff Tara Chand who has since become a major, instituted a suit for cancellation of certain decrees of court through his next friend Mst. Persauni, his certificated guardian. He is the son of Jainti Prasad, and was born on 13th November, 1899. A guardian was appointed by Court of his person and property on 5th October, 1907. He attained the age of majority on 13th November, 1920. After the guardian was appointed, his uncle Benarsi Das adopted him. In 1916 one Mst. Champi sued Banarsi Das and others for partition of a house, and all proceedings were completed in the first Court on 20th March, 1917. Judgment was reserved on that day and 30th March was fixed for delivery. Banarsi Das died between those two dates, and on 28th March Musammat Champi applied to bring Tara Chand on the record in place of his adoptive father, Banarsi Das. He appointed a pleader and contested the suit. On 14th April, 1917, a preliminary decree for partition was passed, and a final decree on the 21st June. Tara Chand himself appealed from both decrees to this Court, and the appeals were dismissed on 28th June, 1920. The present suit for the cancellation of all the four decrees on the ground that they were passed against him while he was a minor and not represented by a guardian was instituted on the 14th of September, 1920.

The learned Subordinate Judge of Meerut decreed the suit, and hence two of the defendants, Must. Champi and Must. Sona Dei, have appealed. The grounds of appeal are; (1) that the plaintiff failed to prove that he was born on the 13th November, 1899, (2) that on his adoption by Banarsi Das the guardianship certificate issued to Must. Persauni, became inoperative, and the plaintiff attained majority at the age of 18 on 13th November, 1917, (3) because the decree of the first Court sought to be cancelled is saved by the provisions of Order 22, Rule 6, (4) that the plaintiff was not entitled to a decree in this suit, because he was in no way prejudiced by the want of appointment of a guardian and he was able to conduct his defence effectively himself, and (5) that the plaintiff was barred by the rule of estoppel from questioning the decrees.

There is no force in any of these grounds It was conceded during the argument that the plaintiff was born on the 13th November, 1899. Once a guardian was

appointed to him, it mattered little what other property he acquired. The adoption did not change his identity and the power of the guardian, Musammat Persauni, and of the District Court, which appointed her, continued to be the same.

Order 22, rule 6, prevents abatement when death takes place between the conclusion of the hearing aud the pronouncement of the judgment, and the decree is passed against a dead man. Obviously this provision of law covers cases where the Court is unaware of the death of a party and proceeds on the supposition that the parties are alive. It was urged that in the present case, hearing concluded on the 20th of March and judgment was delivered on the 14th of April, 1917, and that the death of Banarsi Das took place between the two dates. This is not a correct way of summarising the proceedings of the Court. After the 20th March and before the judgment was pronounced, some proceedings took place, namely, those of bringing Tara Chand on the record; there was, therefore, no conclusion of the hearing prior to the death of Banarsi Das. The rule deals with a decree against a dead man and not with one against living persons. It indicates how a decree against a dead man is to be construed and can have no reference to a decree passed against living persons. Even where preliminary and final decrees were both passed against a dead person, the Patna High Court held that the final decree was a nullity and was not saved by the provisions of this rule. *Jungli Lal* v. *Laddu Ram Marwari* (1).

The four decrees sought to be cancelled were passed against a minor and were void. We have not to consider any question of prejudice to the plaintiff. The learned counsel for the appellant quoted rulings in cases where the minor was not properly represented, and the Courts refused to give him relief when it was discovered that he had not suffered any prejudice by improper representation. The first case is a Privy Council case of *Walliam* v. *Banke Behari Pershad Singh* (2). A Bench case of this Court, *Ram Barechha Ram* v. *Tarak Tewari* (3) was similar. The most recent case is that of the Patna High Court, *Pande Satdeo* v. *Pandeo Ramayan Tewari*, (4). In this case, one of the learned judges (Das, J.) has pointed out the distinction between void and voidable decrees at page 352 of the report :—

"The Court has no jurisdiction to render judgment against one who is not a party to the suit, though it has jurisdiction to render judgment against one who is a party to the suit but who has not been brought before it by reason of the failure on the part of the Court to follow the particular procedure laid down in the Code. The one affects the existence of the jurisdiction of the Court; the other affects the exercise of it. To take a simple case, a minor is not a party to the suit, unless he is represented in the record of the suit by a guardian competent to act as such. Where the record of the suit itself shows that the minor is wholly unrepresented, or that he is represented by a guardian disqualified from acting as such a guardian under the express provision of the statue, the result is that the minor is not properly a party to the suit, and a judgment rendered against the minor is without jurisdiction and null and void. But where he is properly a party to the suit and as he is properly a party if he is represented in the record by a guardian not disqualified from acting the jurisdiction of the Court to try and determine the cause as against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of a guardian." A full Bench of this Court held a decree passed against a minor without the appointment of a guardian *ad litem* to be void (*Bhura Mal* v. *Har Kishan Das* (5). This ruling was followed by a Bench of two Judges in *Hanuman Prasad* v. *Muhammad Ishaq* (6), where the force of the Privy Council case *of* 30 *Calcutta* was explained, and the authority was quoted of the Privy Council case, *Khairajmal* v. *Daim* (7). In the latter case their Lordships observed :—

"Their Lordships agree that the sales cannot be treated as void or now be

(1) (1919) 4 Pat. L.J. 240=1919 Pat. H.C.C. 105=50 I.C. 529 (F.B.)
(2) (1903) 30 Cal. 1021=30 I.A. 182=7 C.W.N. 774=5 Bom. L.R. 882 (P.C.)
(3) (1916) 14 A.L.J. 589=33 I.C. 805.
(4) (1923) Patna 242=2 Pat. 335=4 P.L.T. 147.
(5) (1902) 24 All. 383=(1902) A.W.N. 76.
(6) (1905) 28 All, 137=2 A.L.J. 615=(1905) A.W.N. 229.
(7) (1905) 32 Cal. 296=32 I.A. 23=9 C.W.N.201=2 A.L.J. 71=7 Bom. L.R. 1=1 C.L.J. 584 (P.C.)

avoided on the ground of any mere irregularities of procedure in obtaining the decree, or in the execution of them. But on the other hand the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings, or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity, and might be disregarded without any proceeding to set them aside." The present case is similar. The decrees passed against the plaintiff are a nullity and might be disregarded without any proceeding to set them aside. In *Ram Chander* v. *Cheda Lal* (8), this Court held that where a minor was sued as a major and a decree passed against him, the decree was not binding upon him. That was a case where a certificated guardian was appointed under the Guardian and Wards Act to the minor and it was held that such a minor did not attain majority until the age of 21. In that case it was contended that a guardian having been appointed to the minor's property in one district, the minor would attain the age of majority at 18 with respect to property situated in another district. The learned Judges held that a person cannot be a major in one district and a minor in another. Similarly, it may be stated here that Tara Chand cannot be a minor with respect to the property of his father Jainti Prasad, and major with respect to the property inherited by him from his adoptive father, Banarsi Das. The Calcutta High Court also has held a decree against a minor to be a nullity (*Purna Chandra Kunwar* v. *Bejoy Chand Mahtab*) (9).

As pointed out by the learned Judge of the lower Court the appellant did not come forward herself nor get any agent of hers examined to prove circumstances which would give rise to any question of estoppel. We were not told during the argument how the action of Tara Chand led the defendant, Mst. Champi, to act as she did in the previous litigation. It is not even alleged by an affidavit or otherwise that she was aware of how Tara Chand was acting, and had no knowledge of his being a minor. Her learned Counsel here represented that Tara Chand was playing a trick. Subsequent to the previous litigation, he had purchased more shares in the house (see para. 12 of the plaint) and by re-opening the litigation he desired to get a solid block for himself and oust Mst. Champa from the portion of the house alloted to her. I have, however, to decide a question of law and not of morality. These considerations may be sumitted to the trial Court in case there is a fresh trial of Mst. Champi's suit.

Though not mentioned in the grounds of appeal an argument was advanced here that a declaration is discretionary for this Court to grant and the circumstances of the present case are such that the discretion should not be exercised. The decrees are a nullity and may be disregarded, so it cannot be said that the lower Court exercised its discretion wrongly in granting the declaration sought by the plaintiff. It is also urged that the plaintiff's remedy was by way of injunction to restrain the defendants from executing the decrees and not by way of declaration. The case of *Kunhamed* v. *Kutti* (10), was quoted as an authority. The facts of that case are peculiar and in no way applicable here. The remedy granted to the plaintiff was a proper one.

I would dismiss the appeal with costs.

Mukerji, J.:—This appeal raises the question whether, a minor who was unrepresented in the suit by any guardian can be held to be bound by the decree passed against him, although he neither alleges nor proves that the decree passed against him is unjust or to his prejudice.

The facts of the case are no longer in dispute and are as follows. The appellant Mst. Champi filed the Suit No. 203 of 1916 against one Lala Benarsi Das and several others for the partition of a certain house. The case was duly heard and concluded except for the judgment during the life-time of one Benarsi Das. The Court reserved judgment and fixed the 30th of March, 1917 for delivery of it. Benarsi Das died on the 23rd of March, 1917. An application was made to the Court by Mst. Champi that the respondent, Tara Chand, the adopted son of Benarsi Das, might be brought on the record as his legal representative. This application was granted and ultimately on the 14th of April, 1917 a preliminary decree was

(8) (1905) 2 A.L.J. 460 = (1905) A.W.N. 122.
(9) (1913) 17 C.W.N. 549 = 18 I.C. 859 = 18 C.L.J. 18.
(10) (1891) 14 Mad. 167 = 1 M.L.J. 338.

passed. The final decree for partition followed on 21st of June, 1917. Tara Chand on being brought on the record purported to appoint a Vakil and resisted the suit so far it lay in his power. He filed appeals to this Court against both the preliminary and final decrees which were, however, unsuccessful. Tara Chand was the natural son of one Jainti Prasad. On the death of Jainti Prasad Tara Chand's natural mother Mst. Parsauni took out a certificate of guardianship, on the 15th of November, 1907. It was after this certificate had been obtained that Tara Chand was adopted by Benarsi Das and passed into his family. Evidently everybody forgot that there was a certificated guardian and Tara Chand was throughout treated as a major. As already stated, he also regarded himself a major and accordingly resisted the suit and preferred the appeals. After the appeals were dismissed it struck Tara Chand that he might try his luck again and he accordingly brought the suit, out of which this appeal has arisen, to obtain a declaration that the decrees passed against him were not binding on him on the sole ground that he was unrepresented in the suit, by a duly appointed guardian. He nowhere stated in the plaint how the decrees passed against him were prejudicial to his interests. He made certain allegations about the plaintiffs being aware of his minority and of her having dishonestly put him forward as a major. But that allegation has not been substantiated. As I have stated, the sole question to be decided is whether the mere fact that no guardian had been proposed or appointed for Tara Chand is sufficient to vitiate the decrees passed against him. It may be mentioned here that Tara Chand has purchased the shares of certain co-sharers in the property and possibly the sole object of the present suit is to re-open the partition and to obtain a compact share in the property which would include not only his ancestral share but also the shares purchased by him.

Before the case of *Waliam* v. *Bankey Behari Prasad Singh* (2) was decided it was generally believed that a formal defect in the appointment of a guardian for the suit of a minor was in itself sufficient to vitiate all the proceedings against the minor in the suit. The case of *Bhura Mal* v. *Har Kishan Das* (5) may be cited as an instance. But since the Privy Council decided the case *Walian* it is now clearly recognised that where a minor has been substantially represented and has not been prejudiced in the litigation it is not open to him to obtain the relief of a declaration that the decree is not binding on him. Following this case, it has been held that in order to find out whether the minor was substantially prejudiced or not it would be necessary often to go into the merits of the case. If the representation is of a doubtful character the fact that the minor has not at all suffered would go to establish that the representation was substantial. The case of *Murli* v. *Petambar* (11) was of this nature.

The question, however, before me is what would be the effect of a decree in which the minor has not been at all represented. It has been urged with great force that unless the minor alleges that he was prejudiced for want of a guardian he has no right to succeed. It has been further pointed out that the adjective law, namely, the law of procedure, is merely a handmaiden to justice and where a substantial justice has been done a breach of the rule of procedure cannot by itself be a ground for a suit. There can be no doubt that the last stated proposition is very correct. The Courts exist for granting redress. Where there is no prejudice, there is no grievance to be redressed. The mere fact that there has been a defect in following the procedure cannot be made a matter of grievance and there can be no redress. But the question raised in this appeal is not one of procedure but is one of substantive law. It is a question of status. There can be no doubt that a decree, however proper it may be, passed against a person who is already dead can be of no effect against the estate of the deceased. To quote an expression often used, the decree is a mere 'nullity.' The reason is this. The deceased person cannot be called upon to obey the decree and therefore the decree is of no consequence. The legal representatives of the deceased cannot be called upon, on foot of the decree, to perform what the deceased person was called upon to perform. A minor suffers from certain disabilities under the law of minority. One of the disabilities is that he cannot come to court either to seek a relief or to defend an attack on him, except through a

(11) 1922 All. 91=44 All. 525=20 A.L.J. 329]

person who can properly represent him. This is his disability owing to his being under a certain specified age. In this particular case that age was enhanced to 21 years owing to a certificate of guardianship having been granted to his natural mother. We have not been called upon to consider whether the *factum* of Tara Chand's adoption into another family in any way affected the guardianship certificate and whether his age for obtaining majority was reduced to 18 years. It has been conceded that Tara Chand was a minor when he was brought on the record as a major on the 29th of March 1917. He was a minor when he preferred the appeals. Indeed, he was a minor when he brought the suit out of which this appeal has arisen. He attained majority during the pendency of the suit. Tara Chand was suffering from a disability to defend himself owing to his status of minority. In this particular case the minor (Tara Chand) was probably an intelligent person quite able to look after himself and his property. But he might have been only a baby, one year old, when his father died. The law applicable would have been the same then, as in the present case. The question then is whether the bringing on the record of a person suffering from the disability of minority can be regarded as of no consequence if the ultimate result of the suit was in no way prejudicial to his interest. To my mind, on principle, there is nothing to differentiate the case of a decree passed against a dead man from a decree passed against a person who is suffering from the disability of minority without having a person appointed to look after his interest.

No direct authority of this court has been cited. A number of rulings was cited at the bar but most of them could be distinguished on account of the facts involved in each case. The only case which appears to be exactly in point is the case of *Purna Chandra* v. *Bijai Chand Mahtab*, (9). In this case a decree for arrears of rent had been obtained against a minor who had been sued as a major without anybody to represent him in the litigation. It was held that the decree could not be binding on him and was a nullity. On principle and authority therefore Tara Chand would be entitled to have it declared that the decrees are not binding on him.

It was urged that, having regard to the peculiar facts of the case, namely, the arguments having been concluded during the lifetime of Benarsi Das, the provision of Order 22, rule 6 of the Code of Civil Procedure was applicable and the decree passed was binding on the estate of Benarsi Das. Assuming, but without deciding, that Order 22, rule 6 of the Civil Procedure Code has any application to the facts of this case, it is clear that as a matter of fact no decree was passed against Benarsi Das. On the other hand the only decree that was passed was against Tara Chand himself. The provisions quoted therefore can be of no avail to the appellants.

The further question, however, still remains whether the plaintiff Tara Chand should wholly succeed in the suit or whether the Court should go into the merits of the case and see whether or not he was bound by the decree that was validly passed against the remaining defendants. For, if the decree be such as to bind Tara Chand, without its having been specifically passed against him, he should not be allowed to escape the liability on the decree for the simple reason that he was without a guardian in the proceedings. He cannot be in a better position then he would have been in, if he had not been at all made a party. In the Calcutta case (17 C.W.N. 549) the High Court remanded the case for a trial of the question whether the minor was or was not liable along with the other defendants on account of the arrears of rent. The minor in that case had sued for the recovery of the decree money already paid and it was held that if he was liable, as a matter of fact, he could not recover the money he had paid. Similarly in the case of the *Ram Chander* v. *Chedda Lal* (8) issues were remanded for ascertaining what advantages, if any, had been derived by the plaintiff by the decree impeached. In this case the decree impeached is a decree for partition. Tara Chand could not be bound by a decree passed against any other of the defendants. The result of a declaration that the decrees are not binding on Tara Chand would be that the partition suit will be re-opened at the stage at which Tara Chand came in. No relief in the nature of a refund has been asked for. There is no prayer that the costs paid under the decree should be paid back to him. In the circumstances there seems to be no bar to the plaintiff

obtaining the declaration that the preliminary and final decrees whether passed by the court of first instance or appeal are not binding on him.

The result is that the appeal fails.

By the Court:—The appeal is dismissed with costs here on the higher scale.

Appeal dismissed.

** 1924 Allahabad 897.

MUKERJI and DALAL, JJ.

Durga Prasad Sahu—Appellant

v.

Tameshar Prasad Naik and others—Respondents.

F. A. No. 388 of 1921, decided on 12th May, 1924, from the decree of the Subordinate Judge of Gorakhpur, dated the 30th of August 1921.

(a) *Precedent—Authority.*

A case is an authority only for what it decided and is no authority for what may seem to follow from the reasonings adopted in the case. [P. 899, C. 1.]

(b) *Registration Act, S. 28—Fraud on registration.*

The inclusion in sale-deed of property which the parties intended to be transferred but of which possession was not taken by vendee does not amount to fraud on registration and does not render it invalid simply because the deed which included other items of property was registered in the office of the Sub-Registrar having jurisdiction over the place in which the former item of property was situated. (41 Cal. 972; 19 A.L.J. 385, *Dist.*) [P. 899, C. 2.]

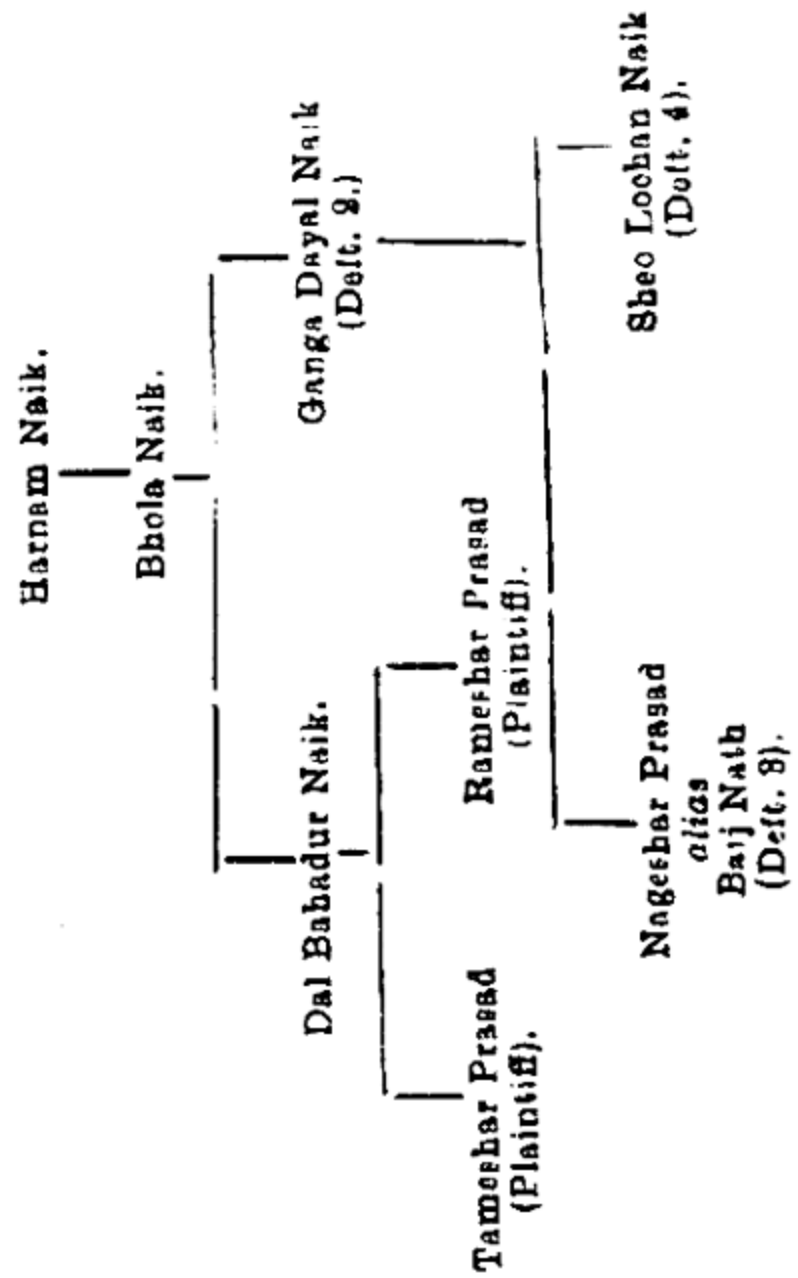
(c) *Registration Act, S. 28—Fraud on registration.*

Obiter.—The inclusion in sale-deed of item of property merely for the sake of registration does not amount to fraud on registration where the transferor is entitled to transfer it. [P. 900, C. 1.]

Jang Bahadur Lal and *Iqbal Ahmad*—for the Appellant.

T. B. Sapru, *Haribans Sahai* and *S. S. Sastry*—for the Respondents.

Judgment:—The appellant in this Court was the defendant No. 1 in the Court below. He purchased on the 17th of January, 1908, a four annas share in each of the two villages Lachhmipur and Harnampur and one dhur area land out of plot No. 95 in the village of Belaura for a consideration of Rs. 25,100. The vendor was one Ganga Dayal Naik. The pedigree of the family will be found at page 1 of the plaint and is as follows:—



The plaintiffs who are sons of Ganga Dayal's brother Dal Bahadur brought the suit, out of which appeal has arisen to have the sale set aside. The suit was instituted on the 14th January, 1920, that is to say, just two days less than 12 years after the sale. Various grounds were taken to impeach the sale. The Court below set aside the sale on two grounds. It held that the registration of the deed was illegal and no title passed to the appellant. It also held that the property was worth at least Rs. 30,000 and the sale of it by the managing member of the family for Rs. 25,100 was not justified.

These are the two points which have been controverted in this appeal and we need not try any other question that was before the Court below.

The question of registration arises in this way. The property of Belaura was a very insignificant one. One dhur is equal to 1·400th part of a bigha. The argument that found favour with the Court below on this question was that, the property being so insignificant neither party intended that any transfer of title to it should take place. It was owing to the inclusion of this property in the sale-deed that the deed became registerable by the Sub-Registrar of Gorakhpur. If this property had been excluded

the Sub-Registrar of Maharajganj alone would have had the jurisdiction to register the document.

The fact that at the date of sale the property in plot No. 95 in Belaura belonged to Ganga Dayal has not been disputed. Indeed, the copies of the village records filed do go to show that the vendor had title to this property. It is, however, urged that the vendee never wanted this property and it is pointed out that he never asked the Revenue Court to enter his name with respect to it and further that he never took possession of the property. The village records, the copies of which are to be found at pages 85 and 91 of the printed record go to show that in spite of the transfer, the name of the transferor Ganga Dayal continued to be recorded over the land in Belaura and it was actually held by a tenant. The evidence of the appellant's son Ganesh Prasad does indicate that the vendee never cared to take possession over the property, although Ganesh Prasad insists on stating that he is in possession of the property and gets one anna as the rent for it. The admitted fact, therefore, is that in spite of the transfer, the vendee never took possession of it. On the other hand, there are circumstances to show that, the vendor believed that the property had been sold and that he had no longer any title left to it. No direct evidence has been adduced to show what was the exact amount of share held by Ganga Dayal and his family in Belaura at the date of the sale. But copies of the decrees that were passed against the family and which record the properties mortgaged show (see pages 42 and 43 of the printed record) that a 4 pies share was held by the family in Belaura. Five years after the sale on the 27th of August, 1913 Ganga Dayal sold the property in this village to one Chandi Prasad Pande. The sale-deed is printed at page 81 of the record. He described the property possessed by him as "A 4 pie share by less by a fraction". It is quite within the range of probabilities that the fraction which he deducted out of the property which he wanted to sell was the fraction represented by the one dhur lands which he had already sold to the appellant. This conduct on the part of Ganga Dayal goes to show that at least, so far as he is concerned he never regarded himself as the owner of one dhur land which he had sold. Further, it appears that Ganga Dayal as a certificated guardian of his nephews, the plaintiffs in the suit, made an application to the District Judge for permission to sell the property, now in suit in order to pay off certain debts of the family. In the application that was presented to the court (Exhibit K, printed at page 65) he expressly mentioned the one dhur land in plot No. 95 situate in Belaura as one of the items of property he intended to sell. In the draft sale-deed that was presented to the District Judge for his approval the plot No. 95 was again specifically mentioned. It is clear, therefore, that, Ganga Dayal did mean to transfer this property and took the trouble of obtaining the sanction of the District Judge for the transfer. On the question of fact, therefore, our finding is that the plot No. 95, a portion of which was sold by the sale-deed in suit, was intended by Ganga Dayal to be sold and was meant to be purchased by the appellant although it is a fact that after the purchase the appellant did not care to take possession of the property.

It has been urged that as a matter of fact neither the vendor nor the vendee wanted to transfer and purchase this property of Belaura and it was included in the sale-deed for the sole purpose of getting the deed registered by the Sub-Registrar of Gorakhpur. In view of our finding on the question of fact, this question does not really arise. But the question has been very well thrashed out before this Court and we owe it to the learned counsel for the respondent and to the court below to discuss it.

The learned counsel for the respondent has taken his stand on two Privy Council judgments, *viz* : *Harendra Lal Roy Chowdhury* v. *Hari Dasi Debi* (1) and the case of *Muthara Prasad* v. *Chandra Narayan Chowdhury* (2). As we understand him, he has argued that the court has to look to the intention of the parties and where neither of the parties intended that the transfer of certain property should take place the inclusion of that property in the

(1) (1914) 41 Cal. 972=41 I. A. 910=1 L.W. 1050=27 M L.J. 80=(1914) M.W.N. 462=16 M.L.T. 6=18 C.W.N. 817=19 C.L.J. 484=16 Bom. L.R. 400=23 I.C. 637=12 A.L.J. 774 (P.C.)

(2) (1921) 48 I.A. 127=40 M.L J. 487=19 A.L.J. 385=33 C.L.J. 440=23 B.L.R. 629=(1921) M.W.N. 370=14 L.W. 1=16 I.C. 833=2 Pat. L T. 397=25 C.W.N. 985=29 M.L.T. 413 (P.C.)

deed would not give jurisdiction to the Sub-Registrar to register the document. The cases cited must be taken to have been decided only with reference to the particular facts dealt with by them. We need hardly mention that, a case is an authority only for what it decided and is no authority for what may seem to follow from the reasonings adopted in the case. In the case of 41 Calcutta the property which was in question was a house No. 25 in Gurudas Street in Calcutta. It was found as a fact that there was no house in existence within the ambit of that street. It followed that it was never intended that any such property should pass to the transferee. Their Lordships of the Privy Council said that there were two ways of looking at the thing, first the property was non-existent and secondly the entry was a fictitious one. In either view the transaction was entered into only to commit a fraud on the registration law, that is to say, to give jurisdiction to an officer who would not otherwise possess jurisdiction. There can be no doubt that their Lordships used the following language :—

"Their Lordships hold that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security," (p. 989 of the report).

We are of opinion that it is not open to contention that the words "the mortgagor intended to mortgage or that the mortgagee intended to form part of his security" can be taken out of the rest of the context and can be read as an independent dictum for guidance of the subordinate courts. In our opinion the words are inseparable from the words "Their Lordships hold that this parcel is in fact a fictitious entry." In the later case, the finding was that the property of one *cowrie* share in the village of Kolhua was the property owing to which the Sub-Registrar of Muzaffarpur had the jurisdiction to register the deed. It was found as a fact that the transferor did not possess any such property. Evidence was adduced to show that he did and one witness was examined who said that he had sold it by an unregistered document. But it was found that there was no real delivery of the property. Their Lordships therefore laid down their law on the foundation of the fact that the mortgagor did not possess any such property and consequently it was never the intention of the parties that the mortgagor should offer it as security to the mortgagee and the latter should hold it as security for his money. The language that was used in connection with this case must be read with the facts involved in it.

In the case before us we have got the fact that the property entered in the deed and which gave jurisdiction to the Sub-Registrar of Gorakhpur to register did exist. We have the fact that it did belong to the vendor. Even if we concede for the sake of argument (we are really considering a case based not on the facts found by us but on the facts as put by the learned counsel for the respondent) that this property of Belaura was entered into the deed simply for the sake of registration, we do not think that fact would not give the Sub-Registrar of Gorakhpur jurisdiction to register the deed. The appellant was purchasing two big items of property. If the parties found that by selling also a small bit of property, which it was not otherwise intended to be sold, they would have the convenience of avoiding the journey to Maharajganj, I do not see why the inclusion of that property should be treated as an act done only to commit fraud on the law of registration. Suppose the journey to Maharajganj costs the party a sum of Rs. 20. Suppose again the property sold is worth Rs. 10. By adding a property worth Rs. 10 and selling it *bona fide*, the parties avoid a journey to Maharajganj at a cost of Rs. 20. Why should not the vendor be allowed to say that I have sold the property and why should not the vendee be allowed to say that I have purchased the property ? The title to the property passes by the registration of the deed and the vendee becomes the owner of the property for the simple reason that the vendor was the owner of it and has chosen to sign a sale-deed with respect to it and to have it registered.

Coming to authority again, no case has been cited to us which can be taken as being on all fours with the case before us. In this Court two learned Judges held in the case of *Pahladi Lal* v. *Mst. Laraiti* (3) that where a property included in a deed of mortgage did exist, the fact that the mortgagor had no title to the property

(3) (1918) 41 All. 22=48 I.C. 200=16 A.L.J. 671.

did not vitiate the registration, if the mortgagee was not aware of the want of title in the mortgagor and was not colluding with him in the inclusion of the property to procure registration. This case too is not on all fours with the case before us. But it lays down at least this much that where a transaction is a *bona fide* one, the inclusion of a property for the sake of obtaining the conveyance of a document at a particular place will not oust the jurisdiction of the Sub-Registrar to register the document. We hold therefore that the sale-deed was perfectly valid and did convey title to the appellant.

Coming to the second point. At the date of the sale the family consisted mainly of four persons, namely, the vendor Ganga Dayal, his father Bhola Naik who was a lunatic and the plaintiffs-respondents who were minors. There were two decrees, for large sums of money passed against the family on foot of two mortgages executed by Ganga Dayal's grandfather Harnam Naik. The total amount due on the two decrees went up to Rs. 35,000. Ganga Dayal, the only male adult in the family who was in a position to enter into any transaction on behalf of it, has been found by the Court below to have acted to the best of his capabilities. He raised samll sums of money from time to time out of the property and put off the evil day of sale by small payments. He got himself appointed guardian under the Guardians and Wards Act of 1890 of his minor nephews the plaintiffs. He approached the learned District Judge of Gorakhpur from time to time and represented how the state of affairs was and sought his permission as the guardian of his nephews and as a manager of his lunatic father's property, to transfer family property, to avoid an auction sale of it and consequent loss. The copies of decrees which have been printed show that shares in no less than six villages had been mortgaged (see Exhibit C at pp. 41 at pp. 42 and 43). We find that he approached the learned District Judge first on the 16th of December 1905 by his application, printed at p. 47 of the record. By an order, he was appointed the manager of his father's property. Then on the 13th of July 1906 he approached the District Judge and obtained permission to raise money by sale or by mortgage with possession of a part of the family property. The order is at page 49 of the printed record. The applications printed at pp. 51, 53, 59 and 61 show how he succeeded in obtaining the good offices of the learned District Judge for staying the execution sale which was pending before the revenue authorities; (possibly the decree had been transferred to the Collector because the property was ancestral.) We have already mentioned that the learned Subordinate Judge gives Ganga Dayal full credit for doing his best in the interests of the family. On the 30th of July 1907 Ganga Dayal approached the District Judge with a definite proposal for transfer. I may mention that the order of the learned District Judge, dated the 13th of July 1906 was not very definite. On the 30th of July 1907 Ganga Dayal definitely proposed that he should be permitted to sell the shares now in suit in the villages of Lachhmipur and Harnampur to one Babu Bhagwati Prasad for Rs. 21,245 and that he might be permitted to mortgage a portion of the remaining family property, namely, 4 annas share in the village Sarpataha to raise a sum of Rs. 5,000 to pay off the decrees. It appears that at that date, the two sums of Rs. 21,000 and odd and Rs. 5,000 would have sufficed to pay off the two decrees. The order dated the 31st of July 1907 of the learned District Judge shows how diligently Ganga Dayal had been acting. The learned Judge recites that the amount of the decrees, was originally between Rs. 35 and 36 000 but Ganga Dayal had been able to reduce it by occasional payments to a sum of Rs. 26,000. The learned Judge sanctioned the sale of 4 annas share in the two villages in suit and an usufructuary mortgage of another portion of the property. But it appears that Bhagwati Prasad backed out of the transaction and the result was that the family property was put up for sale. At p. 63 of the record is printed how the bids went before the Revenue Officer. Bhagwati Prasad evidently preferred to take his chance to purchase the property at an auction sale to a purchase by private treaty. With respect to four annas share in Harnampur he offered Rs. 11,200 but the decree-holder outbid him by offering Rs. 100 more. Similarly in respect of the other property the decree-holder offered Rs. 11,100 as against Rs. 11,000 offered by Bhagwati Prasad. Thus, we find that at an open auction sale the two properties fetched only the sum of

Rs. 22,400. This sale took place on the 20th of December 1907. To save the property Ganga Dayal had to pay within the 30 days of sale not only the decretal amounts but also 5 per cent. over the purchase money. He, it appears, had been able to persuade the appellant to pay Rs. 25,100 for the two shares in the villages of Lachmipur and Harnampur inclusive of one dhur area in village Belaura. He had also been able to persuade the appellant to advance a sum of Rs. 4,500 on a simple mortgage over the share in the village of Sarpataha. The learned District Judge approved of this proposal and a draft sale-deed was filed and approved. The sale-deed was eventually executed and on the 18th of January 1908 the entire amount of Rs. 29,600 was paid into the treasury and the sale was set aside.

It has been urged that although Ganga Dayal may have done his best in the interests of the family he might have done better and if he had used more discretion he might have procured Rs. 30,000 at least for the property. It is urged that his failure to obtain the best value for the family property vitiates the sale and the Court below was right in setting it aside.

It is conceded that although the permission of the District Judge was obtained by Ganga Dayal for the tranactions in which he entered, Ganga Dayal could not validly be appointed a guardian of his minor nephews who were living jointly with him and that therefore the permission which was obtained from the District Judge did not stand good in favour of the appellant. This point having been conceded by the learned Counsel for the appellant we do not wish to express any opinion over it. Assuming however that the learned Judge's permission went for nothing, the proceedings show at least this that it was impossible to obtain a better value at the time than was really obtained. We must assume the learned Judge did his duty and he made an enquiry in the interests of the minors and the lunatic as to the value of the property and sanctioned the transaction only when he found that it was beneficial to their interests. Besides this presumption of law we have got the positive evidence of a learned Vakil of Gorakhpur who says that the then Munsif of Gorakhpur was entrusted with an enquiry into the application submitted before the District Judge. As we have said, the orders of the learned District Judge are very good evidence that the value paid at the time was a very proper value.

Coming to the evidence adduced in the Court below by the parties, we find that there is no documentary evidence whatsoever to show what value the properties in the two villages of Lachmipur and Harnampur could fetch at the time. There is no sale-deed. There is no evidence of income from the property except a certain vague statement on the part of the plaintiff No. 1. That statement is that one bigha of Lachmipur could be let at Rs. 2-4-0 to 2-8-0 per annum. If this be the annual rent the price of the land could not be very high. The learned Subordinate Judge has been mainly, if not wholly, influenced by the fact that he misread the proceedings before the Revenue Officer at the auction-sale. It appears that after a 4 annas share of Harnampur had been sold a one anna share out of the 4 annas share of Lachmipur was offered for being bid for, but no bids were made. The result was that the entire 4 annas share of Lachmipur had to be put up. The learned Subordinate Judge thought that the price fetched namely Rs. 11,100 for Lachmipur was the price paid for a one anna share and not for the entire 4 annas share. We are perfectly sure that if he had correctly read this document he would have come to a different conclusion altogether.

We have already said there is no documentary evidence by which we can judge the market value either at the date of the sale or at the date of the suit of the properties in question.

Coming to oral evidence, we have read the whole of it, we find it impossible to be guided by it. On behalf of the plaintiff-respondent the evidence of no less than 8 persons has been printed. One of these Raj Bahadur Lal is a patwari, but he is not the patwari of any of the villages in question. He said that he was the patwari of two adjoining villages. In our opinion no sufficient reason having been shown why the patwari of the villages in suit could not be found it is impossible to rely and act upon the statement of Raj Bahadur. He says that the lands of Lachmipur could be sold at the date when he was examined at Rs. 100 per bigha and the lands at Harnampur at Rs. 125 per bigha. It does not appear whether he was speaking of the cultivated land or the average value of the

land. The 4 annas share sold would include lands actually under cultivation, lands which could be brought under cultivation by spending money and labour and lands which would be absolutely unreclaimable at any expense. The evidence of the appellant's son Ganesh Prasad would go to show that there are huge areas in both the villages which are not cultivated and which are therefore not capable of yielding any income. Of the 8 witnesses examined by the plaintiffs, the plaintiff No. 1 states that the lands in Harnampur would fetch Rs. 175 to Rs. 200 per bigha and the lands in Lachmipur would fetch Rs. 150 per bigha. The witness Sheo Shankar Dube would not go so far as that. He does not belong to either of the two villages and his means of knowledge is extremely doubtful. He says that he never purchased any share in the two villages and that within the last 20 years, so far as he knew, no shares in those villages had been sold. The witness Dhanraj Rai brought a sale-deed which has been proved by Ram Kripal and which related to an entirely different village of Aligarh. He does not say anything about the valuation of the lands in suit. The witnesses Ramphal Panday and Mahipat do not speak anything on the value of the lands in the two villages in question. We have already commented on the statement of Raj Bahadur Lal. The witness Lalji Sahai does not speak on the point.

The appellant has examined his son to show under what circumstances the property was purchased and what value was paid for which property and why. The witness Jadunath Panday says that the price was fixed at Rs. 34 or Rs. 35 per bigha when the purchase was made. This price was evidently for all the land whether good, bad or indifferent, taken as a whole.

The sale-deed having been executed under the circumstances already discribed it lay heavily on the plaintiff to prove that their uncle, who did so much for them, could obtain much better value than he did obtain. We are of opinion that it has not been established that the price paid, namely Rs. 25,100 was in any way inadequate price for the property at the time of the sale.

The result is that the appeal succeeds and it is hereby allowed and the suit of the respondents Tameshar Prasad and Rameshar Prasad is dismissed with costs throughout. The costs in this Court will include counsel's fees on the higher scale.

There is a cross-objection on the part of the respondents Nos. 1 and 2 but on it no court-fee was paid. A sum of Rs. 800 odd was demanded as court-fee. The respondents never said they would pay the court-fee and the cross-objection might be rejected on that account. The learned counsel for the appellant states that he was served with a copy of the cross-objection. We find on the record that on the 10th of January 1922 Mr. Jang Bahadur Lal, one of the learned counsels for the appellant, was served with a copy of the cross-objection. He was right therefore in claiming the costs of the cross-objection. The cross-objection is being rejected because no court-fee has been paid, but the costs due on the cross-objection will be paid by the respondents Nos. 1 and 2 to the appellant. The costs will include fees on the higher scale.

Appeal allowed.

1924 Allahabad 902.

MUKERJI AND DALAL, JJ.

Darbari Lal—Plaintiff-Appellant

v.

Gobind Saran—Defendant-Respondent.

F.A. No. 458 of 1921, decided on 21st May, 1924, from a decree of the Subordinate Judge of Aligarh, dated 2nd July 1921.

(a) *Hindu Law—Reversioner has a right to bring single suit against different alienees from widow—Civ. Pro. Code, O. 2, R. 2.*

A reversioner is entitled to bring a single suit against any number of persons who may be holding defferent portions of the last male holder's property though they may be holding under different title deeds executed at different dates.

A reversioner under Hindu Law cannot bring suits to recover different pieces of property by virtue of his right as reversioner. [P. 904, C. 1.]

(b) *Hindu Law—Alienation—Legal necessity.*

The support of dependent relations in the family would be a part of the family necessity. [P. 904, C. 2.]

(c) *Evidence Act S. 21—Recital in deed.*

Recital in deed executed by Hindu widow is admissible as evidence of legal necessity. (44 Cal. 186; 1922 A. 436. *Foll.*) [P. 904, C. 2.]

(d) *Hindu Law—Widow—Alienation with reversioner's consent raises presumption of necessity.*

The circumstances that the only reversioners at the time gave their unqualified consent to the

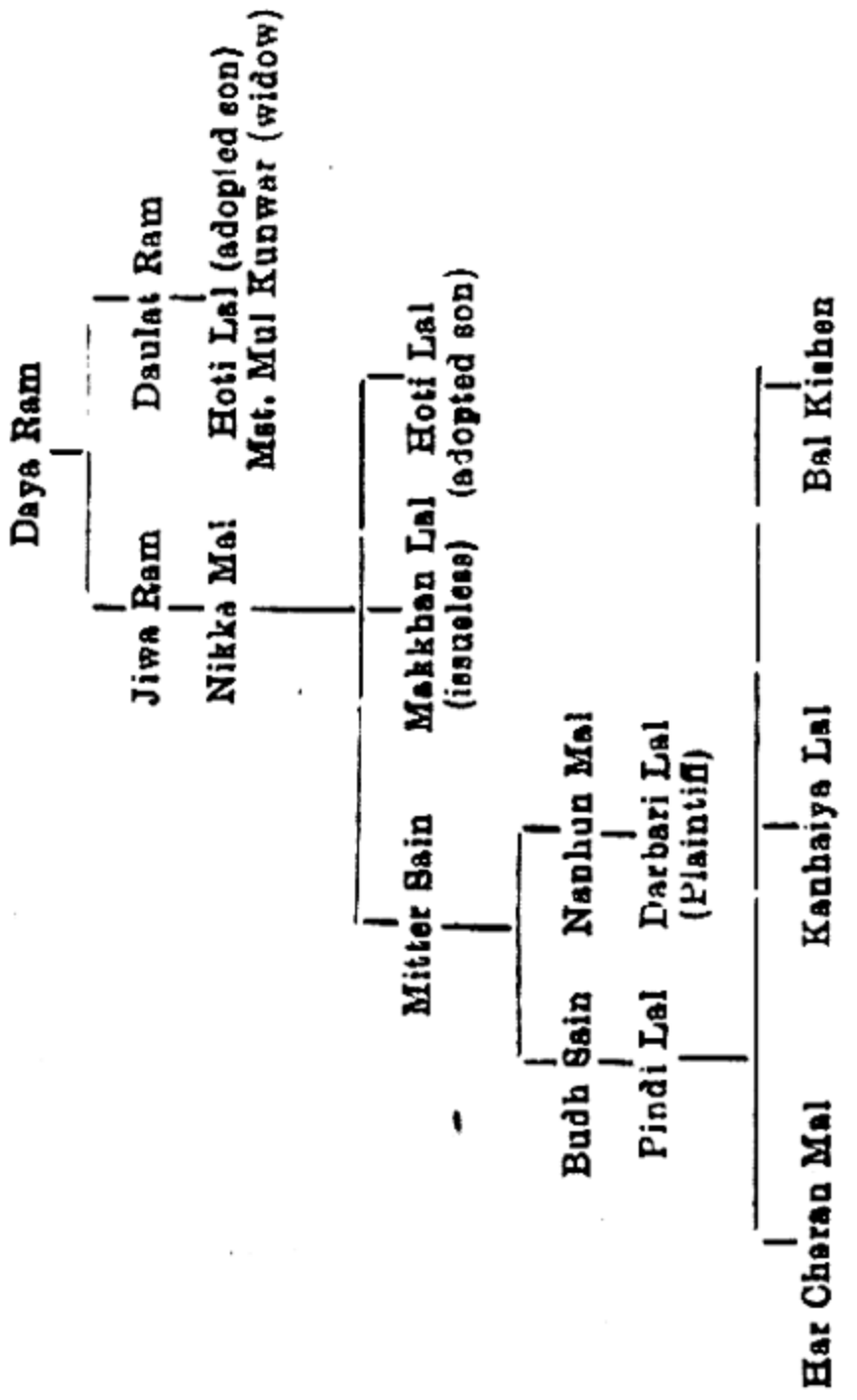
mortgage raised a very strong presumption that the mortgage was supported by legal necessity though the presumption is rebuttable. [P. 905, C. 1.]

G. Agarwala—for the Appellant.

S. N. Sen and *P. L. Banerji*—for the Respondent.

Mukerji, J.—This appeal arises out of a suit brought by the plaintiff appellant againt the respondent for recovery of property sold to his father Chuttan Lal on foot of a sale-deed, dated the 1st of February 1904 by a lady who has since died, namely Mst. Mul Kunwar.

The Appellant claims as a reversioner and the pedigree given below will explain



how he is related to Hoti Lal the last male owner of the property in suit.

It appears that Hoti Lal died, possessed of considerable amount of property, sometime in 1869. Mt. Mul Kunwar succeeded to the property as his widow and she died on the 16th of April 1916. On the 31st of October 1897 she executed a simple mortgage with respect to the properties in suit for the sum of Rs. 12,000 in favour of two persons Beni Ram and Janki Prasad. One Budh Sain joined with her in executing the deed. Budh Sain, it will be noticed, is a paternal uncle to the plaintiff-appellant.

A few days before the execution of the deed of mortgage, the plaintiff's father Nanhun Mal had executed a deed by which he gave his consent to the proposed mortgage by Mt. Mul Kunwar and Budh Sen. On the 1st of February 1904 Mul Kunwar alone sold the property to the respondent's father Chuttan Lal for a sum of Rs. 24,800. The appellant's case was that the mortgage and the sale were made without legal necessity and he is therefore entitled to recover the property without any payment. He also asked for mesne profits.

The defence so far as it is relevant for the purposes of this appeal was this. The suit was barred under the provisions of Order 2, rule 2 of the Code of Civil Procedure inasmuch as the plaintiff brought other suits against the defendant and his father for recovery of the property belonging to Hoti Lal, but omitted to ask for any relief with respect to the properties now in suit, and that the transfers were supported by legal necessity.

The Court below decided the issue involved in the first plea, as noted above, against the respondent, but on the question of necessity it found against him.

In this court the two points to be considered are what have been stated above.

On the first point, it appears to us to be quite clear that the suit is barred under the provisions of Order 2 rule 2, of the Code of Civil Procedure. That rule of law lays down.

> "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action.....Where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished."

By way of illustration it is said that where rent for the whole years 1905, 1906 and 1907 is unpaid the plaintiff sues in 1908 in respect of the rent of 1906 only he shall not afterwards sue for the rents for the years 1905 or 1907. In this case the plaintiff's cause of action is this. He is the reversioner and rightful heir to Hoti Lal and the property in suit in the possession of the defendant belongs to Hoti Lal. This is his whole cause of action. It is immaterial for him whether

the defendant wants to justify his right to continue in possession on different grounds. The defence or the nature of it is immaterial for the purposes of finding out what is the cause of action of the plaintiff.

We find that the plaintiff brought at least two suits against the defendant or his father. He brought Suit No. 45 of 1917, the plaint of which is printed at page 103 of the record, for recovery of a portion of Hoti Lal's property from the respondent and his father. In paragraph 11 he said that his cause of action arose on the 16th of April, 1916, the date of the death of Mt. Mul Kunwar. He brought again Suit No. 282 of 1917, the plaint of which is printed at page 99 of the record against the respondent and his father. In paragraph 13 of the plaint he said that his cause of action arose on the 16th of April, 1916, the day on which Mt. Mul Kunwar died. In paragraph 10 of the plaint of the suit, out of which this appeal has arisen, he makes the same statement namely, his cause of action arose on the 16th of April, 1916, the date of the death of Mt. Mul Kunwar. The Suit No. 45 of 1917 shows that the property in respect of which it was instituted was the property which had been purchased by Kundan Lal, grandfather of the present defendant. It is clear that when this suit of 1917 was brought the plaintiff could have, if he was so disposed, brought a claim with respect to the properties now in dispute. There is no authority so far as we are aware, to establish that any such suit would have been repugnant to any rule of law. On the other hand there are numerous authorities to show that a reversioner is entitled to bring a single suit against any number of persons who may be holding different portions of the last male holder's property, though they may be holding under different title deeds, executed at different dates.

We are therefore clearly of opinion that the suit was barred under the provisions of Order 2, rule 2 of the Code of Civil Procedure and should have been dismissed on that ground alone.

Coming to the question of necessity, we find that so far as the bond of 1897 is concerned there is not much clear evidence. In the bond itself, which is printed at page 33 of the record, the lady Mt. Mul Kunwar says that she wanted money for the performance of pilgrimage for the benefit of her husband's soul and that Bhud Sen stood in need of money for the maintenance of children and for trade. It is not clear what amount of money was required by the lady for the pilgrimage and what amount was wanted by Budh Sen for his own purposes. Before we examine the question of necessity further, it will be interesting to note a slight previous history of the family. It appears that on the death of Hoti Lal in 1869 Mt. Mul Kunwar executed a document dated the 28th of May, 1869, a copy of which is on the record, but which unfortunately has not been printed, by which the lady stated that she regarded Budh Sen as her adopted son and was appointing him as the *Sarbarahkar* or the manager of her property. She further stated that the manager would have no right to transfer any portion of her property without her consent. It further appears from the statement of Tika Ram who was for some time in the service of Mt. Mul Kunwar and held a general power of attorney from her that both Budh Sen and Nanhun Mal were living with the lady Mt. Mul Kunwar as dependent members of the family. His statement receives entire corroboration from the statement of the plaintiff-appellant himself. The plaintiff's father Nanhun Mal, according to the plaintiff himself, had no zamindari property. He did not keep any shop and the appellant did not know if he had any income whatsoever from any source. The support therefore of dependent relations in the family would be a part of the family necessity.

Coming back to the actual evidence in the case, we find the recital in the bond already stated. According to the recital which would be admissible as good evidence under the Privy Council case of *Banga Chandra Dhur Biswar* v. *Jagat Kishore Achariya* (1) and a decision of this Court in *Piari Lal* v. *Sunder Singh* (2) the money was needed for pilgrimage and to enable Budh Sen to earn a living of his own. It is true that Tika Ram has said that half the money was required by the

(1) (1916) 44 Cal. 186=43 I.A. 249=20 M.L.T. 335=31 M L.J. 563=(1916) 2 M.W.N. 336 =4 L W. 458=18 Bom. L.R. 868=14 A.L. J. 1103=24 C.L.J. 487=1 P.L.W. 1=21 C.W.N. 225=36 I.C. 420=10 Bur. L.T. 177 (P.C.).

(2) 1922 All. 486=44 All. 756=20 A.L.J. 658.

lady for pilgrimage and the other half was taken by Budh Sen for the purposes of his trade. But Tika Ram was not in the service of the lady at the time and it is difficult to believe that he could definitely know how the money was disposed of. We have, however, his evidence that the lady did go on pilgrimage and we have the deed of relinquishment executed by the appellant's father showing that the lady contemplated a pilgrimage. It is common ground that Hoti Lal owned a very large amount of property and was a highly respected gentleman of the place. Spending Rs. 12,000 over pilgrimage and support of the family will not be at all considered an extravagant act. As held in the Privy Council case of *Rangasami Gounden* v. *Nachiappa Gounden* (3) the circumstance that the only reversioners at the time gave their unqualified consent to the mortgage raised a very strong presumption that the mortgage was supported by legal necessity. In this case there is no evidence which would rebut the presumption raised. There can be no doubt that the presumption is rebuttable as it was found rebutted in the case of *Ghisiawan Pande* v. *Musammat Raj Kumari* (4). But in this case, as has been stated, there is no evidence whatsoever to show that the consent of the reversioners was not justified. We hold therefore that the mortgage of 1907 was justified by legal necessity.

Coming to the sale-deed of 1904, the case is much easier. We find that the sale consideration is made up of three portions, namely, Rs. 20 000 left with the vendee to pay the mortgage-deed of 1897. The sum of Rs. 4,500 was obtained to pay land revenue which was already overdue—the land revenue was payable for the instalments for the months of November and December, 1903, and the sum of Rs. 300 was taken in cash. We have got the evidence of Tika Ram that a sum of Rs. 300 was needed to meet the expenses of the execution and completion of the bond. We have both documentary and oral evidence to prove that the purchaser deposited Rs. 4,700 in the Government Treasury on two dates, namely, the 1st of February, 1904 and the 4th of February, 1904 towards the payment of land revenue due by the lady Mt. Mul Kunwar. Tika Ram says that on account of drought rent could not be realized from tenants and it was feared that the property of Mt. Mul Kunwar would be attached and the revenue would be realized by direct collection to be made by the Collector. There was therefore a pressing necessity to raise the money. We have evidence to show that the vendee had to pay a very large sum of money much exceeding the sum of Rs. 20,000 left with him to pay of the decree which was passed on foot of the mortgage-deed of 1907. We hold therefore with the Court below that the sale-deed was fully supported by legal necessity.

The result is that the appeal fails and is hereby dismissed with costs, including Counsel's fees in this Court on the higher scale.

Appeal dismissed.

(3) (1919) 42 Mad. 523=46 I.A. 72=36 M.L.J. 493=17 A.L.J. 536=29 C.L.J. 539=21 Bom. L.R. 640=23 C.W.N. 777=1919 M.W.N. 262=26 M.L.T. 5=50 I.C. 498=10 L.W. 105 (P.C.).

(4) (1921) 43 All. 594=63 I.C. 556=19 A.L.J. 476.

---

*1924 Allahabad 905.

MUKERJI and DALAL JJ.

Radhe Lal and others — Plaintiffs-Appellants.

v.

Mulchand and others—Defendants-Respondents.

F.A. No. 463 of 1921, decided on 20th May, 1924, from the decree of the Subordinate Judge of Mainpuri, dated the 28th May, 1921.

Civ. Pro. Code, S. 11—The principle of res judicata *does not apply to a suit for partition of joint property.*

Where a suit for partition was dismissed for default and a fresh suit was instituted there would be no bar under S. 11 because the right to enforce partition is a legal incident of a joint tenancy and as long as such tenancy subsists any of the joint tenants may apply to the Court for partition of a joint property. (28 All. 637, *Foll.*). [P. 906, C. 1.]

Gulzari Lal and *S. S. Sastry*—for the Appellants.

G. Agarwala—for the Respondents.

Judgment:—The plaintiffs' suit for partition was dismissed by the first Civil Court on the ground that it was barred by the principle of *res judicata*. It appears that the plaintiffs, excepting one Lallu, subsequently born, had sued on 8th September, 1919, for partition. This suit

was compromised and both the parties filed a joint petition on 31st August, 1920. It was to the effect: "In the above case the parties entered into a compromise at the remonstrance of a few respectable persons. The parties shall bear their own costs. The plaintiffs withdrew their claim. Hence, the claim should be struck off" (page 43). This petition of compromise was verified by all the parties (page 47). A decree was passed in accordance with this compromise (page 49). The order was: "It is ordered and decreed that according to the compromise this case be struck off. The parties to bear their own costs." The terms of the compromise are not given and the conclusion we draw is that at that particular time the plaintiffs did not desire to press their claim for partition. There was no decision arrived at, that the plaintiffs had no interest in the properties in suit, or that they were not joint holders of the properties with the defendants.

The learned Judge of the lower Court has relied on a Division Bench ruling of this Court, *Gulkandi Lal* v. *Manli Lal* (1). That ruling, however, was not followed in a subsequent case of this Court, *T. C. Mukerjee* v. *Afzal Beg* (2), which ruling was based on a ruling of this Court, *Nasrat Ullah* v. *Mujib Ullah* (3), prior in date to the case reported in 23 All. Subsequent to 23 All. and prior to the 1914 ruling in the case of *T. C. Bannerji* a Bench of this Court held in *Bishesar Das* v. *Ram Prasad* (4) that

> where a suit for partition was dismissed for default and a fresh suit instituted, there would be no bar under section 13 of the Civil Procedure Code because the right to enforce partition is a legal incident of a joint tenancy and as long as such tenancy subsists any of the joint tenants may apply to the Court for partition of a joint property.

One of the Judges who delivered the judgment in 1906 was one of the two, who delivered judgment in 1901 in the case reported in 23 All. In 1906 the Calcutta High Court held in *Madan Mohan Mondul* v. *Baikanta Nath* (5) that a fresh suit for partition is not barred by section 13 of the Civil Procedure Code when a previous suit for partition by the plaintiffs has been compromised. The suit was subsequently dismissed on parties failing to appear during execution proceedings of the preliminary decree passed on compromise. The learned Judge observed at page 840, Col. 2 of the Report, following the ruling in 13 All. 309, that a suit for declaration of right for partition differs from most other suits in this respect that so long as the property is jointly held a right to partition continues. For these reasons we do not think that the lower Court was correct in following the ruling in the case of *Gulkandi Lal* (1).

We set aside the decree of the lower Court and remit the suit to it for trial on the merits. Costs here and heretofore shall abide the result, including costs here on the higher scale.

Suit remanded.

(1) (1901) 23 All. 219=1901 A.W.N. 66.
(2) (1915) 37 All. 155=27 I.C. 694=13 A.L.J. 98.
(3) (1891) 13 All. 309=1891 A.W.N. 117.
(4) (1906) 28 All. 627=3 A.L.J. 379=1906 A.W.N. 142.
(5) (1905-06) 10 C.W.N. 889.

1924 Allahabad 906.

MUKERJI AND DALAL, JJ.

Fateh Chand—Plaintiff-Appellant.

v.

Murari Lal—Defendant-Respondent.

F. A. No. 470 of 1921 from a decree of the Assistant Collector, 1st Class, of Muzaffarnagar.

Agra Tenancy Act, S. 51—The word 'tenant' in S. 51 covers a thekadar or lessee.

S. 51 protects a thekadar or lessee although there is a clear stipulation in the lease between the Zamindar and thekadar or lessee that the rent would be payable irrespective of whether there is any drought or flood or any calamity by which there is no produce in the village. There is nothing in section 51 which could enable the court to take out the case of a lessee from the provisions of section 51. [P. 907, C. 1.]

G. Agarwala—for the Appellant.

S. N. Sen and *S. N. Gupta*—for the Respondent.

Judgment:—This appeal arises out of a suit for arrears of rent, the rent being payable by the lessee or '*thekadar*' under a written lease bearing date 28th June 1918.

It appears that the Local Government, by notification in the local official Gazette, remitted land revenue for a portion of the year (*kharif*) 1326 F. The defendant lessee claimed in the suit that he should receive an abatement in the rent under section 51 of the Tenancy Act of 1901. The lower court held that he should and

decreed the claim after allowing reduction on account of the contention of the defendant.

In appeal it has been contended by the plaintiff that there is a clear stipulation in the lease that the rent would be payable irrespective of whether there is any drought or flood or any calamity by which there is no produce in the village. We have to construe section 51 of the Tenancy Act and to see whether the provisions of the said section override the contract or whether the contract should prevail. In section 51 the word used is "tenant". Under section 4 of the Tenancy Act the word "tenant", unless there is something repugnant in the subject or context, includes a *thekadar* or lessee. We see nothing in section 51 repugnant to the sense that the word "tenant" should include a lessee. If we look to the principle on which section 51 is based we find that it is owing to there being a want of produce in the village that the Government remits the revenue. If in spite of the Government remitting the revenue, the landlord be allowed to collect the rent, the cultivators would receive no benefit and there would be no meaning in the Government giving up the revenue. Similarly if in the present case the zamindar, the plaintiff, be allowed to recover his full amount of rent from the defendant, the result would be that the defendant must try by unfair means to get the rents out of the tenants, the actual cultivators of the soil. We think that there is nothing in section 51 which enables us to take out the case of a lessee, who has agreed to pay rent under all circumstances, from the provisions of section 51 of the Tenancy Act. As for the statute overriding a contract, it is sufficient to say that in majority of cases, the rent is fixed as the result of a contract, and yet the law says that the rent would not be paid or would be suspended. Two cases were cited in the Court below and they have been cited here also. They are to be found in *Bachan Lal* v. *Mst. Pooran Kunwar* (1). In this case the *thekadar* was compelled to pay the rent in spite of remission of the land revenue on the ground that he was holding under a special contract from the zemindar and he may have made substantial profit in fat years. Section 4 of the Tenancy Act was not referred to in that case. This was a decision by a single Judge. The second case is a later one and was decided in 1909. It is reported in *Shiam Lal* v *Makhan Lal* (2). In this case too the thekadar was compelled to pay the rent, but the ground given was entirely different. It was this. Although under section 51 of the Tenancy Act the Local Government remitted or suspended the payment of land revenue there was nothing before the learned Judges to show that there was any order passed to apply to the case of a '*thekadar*'. The learned Judges say that they allowed the defendant an opportunity to produce an order that may have been passed by the Collector, but no order was produced before their Lordships. Section 4 of the Tenancy Act was not referred to in this case also. Without expressing any opinion on the correctness or otherwise of this case, we note that, we have in the present case, an express order of the Collector directing that, the rent payable by the defendant lessee should be remitted to the extent mentioned therein. This document which is called a 'certificate by the Collector' is printed at p. 26 of the record. We should think that the contract between the parties is entirely over-ridden by the express provision of law contained in section 51 of the Tenancy Act. The judgment of the Court below seems to have been correct except in respect of costs, as to which we will pass orders later on. The appeal is otherwise dismissed with proportionate costs to the parties, which will include in this court counsel's fees on the higher scale.

There is a cross objection on behalf of the defendant-respondent. Two points were taken, but only the second one is pressed. It appears that the Court below ordered that the parties should pay their own costs. This portion of the decree has been taken exception to. We see no justification for allowing no costs to the parties. We allow the cross objection and the appeal in part and order that the parties pay and receive costs in both the courts in proportion to their respective failure and success. The respondent will receive costs of the cross objection in proportion to his success. The costs in this Court will include counsel's fees on the higher scale.

Appeal partly allowed.

(1) (1909) 1 I.C. 529.

(2) (1909) 2 I.C. 629.

* 1924 Allahabad 908 (1).

DANIELS AND NEAVE, JJ.

Chetan Singh and another—Plaintiffs-Appellants.

v.

Sartaj Singh and others—Defendants-Respondents.

S. A. No. 954 of 1922, decided on 7th May, 1924, from the decree of the District Judge of Shahjanpur, dated the 18th April, 1922.

Hindu Law—Joint family—Suit against adult members alone is deemed as one against whole family—Civ. Pro. Code, O. 1, r. 10—Limitation Act, S. 22.

Where all the adult members of a joint Hindu family appear on the record as defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members, though it is not formally stated in the plaint that the defendants were being sued as managers and therefore the addition of minor members defts. after limitation does not justify dismissal of suit. (34 All. 549 (F.B.), Foll.) [P. 908, C. 2.]

N. P. Asthana—for the Appellants.

Gulzari Lal—for the Respondents.

Daniels, J.:—This is an appeal by the plaintiffs in a suit for sale on a mortgage. The mortgage was executed in the year 1908 by three brothers, the first two of whom are defendants Nos. 1 and 2 and the mother and heir of the third is defendant No. 3. The property mortgaged was joint family property. On an application made by the defendants during the pendency of the suit the defendants Nos. 6 to 10 who are the sons of defendants Nos. 1 and 2 the original mortgagors were added as parties. At the time when they were so added more than twelve years had elapsed from the date when the mortgage money became payable. On this ground both the Courts below have dismissed the entire suit with reference to Order 34, rule 1 of the Code of Civil Procedure.

In appeal to this Court it is contended, as it was contended in the Courts below, that the added defendants are sufficiently represented in the suit by their respective fathers who are admittedly the managing members of the joint family. This plea is supported by the Full Bench ruling in *Hori Lal* v. *Munwan Kunwar* (1). The same view was followed shortly afterwards in *Madan Lal* v. *Kishan Singh* (2), in a case in which the mortgagor was plaintiff; and in *Krishna Jiva Tewari* v. *Bishnath Kalwar* (3), it was further held that where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members.

We find it impossible to distinguish the present case from *Hori Lal* v. *Munman Kunwar* (1). All the material circumstances are the same. The suit was brought against the original mortgagors. Objection was taken that the sons ought to have been joined. At the time when the objection was taken a suit against the sons would have been barred by limitation. All these circumstances are present in the case before us. The learned District Judge has attempted to distinguish the case on the ground that it was not formally stated in the plaint that the defendants were being sued as managers. A perusal of the judgments in *Hori Lal* v. *Munman Kunwar* (1) makes it sufficiently clear that this allegation was equally absent from the plaint in that case. As here it was at the instance of the defendants that the question whether the sons were represented by their fathers was raised. Following the ruling in that case we hold that the Courts below were wrong in dismissing the suit. The trial Court decided all the issues before it except the issue of legal necessity. That issue must now be tried.

We accordingly set aside the decrees of the Courts below and remand the case through the lower appellate Court to the Court of first instance for decision after coming to a finding on the remaining issue. Costs here and heretofore will abide the result.

Case remanded.

(1) (1912) 34 All. 549 = 15 I. C. 126 = 9 A.L.J. 819 (F.B.).

(2) (1912) 34 All. 572 = 15 I. C. 198 = 9 A.L.J. 844 (F.B.).

(3) (1912) 34 All. 615 = 16 I.C. 392 = 10 A.L.J. 217.

1924 Allahabad 908 (2).

MUKERJI, J.

Kishun Dayal Sahi—Appellant-Defndt.

v.

Lt. Sahibzada Ravi Pratap Narain Singh—Respondent-Plaintiff.

S. A. No. 994 of 1922, decided on 17th January, 1924, from a decree of second Additional District Judge, Gorakhpur.

Landlord and tenant—Mortgagee of occupancy tenant does not become tenant even by payment of rent by him.

A tenant prohibited by law from making a valid transfer cannot convert his mortgagee into a tenant in his own place since there is no privity of contract between the mortgagee and the landlord. The mortgagee does not become a tenant of the landlord even in the case of a fixed rate tenancy though he may have paid the rent with his own hand. [P. 909, C. 2.]

S. P. Sinha—for Appellant.

Haribans Sahai—for Respondent.

Judgment:—The sole question for determination in this appeal is whether a landlord can sue the usufructuary mortgagee of an occupancy tenancy for rent.

The respondent brought the suit out of which this appeal has arisen for recovery of rent of an occupancy holding from two sets of defendants. The appellant who was the mortgagee with possession constituted the second set. He pleaded that there was no relationship of landlord and tenant between him and the plaintiff and he could not be held liable for the rent. The suit failed as against the appellant in the Court of first instance, but the learned Additional Judge of Gorakhpur decreed the suit against the appellant as well.

For the respondent Mr. Haribans Sahai argued that the mortgagee had been paying rent and thereby converted himself into a tenant. But there was no such allegation of the plaintiff in the Court below and there was no such finding. No doubt the principal tenants said that the mortgagee had been paying rent and they should be held liable. But as I have said, there was no issue on the point and there was no decision.

The mortgage in question was created before the present Tenancy Act come into force. According to the rulings of this Court an occupancy tenant could, in spite of the provisions of section 9 of Act XII of 1881, sub-let his right to occupy the lands and it naturally followed from this that he could transfer his right of possession to a mortgagee. It was in this view alone that this Court upheld, as between the mortgagor and the mortgagee, an usufructuary mortgage by an occupancy tenant. The leading case is that of *Khiali Ram* v. *Nathu Lal* (1). At page 231 of the same volume will be found another Full Bench case (*Mahesh Singh* v. *Ganesh Dube* (2)) in which it was considered whether an occupancy tenant could sub-let his holding in perpetuity. The Court remarked that the term of the sub-tenancy was really immaterial and said that such sub letting could not make the sub-lessee a tenant of the landlord. If any authority were needed for a clear proposition like this, this Full Bench case of *Mahesh Singh* v. *Ganesh Dube* (2) provides one. There is no contract between the mortgagee of an occupancy tenancy and the landlord and because the tenant is prohibited by law from making a valid transfer, he by the very fact of the transfer cannot convert the transferee into a tenant in his own place. In the case of *Sawaagar Singh* v. *Ganga Singh* (3) it was distinctly held by a Bench of two Judges of this Court that even in the case of a fixed rate tenancy, the mortgagee did not become a tenant of the landlord even if he paid the rent with his own hand. It was observed that the payment would be payment on behalf of the mortgagor.

My conclusion is that the decree of the learned Judge of the Court below against the appellant was wrong.

The appeal is allowed and the suit of the respondent as against the appellant is dismissed with costs throughout.

Appeal allowed.

(1) (1893) 15 All. 219 (F.B.).

(2) (1893) 15 All. 231 (F.B.).
(3) (1921) 19 A.L.J. 702.

1924 Allahabad 909.

STUART, J.

Girwar Singh—Plaintiff-Appellant.

v.

Ram Piari Kuer and another—Defendants-Respondents.

S. A. No. 1127 of 1922, decided on 22nd January, 1924, against the decree of the District Judge, dated 22nd March, 1922.

Civ. Pro. Code, O. 2, R. 2—Suit for mesne profits.

A suit for recovery of mesne profits from the date of the decree up to the date of getting possession does not lie after a suit for redemption. [P. 910, C. 1.]

Mushtaq Ahmad—for Appellant.

N. P. Asthana—for Respondents.

Judgment:—The learned District Judge has applied the principles which are

laid down by a Bench of this Court in *Ram Din* v. *Bhup Singh* (1) which affirms the view taken by a single Judge in *Kashi* v. *Bajrang Prasad* (2). The learned Counsel for the appellant admits that the law has been applied correctly but he takes exception on one point. The decree for redemption was passed on 23rd April 1919 and possession was not obtained until the 16th July, 1919. His case is that although a separate suit is barred for the profits prior to 23rd April, 1919, he was entitled in the suit out of which this appeal arises to the profits which accrued between the 23rd April, 1919 and the 16th July, 1919. I cannot however accept this argument. The law as laid down in the two above rulings is based upon the provisions of the Code of Civil Procedure which in order to prevent multiplicity of suits direct that all questions arising out of one cause of action should be heard and determined in the same suit and that if a plaintiff omits to take his remedy at the time of the original suit he shall be debarred from taking it at a later stage. But the law also provides for the awarding of mesne profits up to the date of obtaining possession and so it was open to the plaintiff-appellant not only to have asked for the mesne profits up to the date that the decree was passed but up to the date that he obtained possession and his omission to have done so tells against him not only up to the date that the decree was passed but up to the date that he obtained possession. Apart from that fact it is difficult to understand how any profits could have accrued between the 23rd April 1919 and the 16th July 1919, for in that period there are not ordinarily any crops standing on the ground. The question of date of rent demand would probably not enter into the case.

For the above reasons I accept the view taken by the learned District Judge and dismiss this appeal with costs on the higher scale.

Appeal dismissed.

(1) (1908) 30 All. 225;
(2) (1908) 30 All. 96.

1924 Allahabad 910.

MUKERJI, J.

Sobha Ram and another—Defendants-Appellants

v.

Ram Prasad—Plaintiff-Respondent.

S. A. No. 1164 of 1922, decided on 24th January, 1924, from the decree of District Judge, Budaun.

(a) *Civ. Pro. Code, S. 11—Decision by Revenue Court.*

A decision by a Court recovering thakkavi arrears that rent was not paid by the sub-tenant to the tenant in proceedings for sale of the tenure to recover takkavi paid to the tenant is not *res judicata* in a subsequent suit by the purchaser against the sub-tenant for the recovery of the rent payable by the sub-tenant. [P. 911, C. 1.]

(b) *Civ. Pro. Code, O. 21—Applicability.*

Procedure in O. 21 does not apply to a Court recovering thakkavi arrears.

H. Mushtaq Ahmad—for Appellants.

Harnandan Prosad—for Respondent.

Judgment:—This is a simple matter. But it clearly appears that the lower court has gone astray. Certain tenants borrowed money from the Government as *Taqavi*. This was sought to be realised by attachment of the rent said to have been payable to the borrowers by their sub-tenants, the present appellants. The appellants protested that they had paid up and nothing was due by them. Their application containing this protest was dismissed for default. Then the debt, namely, the rent supposed to be payable was put to auction sale and was purchased by the respondent Ram Prasad. Ram Prasad then brought this suit, out of which this appeal has arisen in the Revenue Court for recovery of a sum of Rs. 200 rent and interest. The appellants who are the principal defendants in the case (the sub-tenants) contended *inter alia* that they had really paid up and the auction-purchaser purchased nothing.

The court of first instance disbelieved this story and decreed the suit. There was an appeal lodged before the learned District Judge. He sustained the plea of payment; but he thought—it is difficult to see really what he thought—the judgment is entirely unintelligible. I called upon the learned counsel for the respondent Ram Prasad to sustain the decree of the lower court on any ground he thought fit to do so. The decree is really unsupportable. It appears

to me that what was sold was a debt supposed to be due. There was no guarantee at the time of the sale either by the Government or by anybody else that the debt was really owing. The fact that the alleged debtors' protestation was not heard owing to their own default makes no difference. Even if the court had held that their plea of payment had not been established it could not be said that that finding would operate as *res judicata*. It is not the case of an objection to the attachment of a property by a third party under Order 21, rule 58 of the Code of Civil Procedure. In such a case unless the unsuccessful objector brings a suit to obtain a declaration of his title within a period of one year the decision of the court executing the decree is taken to be conclusive. An authority for this proposition will be found in the case of *Maharaja of Benares* v. *Patraj Kunwar* (1). Further, the court which was selling the debt was not a court constituted under the Civil Procedure Code and was not authorised to exercise the powers laid down in Order 21 of the Civil Procedure Code. The law on the point lays down that the loans advanced are to be realised as if they were arrears of revenue, *vide* Act XII of 1884, section 5.

The appeal succeeds and the suit of the plaintiff-respondent fails. The suit is dismissed with costs throughout which will include fees in this Court on the higher scale.

Appeal allowed.

(1) (1905) 28 All. 262.

---

* 1924 Allahabad 911.

DANIELS, J.

Bhawani Prosad Misir — Defendant-Appellant.

v.

Ram Sunder and others—Plaintiffs-Respondents.

S. A. No. 1456 of 1922, decided on 12th February, 1924, from a decree of Sub-Judge, Jaunpur.

Oaths. Act, S. 9 —Oath is conclusive of the particular matter and is not an adjustment under O. 23, R. 3—Civ. Pro. Code, O. 23, r. 3.

Where the defendant agreed that if the plaintiff's witness ate food from the plaintiff's mother who was alleged to have given birth to the plaintiff in an illegitimate way the suit should be decreed against him and further the defendant stated that if the plaintiff would serve that food to the witness he was willing that the suit should be decreed and when both these things were done but before the decree was passed the defendant put in an application resiling from the application, *held* that so far as the legitimacy of the plaintiff was concerned the point had been conclusively settled against the defendant but that the other issues must be decided on the merits. (31 Mad. 1, *Foll.*) [P. 912, C. 1.]

S. S. Sastry—for Appellant.

U. S. Bajpai—for Respondents.

Daniels:—This is a second appeal in a case in which both courts have declared the plaintiff's right to redeem certain mortgages and directed him to do so. The plaintiff claimed to redeem as the reversioner of one Badal and one of the main defences to the suit was that the plaintiff was not the son of Bhikha through whom he claimed but was the illegitimate son of Bhikha's widow Mt. Pargashi. The plaintiff called one Dukharam Dube as a witness in support of his case. When this witness was called the defendants agreed that if the witness would eat *kachcha* food cooked by Mt. Pargashi the suit should be decreed against them. This was on the 14th December 1921. On the same date the agreement of the parties was reduced to writing by the court and signed by the defendants including the present appellant Bhawani Prosad. Dukharam expressed his willingness to eat food cooked by Mt. Pargashi and arrangements were made for food to be cooked by her and eaten by the witness on the following day. On that day the appellant made a further statement that if after Mt. Pargashi had cooked the food the plaintiff would serve it to the witness he was willing that the suit should be decreed. This was duly done and the witness ate the food. On the same day before the case was decided the appellant put in a written application resiling from his agreement and alleging that owing to the witness having lived in Bombay he had ceased to be particular in caste matters. Both the Courts below have found that the defendant had no good ground for resiling from the agreement and should not be permitted to do so. The case was therefore decreed in accordance with the agreement.

The defendant appeals to this Court and the plea pressed on his behalf is that the agreement in question did not amount to an adjustment of the suit under Order 23,

rule 3 and that the willingness of the witness to eat food cooked by Mt. Pargashi could at most only be conclusive on the particular point it was directed to establish, namely the plaintiff's legitimacy. At most therefore this issue should have been decided in favour of the plaintiff and the other issues should have been decided on evidence. Apart from authority I should have been disposed to accept the view taken by the Courts below. There seems no reason in the nature of things why an agreement of this kind should not be treated as a lawful agreement and why a party who makes it should not be bound by it. The authorities of this Court appear to me however to be against it. The leading case cited is that of *Muhammad Zahur* v. *Cheda Lal* (1). In that case the parties agreed that if a particular statement was to be found in a bond in the possession of a witness the Court should decree the suit but should otherwise dismiss it. Mr. Justice Straight and Mr. Justice Knox who decided the case held that the agreement could not be treated as an adjustment because no decree could be passed on the agreement as it stood. Something still remained to be done before a decree could be passed, namely, it had to be ascertained whether the statement in question was in the agreement or not. This is exactly parallel to the present case. No decree could have been passed on the agreement in this case as it stood. The Court had still to ascertain the willingness of the witness to eat the food which Mt. Pargashi cooked. Although cases in which a party has agreed that the suit should be dismissed if the other party takes an oath in particular form are not precisely parallel they also tend in the same direction. In several such cases, *e g.*, 31 Mad. 1 and 44 All. 117, it has been held that, even if a party agrees that a suit should be dismissed, the oath taken can only be conclusive of the particular matter stated by the witness. Such agreements have not been treated as adjustments under Order 23, rule 3. In the state of the authorities I must hold that the defendant-appellant was bound to this extent that he could not thereafter question the legitimacy of the plaintiff, and it must be held to have been definitely decided against him that the plaintiff is the legitimate son of Bhikha. The other issues must be decided on the merits.

I accordingly set aside the decrees of the Courts below and remand the case under Order 41, rule 23 for decision of the remaining questions at issue. Costs here and heretofore will abide the result.

Decree set aside and case remanded.

(1) (1892) 14 All. 141.

---

*1924 Allahabad 912.

DANIELS, J.

Dhanraj Rai and another—Defendants-Appellants.

v.

Ram Naresh Rai and others—Plaintiffs and Defendants-Respondents.

S. A. No. 1499 of 1922, decided on 5th March, 1924, against the decree of the District Judge of Ghazipur, dated the 10th July, 1922.

(a) *Hindu Law—Alienation—Legal necessity.*

Where the deed was executed by the representatives of all branches of the family and by all the adult male members of the family living at the time. *Held* each of these circumstances separately is sufficient to raise a presumption of legal necessity. (1922 Pat. 450 ; 22 A.L.J. 182 ; 8 Bom. 602 ; 8 A.L.J. 15, *Foll*). [P. 913, C. 2.]

(b) *Hindu Law—Joint family—Alienation—Co-parcener's existence on date of alienation entitles after born co-parcener to sue but only within the period within which the former co-parcener could sue—The right does not devolve as property—Limitation Act, Ss. 6 and 7.*

Where a co-parcener who could challenge a deed was alive at the execution of the deed, and the plaintiffs were born during his lifetime and within twelve years of the alienation, *Held*, they undoubtedly obtained a right to challenge it. A right to sue is not however co-parcenary property in which a son acquires interest by birth. S. 6 of the Limitatipn Act cannot be pleaded by a plaintiff who was not in existence when the alienee took possession. He is entitled to take advantage of the existing cause of action so long as it subsists, but he does not obtain a fresh period of 21 years from the date of his birth. Even a co-parcener who challenges an alienation does so in virtue of his own independent right as a person who has acquired interest in the family estate by birth. Plaintiffs cannot rely on S. 7 where there was no joint right when the period of limitation commenced ; plaintiffs can bring their suit within three years of the date when the co-parcener could have attained majority. (33 All. 654; 1 Lah. 558 ; 24 O.C. 390 ; 4 All. 235 ; 27 All. 704, *Foll.*) [P. 914, Cs. 1 and 2.]

U. S. Bajpai—for the Appellants.

M. L. Agarwala—for the Respondents.

Judgment:—This is an appeal in a suit in which the plaintiffs sought to set aside

on the ground of want of legal necessity two sales of joint family property made in the years 1904 and 1910 respectively. The deed of 1910 has been held by both Courts to be binding on the plaintiffs and the dispute is now confined to the deed of 1904. The two issues to be decided are:—

1. Is the suit within time?
2. Was the alienation justified by legal necessity or antecedent debt?

The family to which the plaintiffs belong consists of four branches headed by the four sons of the common ancestor Jhingur Rai. The deed in suit was executed by the heads of all four branches. Two of the sons of Jhingur Rai, namely, Jharap Rai and Dhanraj Rai, were alive and executed it. The other two Jadu Rai and Dhanoki Rai were dead but the deed was executed by the two sons of Jadu Rai and by the only son of Dhanoki Rai. The executants also admittedly included all the adult male members of the family at the time when the deed was executed. The plaintiffs are all minors born after the execution of the deed. They are respectively a grandson of Jadu Rai, two grandsons of Jharap Rai and one grandson of Dhanraj Rai. Their suit has been held to be within time because in 1904 a grandson of Jharap Rai named Sita Ram was in existence. This lad died in 1912 at the age of thirteen.

The consideration for the deed in suit was Rs. 423 and the whole of it except Rs. 25 was taken for payment of antecedent debts. A list of these debts is given in the judgments both of the Subordinate Judge and of the District Judge. The learned District Judge says that in order to establish the necessity for the sale "it is necessary to show that these prior debts were in existence and that they themselves were binding on the family", and he considers that there is no evidence apart from the recital in the deeds that such necessity existed. If the learned District Judge means by this that in order to support an alienation an antecedent debt incurred by an ancestor must have been incurred for purposes constituting legal necessity in the narrow sense his statement is clearly erroneous. With regard to the four of the items which he has marked (b) (c) (d) and (g) the learned District Judge says that "there is not even any proof on the record that the deeds are genuine". If the learned District Judge means by this that in order to prove that the sale consideration was taken in lieu of prior debts, it is legally essential that the prior deeds which were paid off out of the consideration must be produced and formally proved he is again in error. Indeed such a requirement would render proof in respect of an old transaction impossible. Deeds which have been paid off are not retained with the same care as deeds which are still in force. It is not surprising if after a lapse of nearly twenty years such deeds are not forthcoming, and it is quite open to the defendants to prove by other evidence that these debts existed and that the consideration was paid in satisfaction of them.

But the radical error which vitiates the judgment of the learned District Judge is his failure to realise the legal significance of the fact that the deed was executed by the representatives of all four branches of the family, and by all the adult male members of the family living at the time. Each of these circumstances separately has been held sufficient to raise a presumption of legal necessity. (As to the latter see 8 Bom. 602). When combined they certainly do so. The presumption is still further strengthened by the fact that two of the original vendors Jharap Rai and Dhanraj Rai had sons who died long after attaining the age of majority but who did not during their lifetime make any attempt to contest the validity of the deed. One of the sons of Dhanraj Rai is still alive and is defendant No. 5. In a similar case which came up under the Letters Patent, *Chuttan Lal* v. *Jai Ram* (1), this was held to support an inference in favour of the validity of the transaction.

This presumption applies to the whole deed and not merely to the items so far considered. There is considerable evidence to support it in regard to most of the items, and there is absolutely nothing to rebut it. One of the deeds which was paid off goes back as far as 1899 and it is not to be expected that after 21 years the defendants should be able to produce definite and positive evidence regarding the necessity for it. This is a very much stronger case than *Peare Lal* v. *Sundar Singh* (2), which has been referred to in argument, as in that case the alienation was effected by the manager alone. The learned Subordinate

(1) (1911) 33 All. 283=8 I.C. 719=8 A.L.J. 15.
(2) 1922 All. 436=44 All. 756=68 I.C. 805=20 A.L.J. 658.

Judge accepted all these items as being shown to be for legal necessity and the finding of the learned District Judge to the contrary is vitiated by manifest errors of law which entitle me to set it aside. In dealing with item (f) which he has accepted, the learned District Judge notices the fact that the deed was executed by the leading representatives of every branch of the family, but he seems to think that the only inference which can be drawn from it is that the debt was not illegal or immoral. The inference in reality goes much further than this. The presumption is that the deed represented a valid transaction which would bind the family estate. The finding of the learned Subordinate Judge on this issue was correct and should have been upheld.

In view of my finding on the above issue it is not necessary to say very much on the question of limitation. In view of the fact that Sita Ram was alive at the execution of the deed, the plaintiffs who were born during his lifetime and within twelve years of the alienation undoubtedly obtained a right to challenge it under the ruling of this Court in *Tulshi Ram* v. *Babu Lal* (3). A right to sue is not however co-parcenary property in which a son acquires interest by birth, *Lachman Das* v. *Sundar Das* (4). Limitation under Article 126 runs from the date when the alienee takes possession of the property, which in this case was the date of the sale. If the plaintiff is a minor on the date when limitation commences this period will be extended in virtue of section 6 of the Limitation Act, but it has been held in the Punjab case above referred to that section 6 cannot be pleaded by a plaintiff who was not in existence when the alienee took possession. He is entitled to take advantage of the existing cause of action so long as it subsists, but he does not obtain a fresh period of 21 years from the date of his birth. The same view has been taken in Oudh in a judgment in which the question is fully discussed: 24 O. C., 330. I am informed that the same view has also been taken in Bombay. If it were otherwise limitation might run on for ever. Suppose there is in existence at the time of the alienation an infant co-parcener. He clearly can sue within the period of his minority and three years thereafter. Just within three years after his attaining majority another co-parcener is born in another branch of the family and a fresh period of 21 years commences. It has been suggested in answer to this argument that the right to sue devolves like property on the legal representative of the minor, but a right to challenge an alienation is not property which devolves in this way Every co-parcener who challenges an alienation does so in virtue of his own independent right as a person who has acquired interest in the family estate by birth. It was so held in *Padarath Singh* v. *Raja Ram*, (5). Limitation reckoned from the date when the alienee took possession would have expired in 1916. Section 6 of the Limitation Act not being applicable, the plaintiffs cannot claim any extension beyond that date. For the same reason they cannot rely on section 7 as there was no joint right when the period of limitation commenced *Bhagat Bihari Lal* v. *Ram Nath* (6). If Sita Ram had lived he would have attained his majority in 1917. If that date is material, which I do think it is, it would be for the plaintiffs to show that their suit was brought within three years of it. The suit was not filed till August 1920. The appellants are in my opinion entitled to succeed also on the question of limitation though as I have said they are so clearly entitled to succeed on the other issue that it is almost superfluous to go into the question.

I may note in conclusion that there is a very recent decision of the Letters Patent Bench in *Ananta* v. *Ram Prasad* (7) that where a deed was executed by the father and uncle in lieu of antecedent debt the plaintiffs were bound by the acts of their own ancestor and could not challenge the deed. The same view was taken by the Patna High Court in *Hari Prasad Singh* v. *Sourendra Mohan Sinha* (8).

For the reasons given above I allow the appeal with costs including in this Court fees on the higher scale and restore the decree of the Subordinate Judge.

Appeal allowed.

(3) (1911) 33 All. 654=10 I.C. 908=8 A.L.J. 733.
(4) (1920) 1 Lah. 558=59 I.C. 678.
(5) 4 All. 235.
(6) (1905) 27 All. 704=2 A.L.J. 453=1905 A.W.N. 163.
(7) (1924) 46 All 295=22 A.L.J. 182=78 I.C. 619 =5 L.R.A. (Civ.) 86.
(8) 1922 Patna 450=1 Pat. 506=66 I.C. 945= 3 Pat. L.T. 709.

1924 Allahabad 915.

MUKERJI, J.

Chob Singh—Plaintiff-Appellant.

v.

Daryai Singh and others—Defendants-Respondents.

S. A. Nos. 1524 and 1525 of 1922, decided on 14th March, 1924, from the decree of the District Judge of Mainpuri, dated the 14th July, 1922.

(a) *Limitation Act, S. 5—Bona fide impression of a Court which entertained the appeal though wrongly filed in his Court justifies extension.*

Where a responsible officer like the Commissioner never thought that the appeals were not entertainable by him, under the circumstances, if the appellants thought that, they had a right of appeal to the Commissioner and the mistake must be taken to be a *bona fide* mistake until the contrary is shown. [P. 915, C. 2.]

(b) *Agra Tenancy Act, S. 58—Ejectment—Burden is on tenant to prove his tenure.*

The mere fact that the plaintiffs called the defendants lessees does not imply that they said or meant that the defendants were holding for a term. The burden of proof is on the tenant when he is sued by his landlord for his ejectment, to show that he has a permanent right to stay on the land and cannot be ejected by the proprietor. [P. 916, C. 2.]

N. P. Asthana, Gulzari Lal and *M. L. Agarwala*—for the Appellant.

N. C. Vaish and *S. K. Dar*—for the Respondents.

Mukerji, J.:—These two connected appeals Nos. 1524 and 1525 of 1922 may be disposed of by the same judgment.

Two different plaintiffs brought two different suits out of which these two appeals have arisen for the ejectment of the same set of tenants from lands in two different *mahals*. Except for this difference, the case is the same in both the appeals.

Two points require to be decided. One is whether the appeals, when lodged before the learned District Judge of Mainpuri, ought to have been admitted as within time and should not have been dismissed as barred by limitation. The second is whether, in the circumstances, the defendants-respondents are liable to be ejected.

On the first point it appears that the plaintiffs' suit for ejectment failed in the Court of the Assistant Collector. The suits were suits for ejectment of a tenant under section 58 of the Tenancy Act. The defendants pleaded, *inter alia*, that they were under-proprietors and could not be ejected. The suits having been dismissed the plaintiffs appealed to the Commissioner. No question as to the jurisdiction was raised before the Commissioner. After certain remands the learned officer decreed the appeal and decreed the suits.

The defendants went to the Board of Revenue and the Board held that the appeals were wrongly laid before the Commissioner and directed the Commissioner to return the memoranda for presentation to the proper Court. The memoranda were returned on the 11th of April, 1922, and were filed the very next day in the Court of the District Judge of Mainpuri. The learned District Judge found that the appeals before the Commissioner were lodged after the expiry of the 30 days allowed for filing appeals before the District Judge and that, therefore, the appellants could not succeed, unless they proved that before filing their appeals before the Commissioner, they had obtained legal advice as to the forum before which the appeal lay. Not being satisfied that any such advice had been taken, he held that the appeals were barred by time. As a matter of fact, the appeals would appear to have been admitted, entered into the register and numbered.

As I have already pointed out, the question as to the Court to which the appeals lay was not even raised before the Commissioner. A responsible officer like the Commissioner never thought that the appeals were not entertainable by him. Under the circumstances, if the appellants thought that they had a right of appeal to the Commissioner, the mistake must be taken to be a *bond fide* mistake until the contrary is shown. In my opinion the learned District Judge should not have dismissed the appeals as barred by time and ought to have given the appellants the benefit of section 5 of the Limitation Act.

On the merits the cases appear to be rather peculiar. It has been found that the defendants have been in actual occupancy of the land in suit for about 90 years. How they came into possession nobody could explain. The question as to the status of the defendants arose twice in the course of the last settlement of the district and two judgments were given; one on the 12th of September, 1904, and again on the 13th of March, 1905. The former judgment was given, as the defendants themselves or their predecessors, applied

to the Settlement Officer for the purpose of their being recorded in the *Khewat* as proprietors. In an elaborate judgment the learned officer (probably the Assistant Settlement officer) decided that the defendants were nothing but *thekedars* within the meaning of section 4 (6) of the Tenancy Act. The second judgment was given because a Patwari asked for instructions as to how he was to record the defendants in his papers. The same conclusion was arrived at by the learned Assistant Settlement Officer. It is no longer disputed before me that the defendants have been holding on payment of rent to the plaintiffs, the landholders, that no attempt whatsoever has ever been made to enhance the rent, that the defendants have sued tenants and realised rents and further that, tenants holding under the defendants have been allowed to acquire occupancy rights in the lands held by them. On these facts the learned Assistant Collector and the learned District Judge held that the defendants could not be ejected, they being only *thekedars* within the meaning of section 4 (6) of the Tenancy Act.

It has been argued before me that a *thekedar* is a tenant all the same and is therefore as much liable to be ejected as any other tenant. Dr. Vaish, the learned Counsel appearing for the defendants-respondents has argued that the appellants themselves have stated in the plaint that, the defendants were lessees and that therefore unless they proved that, the terms of the lease had expired, they could not successfully maintain the suit for ejectment.

I think this argument on behalf of the respondents is a little fallacious. A lease may be for a term. It may be permanent and it may be from year to year. The mere fact that the plaintiffs called the defendants lessees does not imply that they said or meant that the defendants were holding for a term. If the status of the defendants be that of a tenant I see no reason why the suit should not be brought within clause (*a*) of section 58 of the Tenancy Act. It has not been actually contended before me that, the defendants are permanent lessees though some argument on this point was advanced at the Bar. The burden of proof is on the tenant when he is sued by his landlord for his ejectment, to show that he has a permanent right to stay on the land and cannot be ejected by the proprietor. This was held so lately as in the case of *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1) by their Lordships of the Privy Council. Their Lordships referred to the case of the *Secretary of State* v. *Luchmeswar Singh* (2), in which the fact that the tenants held the land on a low and uniform rent for 75 years was not held to be sufficient to prove a permanent title to the land. It follows, therefore, that there is no bar to the ejectment of the defendants. In spite of their long possession they have no higher title than tenants from year to year.

The result is that the appeals succeed and are allowed and both the suits of the plaintiffs are decreed with costs throughout, the costs including fees in this Court on the higher scale.

Appeals allowed.

(1) 1924 P.C. 65=47 Mad. 337=51 I.A. 83=5 L.R.P.C, 33=19 L.W. 259=22 A.L.J. 130=34 M.L.T. 10=(1924) M.W.N. 293=46 M.L.J. 546=28 C.W.N. 809 (P.C.).

(2) (1889) 16 Cal. 223=16 I.A. 6=5 Sar. 275. (P.C.).

---

* 1924 Allahabad 916.

DANIELS, J.

Ish Dat Tewari and another—Plaintiffs-Appellants,

v.

Tameshar and others—Defts-Respts.

S. A. No. 1553 of 1922, decided on 6th March, 1924, against the decree of the District Judge of Gorakhpore, dated 26th June, 1922.

(*a*) *Hindu Law—Joint family—Alienation.*

A co-parcener not born on date of alienation by his father and uncle and who separated before suit can't set aside the alienation. (1922 All. 342, *Dist.*) [P. 917, C. 2.]

(*b*) *Hindu Law—Joint family—Alienation.*

Right of the co-parcener to challenge alienation is not lost even where a manager is able to give discharge. (31 All. 156, *Foll.* though doubted 35. All. 380, *Appr.*) [P. 917, C. 2.]

(*c*) *Hindu Law—Alienation—Legal necessity.*

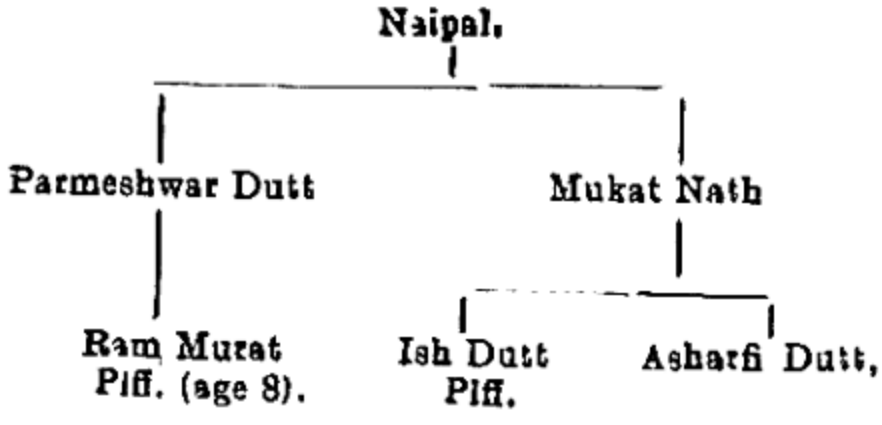
In the case of old transactions full and detailed evidence is not to be expected and it is permissible to fill in the details by reasonable presumptions, (47 I.A. 6; 20 A.L.J. 658; 44 All. 756, *Foll.*) [P. 918, C. 1.]

U. S. Bajpai—for the Appellants.

B. L. Dawe and N. Upadhia—for the Respondents.

Judgment:—In this case the plaintiffs-appellants Ish Dutt and Ram Murat seek

to set aside a sale deed of joint family property executed by their respective fathers Mukat Nath and Parmeshwar Dutt on 28th May 1901 as having been made without legal necessity. The following pedigree will assist in the understanding of the case :—



The trial court dismissed the suit altogether. The lower appellate court dismissed the appeal of Ram Murat but allowed that of Ish Dutt in respect of one item of the sale consideration. The plaintiffs appeal and the defendants have filed cross-objections. The lower Court's findings of fact are :—

(1) That the family was joint when the sale was executed.

(2) That a separation took place on the very next day after the date of the sale-deed.

(3) That Ish Dutt's age was 20 at the time of suit.

The third finding is interpreted by both parties as meaning that Ish Dutt was alive at the execution of the deed but that the suit was filed within three years of his attaining majority and is therefore within time. From the second finding it follows that, there being no longer any joint family in existence, each plaintiff can only sue to recover his own separate share. This is clearly the case, and the ground of appeal which was taken on this point has not been pressed. The appellants contest the finding of the Court below that Ram Murat has no cause of action to contest the sale, but this result follows clearly from the second finding referred to above. Ram Murat was only eight years of age when the suit was filed in 1921. He was therefore born in the year 1913. At that date there was no community of interest between Parmeshwar Dutt and the branch of Mukat Nath, and the only property in which the plaintiff could acquire an interest by birth was the separate and ancestral property of his father Parmeshwar Dutt as it stood on the date of his birth. The plaintiff could not claim the benefit of any cause of action Ish Dutt might have, seeing that Ish Dutt belonged to a family which had separated from that of the plaintiff's father ten years before. The principle laid down in *Ghup Kunwar* v. *Balbir Sahai* (1), does not apply, and the ordinary rule applies that he is not entitled to challenge a transaction made before his birth. The only property in which he acquired interest was his father's property as it stood on that date.

It remains only to consider the case of Ish Dutt. The respondents in their grounds of objection challenge the finding as to Ish Dutt's age but at the hearing this plea has been abandoned. They have indeed contested Ish Dutt's right to sue on the ground that his elder-brother Asharfi Dutt attained majority more than three years before the suit and therefore presumably became manager of the family and capable of giving a valid discharge. There is authority of other High Courts in support of this view, but Courts below followed as they were bound to do, and as I sitting as single Judge must also do, the reported ruling of this Court in *Ganga Dayal* v. *Mani Ram* (2), I may remark however that the authority of this case is somewhat shaken by the ruling in *Achhaibar Singh* v. *Ram Sarup Singh* (3). The consideration for sale-deed in suit was Rs. 1,683, consisting of.—

(1) Rs. 396-12-0 due on a hypothecation bond of 17th January, 1895, executed by Mukat Nath.

(2) Rs. 1085-6-9 due on a hypothecation bond of 26th August, 1897, executed by Mukat Nath.

(3) Rs. 201-4-0 due on a hypothecation bond of 2nd May, 1901, executed by Parmeshwar Dutt.

The third item was borrowed for the expenses of a suit brought by the mortgagee on the basis of the hypothecation bond which forms item No. 1. As the first two debts were incurred by Mukat Nath long before the transaction in suit, and indeed long before the plaintiff's birth, they constituted antecedent debt and the plaintiff Ish Dutt has no right to challenge them. On this point there can be controversy. As regards the third item the learned Judge holds that as the debt was

(1) 1922 All. 342=64 I.C. 885=44 All. 190.
(2) (1909) 31 All. 156=1 I.C. 824=6 A.L.J. 62.
(3) (1913) 35 All. 380=19 I.C. 645=11 A.L.J. 463.

incurred by the plaintiff's uncle Parmeshwar Dutt it is for the defendants to establish legal necessity which they have not done. This part of the finding is challenged by the defendants in their cross-objections. They urge that the fact of Parmeshwar Dutt executing a hypothecation bond to pay off a previous mortgage executed by Mukat Nath, and then both brothers joining in a sale-deed to finally clear off the transaction is sufficient to raise a strong presumption that the transactions were really entered into by both brothers for purposes which would justify the alienation. The two brothers were the only adult male members of the family at the time and there was no one else in the family except Mukat Nath's two sons, one of whom was only nine years old and the other must have been an infant in arms. The original debt was incurred in 1895, 27 years before the suit. This is a case for the application of the principle laid down by their Lordships of the Privy Council in *Venkata Reddi* v. *Rani Saheba of Wadhwan* (4), and applied by this Court in *Peare Lal v. Sundar Singh* (5), that in the case of old transactions full and detailed evidence is not to be expected, and that it is permissible to fill in the details by reasonable presumptions. It is true that in the Privy Council case the transaction was 82 years old but in the case of a transaction nearly 30 years old it is also true that full and detailed evidence as to the circumstances is not to be expected, and the fact that both brothers accepted responsibility for the debt was sufficient in my opinion to raise a presumption that the transaction was valid. There is absolutely nothing to rebut that presumption. In this view I need not consider the last ground of appeal which is that the decree framed by the Court below is unintelligible.

I accordingly dismiss the appeal and allowing the cross-objections modify the decree of the Court below and dismiss the suit with costs in all Courts. The respondents will get their costs in this Court both of the appeal and of the cross-objections. Costs in this Court will include fees on the higher scale. *Appeal dismissed.*

(4) (1920) 43 Mad. 541=47 I.A. 6=38 M.L.J. 393 =11 L.W. 451=1920 M.W.N. 315=55 I.C. 538=18 A.L.J. 367=22 Bom. L.R. 541 (P.C.).

(5) 1922 All. 436=44 A.L.J. 756=68 I.C. 805=20 A.L.J. 658.

1924 Allahabad 918.

DANIELS, J.

Behari Lal—Defendant-Appellant.

v.

Amin Chand and Allah Bande—Plff. and Defendant-Respondents.

S. A. No. 1563 of 1922, decided on 7th April, 1924, against the decree of the Subordinate Judge of Muzaffarnagar at Meerut, dated the 5th July, 1922.

Evidence—Admisibility.

Where a document is admitted without objection in the trial Court, it cannot be objected to afterwards. (3 P.L J. 306; 34 Cal. 1059; 11 Bom. 320; 31 Cal. 155, *Foll.*) [P. 919, C. 1.]

Iqbal Ahmad and *M. A. Aziz*—for the Appellant.

P. L. Banerji—for the Respondents.

Judgment:—This appeal arises out of a suit for possession of the site of a house. The claim was disputed on the ground of adverse possession. It has been found that the plaintiff is the owner of the site. It has also been found that the defendant's predecessor-in interest occupied the land in 1885 under an agreement which allowed him to build a house on it but required him to vacate it and remove the materials when asked to do so by the owner. It is further found that from that time ground rent has been regularly paid and that the appellant when he bought the house knew of the plaintiff's rights, that is, he knew that the site belonged to the plaintiff and that his vendor had no transferable interest in it.

Two pleas are taken in the grounds of appeal:—

1. That no decree for ejectment should have been given but only a decree for arrears of rent.

2. That the lease or counterpart executed by the defendant's predecessor required registration.

The first plea has not been seriously pressed. On the facts found the plaintiff was entitled to a decree for ejectment.

As to the second plea the court below held that it was not open to the appellant. It further held that even if the plea was open there was no force in it.

If it were necessary to support the second finding the plaintiff respondent admits that he would not be in a position to do so. The question which has been argued is whether this Court ought to interfere with the discretion of the court below in holding

that the plea could not be raised by the appellant. The document was admitted without question in the trial court, and even in the appeal to the court below no question of its admissibility was raised. It was only at the time of arguments that the point was taken. Under these circumstances the court below was in my opinion entitled to refuse to entertain it. The Code (O. 41, r. 2) expressly lays down that except by leave of the court no party shall be entitled to urge any objection not taken in the memorandum of appeal. It has also been held in several cases that where a document is admitted without objection in the trial court, it cannot be objected to afterwards. The point arose in a recent case in the Patna High Court *Charitar Rai* v. *Kailash Bihari* (1). Certain papers had been admitted without objection in the trial court. The special Judge in first appeal and a Judge of the High Court in second appeal rejected them as inadmissible. In Letters Patent it was held that the objection should not have been entertained. The learned Judges support their view by reference to a dictum of the Privy Council in *Shajadi Begam* v. *Secretary of State* (2) where their Lordships say :—

"It is now too late for the respondent to take an objection to the admissibility of a document which was received without objection at the trial".

The same view has been taken in another case *Chimanji Govind Godbole* v. *Dinkar Dhondev Godbole* (3) where a copy of a copy had been admitted without objection in the trial court, as also in *Kishori Lal* v. *Rakhal Das* (4).

Even if the document in dispute were rejected for want of registration this would not result in the dismissal of the suit. Quite apart from this document there is a finding of fact based on oral evidence that ground rent has been regularly paid for the site by the appellant's predecessor and that appellant took his sale-deed with full knowledge of the plaintiff's rights.

For the reasons already given I dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) (1918) 3 Pat. L.J. 306=4 Pat. L.W. 213=44 I.C. 422=1918 Pat. 145.
(2) (1907) 34 Cal. 1059=6 C.L.J. 678=9 Bom. L.R. 1192=2 M.L.T. 349.
(3) (1887) 11 Bom. 320.
(4) (1904) 31 Cal. 155.

* 1924 Allahabad 919.

DANIELS, J.

Todar-Mal—Plaintiff-Appellant

v.

Kishan Lal and others—Defendants-Respondents.

S. A. No. 1570 of 1922, decided on 2nd April, 1924, against the decree of the Additional District Judge of Meerut, dated 15th November, 1922.

Hindu Law—Reversioner — Consent of reversioner (alienee) raises no presumption of legal necessity.

Where the transaction is in favour of a person having a direct interest in obtaining it i, e. of the presumptive reversioner himself the presumption of the transaction being a proper one disappears. (34 All. 129, *Appr.* 9. O. C. 104, *Foll.*). [P. 920, C. 1.]

P. L. Banerji—for the Appellant.

N. C. Vaish—for the Respondents.

Judgment:—This appeal arises out of a suit to set aside a sale deed executed by Mst. Shib Dei the mother of the plaintiff in the year 1909. Mst. Shib Dei inherited the property in suit from her father. Prior to this transaction she had married and had become a widow. Prior to the deed in suit she had entered into a *Karao* marriage with a second husband. At the time when the deed was executed she had no children, but a son, the plaintiff, was subsequently born to her. At the time of the transaction the presumptive reversioner was one Hans Ram, the sale deed was executed in favour of Hans Ram's son Rati Ram.

In both the courts below a case was put forward on behalf of the plaintiff that the deed was obtained from Mst. Shib Dei by fraud. This case has been rejected by both courts and is now abandoned. The second defence is that the deed was executed without legal necessity. On behalf of the defendants it was objected that the plaintiff was incompetent to challenge the deed on the ground that he was born after its execution. This plea has also now disappeared. The plaintiff's right to challenge it clearly depends on whether the deed was valid at the time of its execution. An issue was framed on the question of legal necessity but neither court has come to a finding on it. The Courts have held that the deed was valid on the ground that it was executed with the consent of the next presumptive reversioner and that this dispenses

with the necessity for proving legal necessity.

Now it has been held by the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (1) that the consent of the nearest reversioners does not constitute absolute proof of the validity of the deed but that it operates by raising a presumption that the deed was executed for legal necessity. Following this principle it has been held that no consent of reversioners can validate a deed of gift because in such a case there can be no legal necessity. (34 All. 129). It has also been held in an Oudh case decided by Mr. Scott and Sir Edward Chamier (9 O.C. 104) that where the presumptive reversioner was a man of over eighty his consent was not sufficient to dispense with other evidence. Similarly it appears to me that where the transaction is in favour of a person having a direct interest in obtaining it, *i.e.*, of the presumptive reversioner himself or as in the present case of his son, the presumption of the transaction being a proper one disappears. The deed in the present case being in favour of the son of the person whose consent is relied on, it was in my opinion necessary to offer other evidence in proof of the legal necessity. Evidence on this point was tendered but as no finding has been arrived at by the Court below I remit an issue under Order 41, rule 25.

"Was the deed in suit executed for legal necessity"?.

The finding should be submitted before the Judge's Court vacation. On receipt of the finding ten days will be allowed for objections.

Finding called for.

(1) (1919-20) 42 Mad. 513=46 I.A. 72=36 M.L.J. 493=17 A.L.J. 536=29 C.L.J. 539=21 Bom. L.R. 640=50 I. C. 498=23 C.W.N. 777=(1919) M.W.N. 262=26 M.L.T. 5=10 L.W.105 (P.C.).

1924 Allahabad 920.

DANIELS, J.

Basu and others—Defendants-Appellants.

v.

Mt. Nanhi—Plaintiff-Respondent.

S. A. No. 1586 of 1922, decided on 8th April, 1924, from the decree of the First Additional Subordinate Judge of Aligarh, dated the 16th May, 1922.

Co-sharers—Ouster, non-payment of profits may amount to.

If a tenant in common has not been in participation of the rents and profits for a considerable length of time and other circumstances concur, there may be ouster of the tenant in common. (*Corea* v. *Appuhamy*, (1912) A.C. 230, *Dist.*; 43 Mad. 244, *Expl.*) [P. 921, C. 1.]

M. L. Agarwala—for the Appellants.

D. C. Banerji—for the Respondent.

Judgment:—This appeal arises out of a suit for possession of a share in an occupancy holding and for damages. The suit was dismissed after a careful trial by the Munsif but decreed by the learned Additional Subordinate Judge and the defendants appeal. The case involves one question of fact and two of law. The original title depended on the question of fact whether the plaintiff's father was joint with or separate from the other branches of the family. The Courts below differed on this point. The finding of the lower appellate Court which must be accepted is that the plaintiff's father was separate and therefore his share descended to his daughter.

The main question of law is one of limitation. The suit is governed by article 142 of the Limitation Act and therefore it was necessary for the plaintiff to prove possession within twelve years. She alleged in her plaint that she was in possession of the share till the defendants took wrongful possession at the commencement of Fasli 1325 (para. 3 of the plaint), The learned Munsif found that she had in fact been out of possession for at least 31 years. Her father died 35 years ago and her mother not more than four years later and since then the plaintiff has never had actual possession of the share. The learned Additional Subordinate Judge does not differ from these findings. He gets over the difficulty by applying the doctrine of constructive possession and treating the possession of the defendants as possession on behalf of the plaintiff. He also says that as there is no proof of denial of the plaintiff's title and the plaintiff's name appeared in the revenue records within twelve years of suit adverse possession for twelve years is not established.

It appears to me that it is an abuse of the doctrine of constructive possession to apply it to the circumstances of the present case. The plaintiff's own case is that there has been an ouster as a result of which she claims considerable damages for

dispossession. The only question is when that ouster took place. She says that it was in Fasli 1325 within three years of the suit. In reality (for in the absence of any finding to the contrary I have no hesitation in accepting the finding of the trial Court on this point) it took place over thirty years before suit. The Ceylon Privy Council case *Corea* v. *Appuhamy* (1) which is relied on by the respondent was a case between brother and sister and it recognises that there are cases in which ouster may be inferred from the circumstances. In *Varatha Pillai* v. *Jeevaratnamal* (2) the Privy Council expressed a doubt whether the rule of possession by one co-owner applies to sharers in an unpartitioned agricultural village in India who are not members of a joint family, but without deciding the point they quote with approval the rule laid down *Culley* v. *Doed Taylerson* (3) that even where the rule is applicable, if a tenant in common had not been in participation of the rents and profits for a considerable length of time and other circumstances concur the Judge may direct the jury to consider whether in the circumstances they will not find that there has been an ouster. In this case it is common ground that there had been an ouster at the time of the suit. The plaintiff said that it took place in 1325 fasli. That case is false. The actual ouster was when the defendants took exclusive possession of the holding on the death of Ram Sahai's widow. Under these circumstances to say that they were holding possession on the plaintiff's behalf is in my opinion to apply a legal fiction quite at variance with the facts of the case.

I accoringly allow the appeal and setting aside the decree of the Court below restore the decree of the trial Court with costs in all Courts.

Appeal allowed.

(1) (1912) A.C. 230=86 L.J.P.C. 151=105 L.T. 896 (P.C.)
(2) (1920) 43 Mad. 244=46 I.A. 285=38 M.L.J. 318=27 M.L.T. 6=22 Bom. L.R. 144=18 A.L.J. 274=24 C.W.N. 346=58 I.C. 901 =(1919) M.W.N. 724=10 L.W. 679 (P.C.)
(3) (1840) 11 A. & E. 1008=3 P. & D. 599=9 L.J. Q.B. 288.

1924 Allahabad 921.

DANIELS, J.

Mt. Champa Kunwar—Plff.-Appellant.

v.

Tulsi Ram and others—Defendants-Respondents.

S. A. No. 1590 of 1922, decided on 8th April, 1924, from the decree of the Additional District Judge of Aligarh, dated the 8th July, 1922.

Abadi—Transfer.

A sale to another tenant is just as much an infringement of the Zamindar's right as a sale to a person residing outside the village, unless the *Wajib-ul-arz* expressly permits such a transfer. [P. 939, C. 1.]

Panna Lal—for the Appellant.

K. N. Katju and *Saila Nath Mukerji*—for the Respondent.

Judgment.—This was a suit brought by the plaintiff Zamindar for possession of a house. The Court below, overruling the trial Court, has dismissed the suit, and the plaintiff appeals. The house was occupied by a tenant who has made a gift of it to the defendant. One of the defences was that the defendant's vendor had quitted the village twenty years before and that the house escheated to the Zamindar. The Court below remitted issues to the trial Court. The findings on those issues were in favour of the appellant. No objections were taken within the time allowed but the learned Additional Judge nevertheless went into evidence and overruled the findings of the trial Court on the facts. There is some authority in favour of his right to do so but I am constrained to remark that if such a practice became common the procedure of allowing a time within which objections to the findings must be taken would be reduced to a useless farce.

However there is no need to go into this question as the judgment of the learned Additional Judge is clearly wrong on the second issue. That issue is whether the tenant had a right to sell his house together with a right of residence. Apart from special contract it is well settled that no such right exists in an agricultural village. This was laid down as far back as 1898 in *Sri Girdhariji* v. *Chota Lal* (1) and followed in *Muhammad Usman* v.

(1) (1898) 20 All. 248=(1899) 8 A.W.N. 27.

Babu (2), *Faiyaz Ali* v. *Rekhab Das* (3), only modifies the previous rulings to this extent that it is open to the tenant to prove a special custom allowing a right of sale. In this case the *Wajib-ul-arz* is quoted by the Additional Judge. The custom which it records gives the tenant who is resident in the village no right to do more than sell the materials of his house. It does not recognise his right to convey his right of residence to the purchaser. The learned Judge admits the law to be as stated above but finds that it does not apply to a sale by one tenant to another tenant. There is no warrant for making any such distinction. A sale to the Zamindar himself has been in some cases recognised as valid on the ground that the prohibition against a transfer is for the benefit of the Zamindar and if he likes to waive the prohibition he is at liberty to do so. There is no infringement of his right. But a sale to another tenant is just as much an infringement of the Zamindar's right as a sale to a person residing outside the village. The learned Judge at the conclusion of his findings mentions that there are four instances of sales by tenants. He does not say that these instances establish a custom, and clearly they could not do so. Indeed three of the four instances were, as the learned Munsif points out, transfers to the Zamindar himself. The learned Munsif was therefore right in decreeing the suit subject to payment of the price of the materials of the house.

I set aside the decree of the Court below and restore the decree of the Munsif with costs in all courts.

Appeal allowed.

(2) (1911) 8 A.L.J. 61=9 I.C. 314.
(3) (1921) 19 A.L.J. 104=61 I.C. 24.

1924 Allahabad 922.

NEAVE, J.

Bhaun Pratap Singh—Plaintiff—Appellant.

v.

Bhagwan Singh and others—Defendants—Respondents.

S. A. No. 1595 of 1922 decided on 14th April 1924 from a decree of the Judge of the Court of Small Causes of Allahabad, dated 18th July, 1922.

Civ. Pro. Code, S. 11—Subject matter being different.

Where the groves in later suit are different from the grove which formed the subject of the previous litigation and it could not be said that the matter in issue in later suit between the parties was directly and substantially in issue between them in the former litigation. *Held* S. 11 did not apply. [P. 923, C. 1.]

Haribans Sahai—for the Appellant.

P. L. Banerji and J. N. Dutt—for the Respondents.

Judgment:—This is a second appeal by the plaintiff, and his learned advocate states that the matter will not be taken further, whatever the decision of this court may be. The suit was for partition of certain groves in which the plaintiff claimed one half share. The genealogy appended to the plaint shows that the parties are descendants from a common ancestor, Aman Singh who has several sons. The plaintiff is the descendant of one of these sons, Pancham Singh, and the defendants are the descendants of another son, named Harnam Singh. Defendants Nos. 1 & 2, who are the sons of Harnam Singh's son Jawahir Singh, have admitted the plaintiff's claim but defendants 3, 4, 9 and 10, who are descended from another son of Harnam Singh, contested the claim. The remaining defendants did not put in an appearence. The appellant's case was that originally all the parties were members of a joint Hindu family. Some 40 years ago, separation took place, but the groves belonging to the family were not divided. The groves in suit continued to be recorded in the name of Harnam Singh, until in 1325 Fasli defendants 1 & 2 got the appellant's name entered in respect of a half share of the groves in suit. The other defendants, however, denied the appellant's title and disputes arose. The appellant accordingly filed this suit for partition.

The defence was that the property belonged to Harnam Singh's branch alone and the plaintiff had no right to it. It was also pleaded that the suit was barred by limitation, as the plaintiff has never been in possession. The first court decreed the suit, but the lower appellate court dismissed it, holding that the groves belonged entirely to the branch of Harnam Singh alone. Two points only have been argued in appeal: the first that the matter is *res judicata*, the second that, as defendants 1 & 2 confess judgment the appellant should at

least get a decree from their share in the property.

It is in evidence that in 1910 there was a dispute among the descendants of Harnam Singh over the groves. This was referred to arbitration, and Sitla Bakhsh, the father of the plaintiff appellant was one of the arbitrators. On the 6th July, 1910, an award was made granting a one quarter share to the present defendants 1 and 2. Later on a creditor of defendant 1 got half the share in another grove (not one of those now in suit) attached and brought to sale. It was purchased at action by the plaintiff appellant and the contesting defendant instituted a suit to recover three quarters of the property, claiming that the whole grove had belonged to Harnam Singh's branch. The present plaintiff, who was defendant in the suit, pleaded that he was the owner of half the grove in his own right and that he was entitled to the other half as purchaser at the auction-sale. The Munsif decreed the suit holding that the groves had belonged to Harnam Singh's branch of the family alone, but on appeal the District Judge took the view that half the grove belonged to the plaintiff in his own rights as a descendant of Pancham Singh and that he got only one eighth of it at that auction.

It is contended that this decision operates as *res judicata* in the present suit for though the subject matter of the suit is not the same, the matter in issue is substantially the same. In support of this contention the learned Advocate for the appellant relies on 14 Calcutta L.J., page 212 (sic) and 4 Allahabad, page 55. With this view I am unable to agree, as the groves now in suit are different from the grove which formed the subject of the previous litigation; and it cannot be said that the matter now in issue between the parties was directly and substantially in issue between them in the former litigation.

Turning to the other point raised, it is difficult to see why the plaintiff should not have been allowed a decree as against defendants 1 and 2. The lower appellate Court has found that they are colluding with the plaintiff and the history of the case supports this view; but it is nowhere denied in the written statement of the other defendants that defendants 1 and 2 are entitled to a share in the groves in suit, nor does it appear that the other defendants would in any way be prejudiced by the granting of a decree against defendants 1 and 2 from their share of the property.

The appeal is dismissed as against all the defendents except 1 and 2 Bhagwan Singh and Teji Singh, and against them a decree for partition of one half of their one quarter share in the groves in dispute is granted to the appellant. No order as to costs against defendants 1 and 2.

Appeal allowed in part.

---

* 1924 Allahabad 923.

NEAVE, J.

Ambika Prasad Singh and others—Plaintiffs-Appellants.

v.

Ram Kishen Barnawar and others—Defendants-Respondents.

S. A. No. 1599 of 1922, decided on 16th April, 1924, from the decree of the District Judge of Azamgarh, dated 26th of June, 1922.

Co-sharers—Possession—Decree for joint possession may be refused in proper cases.

A person who was entitled to joint possession but had not obtained such possession might get a decree for joint possession but there may indeed be cases in which the Court may not deem it reasonable in the interests of all the parties concerned to make a decree for joint possession. Where the plaintiffs have an equally satisfactory remedy and where the plots in dispute have for many years past been cultivated by the defendant alone. *Held*, plffs. should not be granted a decree. (34 All. p. 150, *Foll.*) [P. 924, Cs. 1 and 2.]

N. P. Asthana and *K. Verma*—for the Appellants.

P. L. Banerji—for the Respondents.

Neave, J.:—This is a plaintiffs' appeal. The suit was for joint possession over certain plots of land belonging to the defendants and the plaintiffs jointly. Other reliefs were prayed for, but these were not granted and do not form the subject of the present appeal. The first Court granted the plaintiffs a decree for joint possession, but the lower appellate Court, while holding in the plaintiffs' favour that they were entitled as joint owners, granted a decree for joint possession in respect of certain plots only. In respect of others it found that the defendants had been in possession for a long time and held that it would therefore be improper to give actual joint possession to the plaintiffs. It

accordingly modified decree of the lower Court in respect of these plots.

The learned Advocate for the appellants relies on a ruling of this Court in *Jagarnath Ojha* v. *Ram Phal* (1) in which it was held that a plaintiff who is entitled to possession jointly with other persons can be granted a decree for joint possession whether the plaintiff was originally in joint possession and was subsequently dispossessed or whether he had never been in possession. It is pleaded that all that the appellants want is to be allowed to execute their decree as provided in Order 21, rule 35 (2) by delivery of symbolical possession, and that the result of the lower appellate Court's refusal to grant them a decree will be that if they apply for partition or for profits, these will be denied them.

On the other side it is contended that this suit is no more than an ingenious method of depriving the respondents of their *Khudkasht* rights. They do not deny the appellants, joint proprietary title in the land but maintain that their proper remedy, if the respondents are in possession of more than their proportionate share, was to apply for partition or bring a suit for profits. If the present appeal is allowed it will result in the loss by the respondents of a part of the *Khudkasht* rights which they have acquired by long cultivating possession of the plots in suit.

The learned District Judge based his decision on two cases *Bisheshar Singh* v. *Hanuman Singh* (2) and *Sarbjit Singh* v. *Rajkumar Rai* (3). In both these cases however decrees for joint possession were granted.

In their plaint the plaintiffs made a number of allegations which have been found to be untrue claiming that they themselves had been in possession of the disputed plots but had been ousted by the respondents. Both the courts below have concurred in finding that this was not the case. In *Jagarnath Ojha* v. *Ram Phal* (1) the court though it held that a person who was entitled to joint possession but had not obtained such possession might get a decree for joint possession remarked that there may indeed be cases in which the Court may not deem it reasonable in the interest of all the parties concerned to make decree for joint possession, and was careful to say that the circumstances of the case before it were such as to entitle the plaintiff to a decree. I am unable to see that any such circumstances exist in the present case. In all of the three cases which have been referred to the plaintiffs were driven to come into court by the conduct of the defendants. In the present case the plaintiffs could have found an equally satisfactory remedy, by adopting the more normal procedure of suing either for profits or partition. The plaintiffs run no risk of suffering any loss by the order passed by the court below. Their proprietary title remains unaffected and their rights to share in profits are unaltered. No adequate reason has been shown for granting them a decree for joint possession in plots which have for many years past been cultivated by the defendants alone. The appeal fails and is dismissed with costs including this Court costs on the higher scale.

Appeal dismissed.

(1) (1912) 34 All. 150=8 A.L.J.1312=13 I.C. 79.
(2) (1921) 19 A.L.J. 780=63 I.C. 802.
(3) (1921) 19 A.L.J. 783=63 I.C. 806.

1924 Allahabad 924.

NEAVE, J.

Shin Prasad Singh and another—Plaintiffs-Appellants.

v.

Muneshwar Dube and others—Defendants-Respondents.

S. A. No. 1613 of 1922 decided on 16th April, 1924, against the decree of the Subordinate Judge, Jaunpur, dated 21st June, 1922.

Limitation Act, Art. 144—Burden of proof.

Where the title was shown to be with the plaintiffs. *Held* it was for the defendants to prove their adverse possession.

Evidence Act, S. 101.

Where evidence was given by both parties, *Held* the question of the initial onus loses its importance. [P. 925, C. 2.]

Haribans Sahai—for the Appellants.
N. Upadhya—for the Respondents.

Judgment:—This was a suit brought by the plaintiffs appellants for a declaration of their title to or, in the alternative, for possession of a moiety of Grove No. 1024. This grove admittedly belonged to Musai Singh and Gajraj Singh in equal shares until in 1864 Gajraj Singh's half was sold in execution of a decree and purchased by Hanwant Singh, the father of plaintiff No. 1. Hanwant Singh obtained formal possession, and at the settlement of 1882

the names of his representatives Bisheshar Singh and Sheo Baran Singh, cousin and elder brother of plaintiff No. 1, were recorded along with that of Musai Singh. It is further admitted that in 1908 Nankai Singh, a son of Gajraj Singh sold the half share now claimed by the appellants to defendant respondent No. 1 and that the other half, belonging to Musai Singh, was sold in 1915 to defendant No. 2. The appellants' case is that plaintiff No. 1 was away on Military Service for about 20 years and did not return to the village till six or seven years before the institution of this suit. He alleged that he and his minor nephew (plaintiff No. 2) had always been in possession of half the grove and that it was not till a dispute arose over a fallen branch of a tree that he discovered that the defendants had any claim to the property. He then applied for correction of the entry in the revenue papers but without success, and was, therefore, driven to file this suit in the Civil Court.

The main defence set up was that the plaintiffs had not been in possession since the settlement of 1882 and that the suit was barred by limitation. Both the Courts below have accepted this plea and have dismissed the plaintiffs' suit.

In appeal the only argument pressed has been that the burden of proof was wrongly thrown by the Courts below on the plaintiffs, who were called upon to show that they had been in possession within twelve years before the institution of this suit. Their learned Counsel, relying on the decision of the Privy Council in *Secretary of State* v. *Chellikani Ram Rao* (1) and a ruling of this Court in the case of *Jai Chand Bahadur* v. *Girwar Singh* (2) contends that as the title was shown to be with the plaintiffs, it was for the defendants to prove their adverse possession.

It certainly does appear that the onus was wrongly placed by the first Court, whose first issue was "Do the plaintiffs own any share of the disputed grove and have they been in possession thereof within 12 years next before the institution of the suit." But evidence was given by both parties and both Courts concurred in finding on this evidence that the defendants have proved their possession or that of their vendor ever since 1882. As both sides produce evidence the question of the initial onus loses its importance. The facts of this case distinguish it clearly from 41 Allahabad, where the defendant failed to prove his adverse possession.

In the present case there is a concurrent finding by two Courts that the respondents have been in possession of the share in dispute for much more than the requisite twelve years. This finding is one of fact and is largely based on the evidence of the plaintiffs' own witnesses, and it cannot be disturbed in second appeal.

One other argument was addressed to the Court, which does not appear distinctly in the grounds of appeal. This was that the possession of Nankai Singh was that of a co-sharer and could not therefore be adverse to that of the respondents. There is no force in this argument. The appeal fails and is dismissed with costs on the higher scale.

Appeal dismissed.

(1) (1916) 39 Mad. 617=43 I.A. 192=31 M.L.J. 324=20 C.W.N. 1311=(1916) 2 M.W.N. 224=14 A.L.J. 1114=20 M.L.T. 435=4 L.W. 486=35 I.C. 902=18 Bom. L.R. 1007 =25 C.L.J. 69 P.C.

(2) (1919) 41 All. 669=52 I.C. 636=17 A.L.J. 814.

1924 Allahabad 925.

LINDSAY AND SULAIMAN, JJ.

Mutsaddi Lal and others—Defendants-Appellants.

v.

Captain Dr. Kharag Bahadur Singh—Plaintiff-Respondent.

S. A. Nos. 1664 and 1665 of 1922 decided on 1st February, 1924 from the Decree of District Judge Saharanpur, dated 28th June, 1922.

(a) *Pre-emption*—Wajib-ul-arz.

Where the *wajib-ul-arz* of 1884 gave a right of pre-emption to Zemindars but that of 1868 would not show such right, *held*, that the presumption created by the *wajib-ul-arz* of 1884 was destroyed by that of 1863. [P. 926, C. 2.]

(a) *Pre-emption*—Wajib-ul-arz.

The mere fact that the *wajib-ul arz* records a right of pre-emption in favour of owners of contiguous villages does not by itself render the *wajib-ul-arz* useless as evidence of custom.

K.N. Katju—for Appellant.

Durga Prosad and P. L. Bannerji—for Respondent.

Lindsay, J.—These two appeals have arisen out of two separate suits for pre-emption which were brought with respect

to the sales of two items of property situated in a village called Purchitwala Birpur in the district of Dehra Dun.

The plaintiffs based their right of pre-emption upon a clause in the *wajib-ul-arz*.

The defendants denied the existence of custom. Both the courts below were of opinion that the custom existed, and after deciding some other question which arose for disposal, awarded the plaintiffs in each case a decree for pre-emption.

The vendees have now come here in appeal and the first point which has been taken on their behalf is that the courts below were erroneous in finding that a custom existed. After examination of the evidence on this point and the judgments of the courts below we are of opinion that this appeal ought to prevail. We think the decision of the courts below is erroneous.

It is apparent from the judgment of the learned District Judge that for the purpose of deciding this issue he looked only to one *wajib-ul-arz* which was filed before him and which according to its tenor was prepared in the year 1884.

According to this document a right of pre-emption is created in favour of certain classes of persons. The first class of pre-emptors according to this *wajib-ul-arz* are own brothers. The second class consists of co-sharers in the village, and the third class consists of the zamindar of contiguous villages. It is then declared that if these three classes refuse to purchase then the sale can be made to a stranger. (*ghair shakhs.*)

It was contended in the first place before us that the right of pre-emption which is recited in favour of the owners of contiguous villages is an extraordinary right and one which it is very unusual to find in records of custom. While this may be admitted, this fact by itself would not be sufficient in our opinion to render the *wajib-ul-arz* of no value as evidence of custom and we do not think that for this simple reason the *wajib-ul-arz* could be withdrawn from the purview of the ruling cited by the learned Judge of the court below, namely, *Digambar Singh* v. *Ahmad Sayed Khan*.

The learned Judge however omitted to notice (though the first court does notice in its judgment), that an earlier *wajib-ul-arz* of 1863 was filed in the case.

A reference to this latter document shows in the first place that there is no definite recital of a custom at all. There is indeed a mention of rights of pre-emption in a clause of the *wajib-ul-arz* which is headed *zikr integal haqiat* (recital of transfers of property). This clause begins by providing for a right of pre-emption in favour of near co-sharers (*hissedar karibi*).

The second class of pre-emptors are the co-sharers of the village, *hissedar deh*. After these two classes have had the offer transfers can be made to any person.

It has been pointed out by Dr. Katju that this clause *zikr inteqal haqiat*, contains reference to many other matters, and he claims that in view of the well-known rulings of this Court this record of 1863 ought not to and cannot be treated as a record of custom. There is no doubt that there are miscellaneous provisions in the clause in question and one of them amounts to a restraint upon the right of gift which could not possibly be the subject of a custom.

Apart from that it is important to notice that the scheme of pre-emption which is laid down in this document of 1863 is quite defferent from the scheme which is to be found in the document of 1884.

As will be observed in the later document the first right of pre-emption is given to own brothers irrespective of their being co-sharers or not, whereas in the 1863 document the first right of pre-emption is reserved to relations who are co-sharers. Then again, as has been pointed out, the class of pre-emptors recited in the document of 1884 under the name of zamindars of contiguous villages finds no place in the document of 1863.

We are constrained to hold therefore that any presumption of the existence of a custom which arises from the production of this *wajib-ul-arz* of 1884 has been destroyed by a reference to the earlier document of 1863. It seems to us that on these two documents it is impossible to conclude that there is clear and unambiguous evidence of the existence of this custom of pre-emption in the village in question. We decide accordingly.

The result, therefore, is that both these appeals are allowed and the decrees of the courts below are set aside and it is directed that both suits be dismissed with costs to the defendants in all courts including in this Court fees on the higher scale.

Appeals allowed.

*1924 Allahabad 927.

DANIELS, J.

Kundan Lal and another—Appellants

v.

Babu Jagat Ram—Respondent.

E. S. A. No. 1668 of 1922, dated 31st May, 1923, against the decree of the District Judge, Saharanpur, dated 13th July, 1922.

Civ. Pro. Code, S 11—Might and ought—Prior mortgagee omitting one of his several mortgages on the property in the written statement in a suit by puisne mortgagee—Right to enforce the same as against plaintiff, barred.

If the prior mortgagee is impleaded in a suit by the puisne mortgagee without his priority being recognised, he is bound to set up his prior charge as a ground of defence under explanation 4, S. 11 C. P. C. to the suit. Otherwise the mortgagee will obtain a decree entitling him to bring the entire property to sale and not merely the equity of redemption. [P. 927, C. 2.]

Balmukunda—for the Appellants.

S. A. Haider—for the Respondent.

Judgment:—This is an appeal in execution proceedings. The appellant Kundan Lal held a mortgage of the year 1905 upon the same property. He brought a suit on this mortgage and obtained a decree for sale in 1917. He now seeks to put that decree in execution and the court below, overruling the trial court, has held that he is precluded from doing so. The appellant Kundan Lal subsequently obtained a simple money decree against Ram Chandra the owner of the property. In execution of this decree he got the property proclaimed for sale subject to his mortgage decree of 1917 which was duly notified. The property was brought to sale and was purchased by the respondent Babu Jagat Ram on the 20th of January 1920. Between the date of the plaintiffs' decree and the date of the purchase of Jagat Ram a puisne mortgagee named Lachman Singh had brought a suit for sale of the property on the basis of his mortgage which was of December, 1913. To that suit Kundan Lal was made a party in respect of a prior mortgagee of January, 1913, which he held on the property. He failed to set up his mortgage of 1905, possibly thinking it unnecessary to do so as that mortgage had already merged in a decree for sale. The learned District Judge holds that Kundan Lal's failure to set up his mortgage decree in the suit brought by Lachman Singh precludes him from enforcing that mortgage against the respondent Jagat Ram. The ruling on which he relies—and there are other ruling to the same effect—lays down that if a prior mortgagee abstains from setting up his prior mortgage in a suit by the puisne mortagagee he cannot afterwards set up that mortgage against the puisne mortgagee or against the auction purchaser under a decree obtained on the puisne mortgage. There is no authority for applying the same rule to the case of a mortgagor. In this case the puisne mortgagee has apparently not attempted to execute his decree and certainly no sale has taken place under it. Kundan Lal on the contrary not only holds a decree for sale on the mortgage but Jagat Ram when he bought the property was fully aware of the existence of the prior charge and bought the property subject to it. There is no ground either of principle or authority on which the decree-holder can be debarred from executing his decree under the circumstances. The position of the puisne mortgagee and of the mortgagor with reference to a prior mortgagee is not analogous. To the puisne mortgagee the existence of a prior mortgage is of vital importance. He may lose his security altogether if the prior mortgage is enforced. In any case he is entitled only to what is left after the prior mortgage is satisfied. If therefore the prior mortgagee is impleaded in a suit by the puisne mortgagee without his priority being recognised, he is bound to set up his prior charge as a ground of defence under Explanation 4, section 11, C P.C. to the suit. Otherwise the mortgagee will obtain a decree entitling him to bring the entire property to sale and not merely the equity of redemption. But to the mortgagor the question of priority as between encumbrances all of which he is bound to pay is largely immaterial. His position is thus radically different from that of the puisne mortgagee who is only liable to satisfy charges having priority to his own.

It appears also, although the learned District Judge has not taken notice of the fact, that the question was really *res judicata* against the respondent. Jagat Ram's objection in which he maintained that the decree-holder had now no right to take out execution of the decree was filed on the 5th of January 1921. The decree-holder filed an answer to it, and the matter

was decided by the learned Munsif on the 7th of May 1921 by an order declaring that the objection had no force and dismissed it. An appeal was filed against that decision to the District Judge but was withdrawn on the 25th of August 1921, when the District Judge passed an order. "The appeal having been withdrawn is dismissed." The Munsif's order therupon became final. No doubt it has been found by the District Judge that the ground on which the Munsif dismissed the objection was erroneous, the ground being that the property now sought to be sold was different from that contained in Lachman Singh's decree. It is however the issue decided and not the reason for the decision which constitutes *res judicata*, and the question at issue was whether the decree-holder was by reason of not pleading his mortgage in the former suit precluded from executing his decree. After the Munsif's decision Jagat Ram put in an application that there was some confusion between the Khewat-numbers of the old and new settlements and asked that the Khewat-numbers of recent settlement might be exempted from sale. It is on the basis of the application that the orders now in appeal have been passed. For the reasons already given the appeal is allowed, the decree of the court below set aside and the decree of the trial court dismissing the objection is restored with costs in all courts.

Appeal allowed.

1924 Allahabad 928.

DALAL, J.

Sheo Kumar Pandey—Plff-Appellant.

v.

Babu Nandan Dube—Defdt-Respodt.

S.A. No. 1677 of 1922 decided on 22nd April 1924, against the decree of the Subordinate Judge of Jaunpur, dated the 20th May 1922.

Civ Pro. Code, O. 34, R. 1—Non-joinder.

Non-joinder of necessary parties is not fatal to the suit. [P. 928, C. 2.]

H. Mushtaq Ahmad—for the Appellant.

Harnandan Prasad—for the Respondent.

Judgment.—Plaintiff now appeals here to obtain a decree for sale. He holds a usufructuary mortgage in his favour executed by the defendant Babu Nandan. The first Court refused to give him a decree on the ground that the property belonged to three brothers, Babu Nandan, Janardan and Rain Bharose and the two latter were not party defendants to the suit. Its opinion appears to be that under Order 34, rule 1, if necessary parties are not brought on the record a suit for sale must fail. The lower appellate Court paid no heed to this argument and held that the suit for sale failed because the plaintiff acquired that remedy only in case of dispossession. The argument of the lower appellate Court is certainly untenable. The words of the document are:—"*Kuchb fitur Waqe howe*" in obtaining possession. They do not convey the idea that the mortgagee must first take possession and only on his dispossession he was entitled to sue for sale. He would be equally entitled in case there was difficulty in obtaining possession and the lower appellate court itself has admitted that there would be difficulty because the land was owned by several co-sharers.

The learned counsel for the respondent relied upon the argument of the first Court that the suit was liable to dismissal under Order 34 rule 1. That rule however does not state what is to happen if necessary parties are not joined and it is made subject to the provisions of the Code. A previous provision of the code is contained in Order 1 rule 9 that 'no suit shall be defeated by reason of the misjoinder or non-joinder of the parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it.',

The lower courts were therefore at liberty to order the sale of the defendants' interest in the land in suit.

The prayer for possession was not pressed here.

In the result I decree the plaintiff's suit for sale. A decree in the usual form shall be prepared and six months time shall be granted from to-day's date for deposit of money due in the first court. Interest at bond rate shall run up to that date and subsequently simple interest at 6 per cent. per annum. On non-deposit of the money the defendant's right in the mortgaged property shall be sold. The plaintiff appellant shall receive his costs throughout.

Appeal allowed.

1924 Allahabad 929.

LINDSAY AND SULAIMAN, JJ.

Benaik Rao and others—Plaintiffs-Appellants.

v.

Putain Singh—Defendant-Respondent.

F.A. No. 287 of 1921, decided on the 6th February, 1924, from the decree of the Subordinate Judge of Mainpuri, dated the 15th April, 1921.

(a) *Civ. Pro. Code, S. 105—Plea.*

Order setting aside *ex parte* decree cannot be challenged in appeal from the decree in the suit. 24 All. 464; 25 All. 280; 3 A.L.J. 30; 14 A.L.J. 610, *Foll.*; 34 All. 590, *Dist.*

(b) *Hindu Law—Alienation—Legal necessity.*

Expenses for marriage of daughter of a separate co-parcener are not necessary.

(c) *Transfer of Property Act, S. 51—Attestation before Transfer of Property Act.*

In case of mortgage deed executed prior to the coming into force of the Transfer of Property Act no question of attestation can arise. [P. 931, C. 2.]

(d) *Transfer of Property Act, S. 81, Scope.*

In the case of the representative of the mortgagor himself no question of contribution arises. [P. 931, C. 2.]

(e) *Mortgage—Interest runs in absence of contrary contract.*

Where there is no provision in the mortgage deed that interest would cease to run after expiry of a certain period the ordinary presumption is that money was lent and interest was agreed to be charged all along. 19 All. 39; 20 All. 171, *Foll.* 11 A.L.J. 829. *Dist.* [P. 932, C. 1]

S. N. Sen and *Baleshwari Prasad*—for the Appellants.

Iqbal Ahmad and *S. N. Gupta*—for the Respondent.

Judgment:—This is a plaintiff's appeal arising out of a suit on the basis of a mortgage deed, dated the 14th of November, 1873. The deed in question was executed by Deota Prasad, his two nephews Raghubir Singh and Kur Lal and Musammat Ugar Kunwar, the widow of his deceased brother Prag Dat. It was in favour of Jwala Prasad and Bansi Dhar the predecessors-in title of the present plaintiffs. The mortgage deed was executed for a sum of Rs.3,000 and was payable in ten years with interest at the rate of 13 annas 4 pies per cent per mensem. Out of Rs. 300 due on account of interest, Rs. 200, if not paid within the next six months, were to be compounded after the expiry of each such period. We may also point out one of the covenants of the deed under which it was stipulated that each of the three sets of mortgagors would be entitled to redeem his share of the mortgaged property on payment of a proportionate share of the mortgage debt.

There was a prior mortgage by conditional sale under which the two villages mortgaged under the deed of 1873 had also been mortgaged. It is an admitted fact that in the year 1894 the present plaintiff, in whose favour the previous deed of 1871 had stood, obtained a foreclosure decree in respect of one of the two villages mortgaged under the deed of 1873. Accordingly the present claim is confined to the remaining village.

The present suit was instituted on the 6th of August, 1910, within the extended period of limitation. No written statements were originally filed, and it was decreed *ex parte* on the 5th of June 1911. On the 16th December, 1912, an application for setting aside the *ex parte* decree was filed on behalf of all the representatives of the mortgagors, the principal defendants on the record, except Mahendra Singh, and the decree on that application was set aside. We may note here that Putain Singh the present defendant respondent, was treated at that stage of the proceedings as a minor and was represented by a guardian *ad litem*. After the decree had been set aside a written statement by four of the defendants was put in but ultimately the case was compromised and a compromise was filed in Court on the 18th November, 1913. This compromise was incorporated in a decree, dated the 19th November, 1913. As against the other defendants the suit was heard and decreed on the merits. A final decree for foreclosure was passed on the 14th April 1917.

In the year 1918 Putain Singh put in an application for setting aside the decree passed against him on the allegation that in fact he had been a major all along and had been wrongly treated as a minor. He alleged that he had had no notice of the suit and that the entire decree was therefore a nullity as against him. Objections were raised to this application on behalf of the plaintiffs and evidence was led on both sides. The main issue which the learned Subordinate Judge took upon himself to consider was as to whether Putain Singh had been properly represented as a minor. On the 2nd January, 1919, the learned

Subordinate Judge passed an order setting aside the decree as against Putain Singh and restoring the case to the pending file as against him only. This was done because he came to the conclusion that Putain Singh had really not been a minor and had been wrongly treated as a minor.

After the case had been restored so far as Putain Singh is concerned evidence was led again by the plaintiffs. The suit was ultimately decreed in part against Putain Singh. The plaintiffs have come up in appeal and press their entire claim against the defendant Putain Singh.

We may at the outset refer to one point which has been raised in appeal. The learned Advocate for the appellant wanted us to go into the evidence and consider whether the finding of the learned Subordinate Judge that Putain Singh was in fact a minor, was or was not correct. On the other hand, the learned Advocate for the respondents has called our attention to a number of cases of this Court in which it has been laid down that as in such an order there was no error, defect or irregularity affecting the decision of that case the point cannot be opened. We are satisfied that this has been the view taken in the previous cases of this Court *vide* the case of *Gulab Kunwar* v. *Thakur Das* (1), *Tasadduq Husain* v. *Hayat-un-nissa* (2), *Kunja Mal* v. *Gauri Skankar* (3) and *Niddha Lal* v. *The Collector of Bulandshar* (4).

The case relied upon by the learned Advocate for the appellants, namely, 34 All. 590, is clearly distinguishable inasmuch as there an application for revision had been presented and the question had not been raised in an appeal from the final decree. We are therefore of opinion that we must accept the view taken by the learned Subordinate Judge that Putain Singh had in fact been major. There is no irregularity or defect in the procedure.

Coming to the merits of this case we may point out that the mortgage-deed in question was executed by three sets of persons. The learned Subordinate Judge has found that these three branches of the family were separate and the learned Advocate for the respondents has in express terms conceded that he is not prepared to challenge that finding. The result therefore is that we must take it that one-third share belonging to Deota Prasad, one-third share belonging to Kure Lal and Raghubir Singh and one-third share in the possession of Musammat Ugar Kunwar inherited by her from her deceased husband had been mortgaged under this deed. So far as the one-third share of Deota Prasad is concerned it is manifest that the present defendant respondent is not entitled to challenge it on the ground that it was not for any legal necessity. Deota Prasad being separate from the other members and having no son or any person joint with him was the absolute owner of his property and was entitled to mortgage it for any reason he pleased. We have already pointed out that the right of each set of the mortgagors to redeem his one-third share was fully preserved. The plaintiffs' claim as against the one-third share of Deota Prasad cannot be seriously disputed. The result will therefore be that Putain Singh will be entitled to redeem this one-third share on payment of one-third of the entire amount due on the mortgage-deed with interest up to date. The question of interest we shall hereafter consider separately. In case of default of payment this one-third share shall stand foreclosed.

As to the interest of Kure Lal and Raghubir Singh we are of opinion that Putain Singh is entitled to put the plaintiffs to proof of necessity for this mortgage debt. Raghubir Singh was the grandfather of the plaintiff. It is true that the plaintiff himself was not born at the time of the mortgage deed, nevertheless there were other members in his family who were then alive. His right to challenge this transaction therefore cannot be disputed. Under the mortgage deed there were three items which were borrowed: Rs. 946 were received in cash in order to pay off the money due under a decree against Musammat Ugar Kunwar. Rupees 450 were required to pay off the arrears of instalments on account of a mortgage-deed (of the year 1871) which had been executed by Prag Dat as well as the other male mortgagors. And a sum of Rs. 1,604 was paid in cash. There is no evidence on the record to show that the decree against Musammat Ugar Kunwar was anything but a personal decree against her. We are therefore unable to hold that Kure Lal and Raghubir Singh were in any

(1) (1902) 24 All. 464 = 1902 A.W.N. 136.
(2) (1903) 25 All. 280 = 1903 A.W.N. 39.
(3) (1905) 3 A.L.J. 30 = 1905 A.W.N. 274 = 1 M.L.T. 52.
(4) (1916) 14 A.L.J. 610 = 35 I.C. 209.

way bound to pay it off or to undertake liability therefor. As regards the sum of Rs. 1,604 the learned Subordinate Judge has found that on the plaintiffs' own showing this sum was required in connection with the expenses of the marriage of Mussammat Ugar Kunwar's daughter. Such a marriage though a necessity for Mussammat Ugar Kunwar, should not be considered to be a necessity for Kure Lal and Raghubir Singh, who had been separate from her deceased husband. We are therefore of opinion that *qua* this one-third share the defendant Putain Singh is not bound to pay this amount. The result therefore is that so far as the one-third share of the defendant's branch is concerned it can be redeemed by him on payment of one-third of Rs. 450 with interest up-to-date. In default of payment of this sum this share also will stand foreclosed.

Coming to the one-third share which was in the possession of Mussammat Ugar Kunwar, we may note that the first item of Rs. 946 which was due under a decree is an item for which there is no other direct evidence as to the exact necessity. The learned Advocate for the appellants has asked us to presume after this long lapse of time, specially having regard to the consent given by the other reversioners that this item must have been borrowed for necessity. If there had been any recital in the deed showing the nature of the necessity we might have made that presumption. There is however only this fact that a decree had been passed against Mussammat Ugar Kunwar. We do not know under what circumstances this decree had been passed and to what extent she was liable under it. We are therefore unable to differ from the view taken by the learned Subordinate Judge that this item cannot be held to have been incurred for legal necessity. On the other hand, we are unable to appreciate the reasoning on which he has disallowed the sum of Rs. 1,604. The plaintiffs' case was that this sum had been incurred in order to meet the expenses of the marriage of the daughter of Musammat Ugar Kunwar. In support of this case the plaintiffs produced two witnesses, Patrakhan and Lachmidhar, whose statements were that this sum was required for the expenses of the marriage. So far as Patrakhan is concerned the learned Subordinate Judge distinctly believed his testimony in connection with the execution of the document by the lady. He went on to remark that this witness had also stated that this sum was required for the expenses of the marriage of the daughter and then added:—

"It would thus appear that excepting the amount of Rs. 450 the rest of the money under the mortgage in suit was taken by Mussammat Ugar Kunwar for her sole use."

The other witness Lachmidhar has not been referred to by him at all. Our attention has been drawn to a subsequent mortgage-deed, dated the 14th of March, 1883 under which Raghubir Singh had borrowed a sum of money for the expenses of the marriage of a daughter of this daughter. As the learned Subordinate Judge has believed the evidence of Patrakhan and as it is most likely that the other male members of the family would not have joined in the execution unless they had been satisfied that this large sum was being borrowed for some urgent necessity we are of opinion that this sum should be allowed.

We may note here that the learned Subordinate Judge had recorded a finding that the plaintiffs had failed to prove that the mortgage-deed in question had been attested in the manner required by law. This finding has not been supported by the learned Advocate for the respondent. In fact the mortgage-deed was executed prior to the coming into force of the Transfer of Property Act and no question of attestation really arises. The learned Advocate for the respondent has not disputed the finding that Mussammat Ugar Kunwar had actually executed this deed and borrowed this sum.

The last argument urged on behalf of the respondent is that inasmuch as the plaintiffs themselves had foreclosed one village in the year 1894 they are not now entitled to throw the entire burden of the mortgage debt on the remaining village. In our opinion this contention has no force. In the first place, the defendant Putain Singh is the representative of the mortgagor himself and is not a transferee from the mortgagors. No question of contribution therefore at all arises. In the next place the mortgagee was entitled to recover his debt by foreclosure of any part of the mortgaged property. One village has already been forclosed on the strength of the prior deed and in our

opinion the plaintiff can now foreclose the remaining village for amount due on the second deed.

The other question that remains is one of interest. The learned Subordinate Judge came to the conclusion that interest at the contract rate would run only for the period of ten years fixed in the mortgage-deed, and that thereafter there was no stipulation for payment of any interest and the utmost amount which the plaintiffs could get would be interest for six years prior to the suit by way of compensation.

We are unable to agree with this view. There is admittedly no provision in the mortgage-deed under which it was stipulated that interest would cease to run after expiry of ten years. The ordinary presumption is that money was lent and interest was agreed to be charged all along. There is an express provision for payment of interest at a fixed rate at the expiry of the term. There is also a condition in the deed that.

"If we fail to pay up the money the mortgagees shall have power to foreclose the property mortgaged in lieu of the *entire* amount due to them."

There is also a covenant to pay compound interest at the contract rate on default of payment of interest. We are therefore unable to distinguish this case from that reported as *Mathura Das* v. *Raja Narain-dar Bahadur* (5) or *Bindesri Naik* v. *Ganga Saran Sahu* (6). The learned Subordinate Judge has relied on a case reported in 11 A.L.J. 829. In that case it was pointed out that the question depended on the proper interpretation of each document. The learned Chief Justice who delivered judgment in that case distinguished it in the later case in 24 I.C. 674. We are therefore satisfied that the intention of the parties must have been that interest would be payable even after the expiry of the time fixed and that there was no stipulation on behalf of the mortgagees that interest would cease to run as soon as the ten years expired. It is true that the mortgagees have waited for all these years in bringing the suit for foreclosure; on the other hand, the mortgagors also have not thought fit to redeem it earlier. In our opinion the interest therefore at the contract rate will be charged up to the date fixed for payment.

The result therefore is that the decree of the Court below is modified to this extent that as against Putain Singh, defendant-respondent a preliminary decree for foreclosure in the ordinary form against one-third share of Deota Prasad on payment of one-third of the total amount due under the mortgage-deed with interest at the contract rate up to the date to be fixed by this Court's decree (which will be six months from the present day) will be given.

As against the one-third share of Raghubir Singh and Kure Lal there will be a preliminary decree for foreclosure in the ordinary form on payment of one-third of Rs. 450 with interest at the contract rate up to the date fixed for payment. In default the property will be foreclosed.

As against the one-third share of Mussammat Ugar Kunwar there will be a preliminary decree for foreclosure on payment of one-third of Rs. 450 with interest up to the date fixed for payment plus Rs. 1,604 with interest at the contract rate up to the date fixed for payment at the same rate. In case of default the property will be foreclosed.

This modification of the decree is only in favour of Putain Singh, defendant-respondent. So far as concerns the other defendants, who are parties to the compromise decree, as against whom the decree has not been set aside and a final decree has been passed, their rights and liabilities will be determined by the former decree and will not be affected by the present decree. As the appeal has succeeded in part and failed in part we direct that the plaintiffs appellants shall get half their costs incurred here and in the Court below since the date of the restoration against Putain Singh, who will bear his own costs.

Decree varied.

(5) (1897) 19 All. 39=23 I.A. 138=1 C.W.N. 52 =6 M.L.J. 214=7 Sar. 88 (P.C.).

(6) (1898) 20 All. 171=25 I.A. 9=2 C.W.N. 129 =7 Sar. 273 (P.C.).

* 1924 Allahabad 933.

LINDSAY AND KANHAIYA LAL, JJ.

Baldeo Prasad and others—Defendants-Appellants.

v.

Raja Fateh Singh and others—(Plffts.) Respondents.

F. A. No. 350 of 1921, decided on 28th February, 1924, from the decree of the Subordinate Judge of Shahjahanpur.

Hindu Law — Widow—Gift — Widow has greater powers of disposal for religious purposes and small portion can be gifted for such purposes.

A Hindu widow has a larger power of disposition for religious or charitable purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes. Where the value of the property gifted to a priest at Gaya by *suphal sankalp* bears a very small proportion to the total value of the property which the widow had inherited from her husband. *Held*, the gift in valid and binding on the reversioners. [P. 934, Cls. 1 & 2.]

Surendra Nath Sen—for the Appellants.

Gulzari Lal and *Shiva Prasad Sinha*—for the Respondents.

Kanhaiya Lal, J:—The dispute in this appeal is confined to a 13 biswas and odd share in the village Chalautha which was held by Mst. Chetni, the widow of Kanhai Lal, and the questions for consideration are whether she had made a valid *suphal sankalp* of the same in favour of Lachman Prasad, a priest of Gaya, so as to bind the members of the family, to which her husband belonged or his reversionary heirs.

Kanhai Lal had died in the lifetime of his father Shib Dayal. The allegation of the plaintiffs was that Shib Dayal and Kanhai Lal lived separately, that the property in dispute was the separate property of Kanhai Lal, and that on his death it devolved on Mst. Chetni as a Hindu widow. They denied that any gift had been made or could have been validly made by Mst. Chetni in favour of Lachman Prasad. Shib Dayal, died in 1902. Mst. Chetni, died in 1916. One of the plaintiffs, Ram Lal, claimed to be the son of one of the sisters of Kanhai Lal, and also claimed to have acquired by purchase the shares of the sons of the other sisters of Kanhai Lal. The other plaintiff, Raja Fateh Singh, claimed to have purchased a half share of the property in question from Ram Lal. There were two other plaintiffs, who claimed to have derived their title under a deed of gift made by Ram Lal and Raja Fateh Singh. The defendants are the transferees and successors-in-interest of Lachman Prasad. Their case was that Shib Dayal and Kanhai Lal lived jointly, that after the death of the latter the property in dispute was entered in the name of Mst. Chetni, his widow, who remained in possession as an adverse owner, and that she had a right to make a valid gift of the same for the spiritual benefit of her deceased husband. They denied that the plaintiff, Ram Lal, or the persons from whom he claimed to derive his title were the nearest reversionary heirs of Kanhai Lal.

The Court below found that Shib Dayal and Kanhai Lal lived separately, that the property in dispute was the self-acquired property of the latter, that on the death of Kanhai Lal Mst. Chetni inherited the same as a Hindu widow and that she could not have acquired an adverse title thereto. It further held that no gift was shown to have been made or could have been validly made by Mst. Chetni in favour of Lachman Prasad and that the plaintiffs, as the lawful successors-in-interest of her husband had a right to recover possession of the property in question.

The correctness of these findings is challenged here. There can be no doubt that Ram Lal and his vendors were the nearest reversionary heirs of Kanhai Lal. The evidence on the record satisfactorily establishes that Shib Dayal and Kanhai Lal lived separately and carried on a separate cloth business and that the property in dispute was the self-acquired property of the latter. In fact on the death of Kanhai Lal an application was made by Mst. Chetni for a succession certificate to collect certain debts due to her deceased husband. Shib Dayal resisted that application on the ground that Kanhai Lal lived jointly with him: but District Judge of Shahjahanpur who heard the application came to the conclusion that Shib Dayal and Kanhai Lal lived and carried on business separately, that each of them was assessed to income tax, and that Mst. Chetni was entitled to collect the debts due to her husband. Shib Dayal took no steps thereafter to establish his title against Mst. Chetni by a suit and allowed Mst. Chetni to remain in separate possession of the disputed property from

the time of the death of her husband. Indeed her name was recorded in the place of her deceased husband in respect of the disputed property in the revenue papers and she was in receipt of the profits of the same on her account. She had only a life interest in the said property ; but she could alienate any reasonable portion of the same for pious or religious purposes or for the spiritual benefit of her husband.

As pointed out in *Khub Lal Singh* v. *Ajodhya Misser* (1) a Hindu widow has a larger power of disposition for religious or charitable purposes, which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes. In *Lachhman Kunwar* v. *Durga Kunwar* (2) a gift made by a Hindu widow for the spiritual benefit of her husband after she had returned from a pilgrimage, was upheld, and in *Gobind Upadhya* v. *Lakhrani* (3) a similar gift made by a widow on her return from a pilgrimage to Gaya was treated as valid and binding on the reversionary heirs of her husband.

The question, therefore, is whether such a gift was really made. The evidence produced on behalf of the defendants appellants to prove that a gift had been made by Mst. Chetni in favour of Lachman Prasad, a priest of Gaya, has, in our opinion, been rejected by the learned Subordinate Judge on insufficient grounds. Raghubar Dayal states that he went with Shib Dayal and Mst. Chetni to Gaya about 35 or 36 years ago and that the gift was made in his presence by both of them in favour of Lachman Prasad. No deed of gift appears to have been written at the time. But there was a mutation of names effected in pursuance of an order of the 13th February 1885 in favour of Lachman Prasad. A copy of an extract from the mutation register has been filed in proof of that entry. There is no satisfactory explanation why this mutation of names was effected in favour of Lachman Prasad, if no gift had been made in his favour. The learned Counsel for the plaintiffs refers to the written statement of the defendants appellants, wherein the gift aforesaid is stated to have been made after the death of Shib Dayal. Being vendees from the transferees of the original donee, it is possible that they may have been misinformed as to the actual date of the gift. The extract from the mutation register shows that the transfer must have been made some time before the 13th February, 1885.

Shib Dayal was then alive. He never challenged the gift or the right of the donee or his transferees in his lifetime. Ram Lal states that there was a priest of Gaya named Lachman Prasad who lived at one time in Pawayan. Lachman Prasad transferred his rights in favour of Khaga Lal and Ram Lal, who resold the same to the defendants appellants on the 24th December, 1897. The gift aforesaid is in our opinion satisfactorily established and the plaintiffs have no right to recover possession from the donee or his transferees.

The evidence adduced by the plaintiffs goes to show that Kanhai Lal was possessed of considerable property. Sita Ram one of the witnesses for the plaintiffs states that Kanhai Lal had property worth Rs. 30,000 or 40,000—Ajudhya Prasad another witness states that he had property of the value of Rs. 50,000, Puttu Lal another witness estimates the value of the property of Kanhai Lal at Rs. 60,000 or Rs. 70,000 including groves and *muafi* land. Ram Lal one of the plaintiffs himself states that the landed property of Kanhai Lal yielded an income of Rs. 500, or Rs. 600 per year. The property comprised in the above gift is assessed at a revenue of Rs. 93 5-4. The plaintiff valued it at Rs. 3,000, but a property yielding approximately a profit of about Rs. 100 a year could not have been of that value in 1885. It is not clear what was the revenue assessed on that property at that time. In 1897 it was sold for Rs. 595 and that value bears a very small proportion for the total value of the property which Mst. Chetni had inherited from her husband.

The appeal must, therefore, be allowed and the claim with regard to the 13 biswas and odd share of the village Chilauta dismissed with costs here and hitherto to the defendants appellants including fees in this Court on the higher scale.

Appeal allowed.

(1) 1916) 43 Cal. 574 = 31 I.C. 438 = 22 C.L.J. 345.
(2) (1918) 40 All. 619 = 16 A.L.J. 646 = 46 I.C. 596.
(3) (1921) 43 All. 515 = 63 I.C. 221 = 19 A.L.J. 499.

1924 Allahabad 935.

STUART, J.

Mt. Faiz Bibi—Plaintiff-Appellant.

v.

Qudrat Ullah and another—Defendants-Respondents.

S. A. No. 1755 of 1921, decided on 15th November, 1923, against the decree of the 1st Additional District Judge of Aligarh dated 7th June, 1921.

Muhammadan Law—Death illness—Carbuncle in case of person of eighty is death illness.

Where a man over eighty years of age had been suffering from a carbuncle, *Held* that his illness came under the category of death illness. [P. 935, C. 2.]

Iqbal Ahmad—for the Appellant.

S. Abu Ali—for the Respondents.

Judgment:—The remand findings have now been received. They are to the effect that the deed in suit was executed during the death illness of Sadal Khan. Much that has been said by the learned District Judge who has arrived at the remand findings would go to show that Sadal Khan was not in a condition to know what he was executing on the date when the alleged deed of gift is said to have come into being. But it is not open to the court to arrive at a decision to the effect that he was not in a condition to know what he had executed, in view of the finding of Mr. Hunter. That finding cannot be attacked in second appeal. On the remaining point, however, as to whether the deed is of no effect under the doctrine of *Marz ul-mout* it is for this Court to arrive at a finding. The deed was executed on the 23rd August, 1919. From the copy produced and from the evidence it appears that it was not signed by Sadal Khan but that it bore his thumb impression. Sadal Khan died according to the plaintiff-appellant on the 27th August, 1919. and according to the defendants respondents on the 2nd September, 1919. There is no finding of the courts as to when he died. He was a very old man of over 80. He was suffering from a carbuncle. According to the evidence of Mumtay Khan Hakim, which Mr. K. C. Banerji believes Sadal Khan was delirious some days before his death. The point which I have to decide is whether on the finding of Mr. Banerji the deed is invalid under the doctrine of *Marz-ul-mout*. Sadal Khan was certainly suffering at the time from a disease which was the immediate cause of his death. The disease was such as to incapacitate him from the pursuit of his ordinary vocation or standing up for prayers. In a man of his advanced age such an illness was always likely to end fatally and it is impossible to conceive that such a possibility would not have been present to his mind. The presence of a carbuncle is always dangerous even in a middle aged man of robust health and is occasionally fatal and a carbuncle is very frequently the cause of death in the aged. Any Indian of advanced years would know this and would be apprehensive when suffering from such an ailment as to its possible consequences. Applying the principles that were laid down in *Husorat Bibi* v. *Ghulam Jafar* (1) the disease from which Sadal Khan was suffering undoubtedly came within the category of a *Marz-ul-mout* illness. I therefore accept the findings of Mr. Banerji and upon these findings I allow the appeal. I restore the decision of the learned Munsif, setting aside the decision of the District Judge. The defendants Qudratullah and Amanullah will pay their costs and those of the appellant in all courts. These costs will include in this Court fees on the higher scale.

Appeal allowed.

(1) (1898) 3 C.W.N 57.

1924 Allahabad 935.

KANHAIYA LAL, J.

Kundan Lal and another—Defendants—Appellants.

v.

Basant Rai—Plaintiff—Respondent.

S.A. No. 1782 of 1921, dated 19th April, 1923, against the decree of the District Judge of Shajanpur, dated 5th July, 1921.

U. P. Land Rev. Act (III of 1901) S. 4—Rights of lambardar to sue the co-sharers—Agra Tenancy Act, S. 165.

A lambardar can sue the other co-sharers of the village, who hold sir or Khudkasht land, for a refund of the whole of the profit which they may have realised in excess of their share and not only to the extent of the share of the lambardar in such excess. S. 165 of the Agra Tenancy Act (II of 1901) does not exclude the general authority, which the lambardar possesses to represent his co-sharers in such a litigation. [P. 936, C. 2.]

Gulzari Lal and *Harnandan Prasad*—for the Appellants.

G. Agarwala—for the Respondent.

Judgment:—Basant Rai is the sole respondent in the appeal. The question for

consideration in this appeal is whether a lambardar can sue the other co-sharers of the village, who hold sir or Khudkasht land, for a refund of such profits as they may have realised in excess of their share.

The suit was filed by the lambardar in this instance against two co-sharers Kundan Lal and Misri Lal, who have been found to have held *Kkudkasht* land in excess of their share. The court of first instance confined its decree to the share of the lambardar in such excess. The lower appellate court allowed the decree for the entire excess. One of the defendants appellants died during the pendency of this appeal and his heirs did not apply for substitution within the time allowed by law; his appeal, therefore, has abated. The other appellant wants to contest the right of the lambardar to realise anything in excess of his share, as a co-sharer, under section 165 of the Agra Tenancy Act (II of 1901). A lambardar is not merely a co-sharer but also the agent of the other co-sharers and he is authorised to represent them in all transactions appertaining to the administration of the mahal and the collection of its profits. Section 4 of the U. P. Land Revenue Act (III of 1901) defines a lambardar as co-sharer of a mahal appointed to represent all or any of the co-sharers in that mahal. If he were not authorised to collect the rents from all the tenants he would obviously not be in a position to render accounts to his co-sharers under section 164 of the Agra Tenancy Act in such a manner as to close the determination of his and their liability for the period in question with any finality. If he is entitled to collect the rents from the co-sharers, he is equally entitled to charge any of the co-sharers, who may hold *Khudkasht* land in excess of their share, with a liability for the excess. On behalf of the surviving defendant appellant, a reliance has been placed on the decision in *Bishamber Nath* v. *Bhola* (1). But the correctness of that decision has been questioned in a later decision in *Ganga Singh* v. *Ram Sarup* (2) where, referring to the above decision, the learned judges who decided the latter case observed, (page 225).—"It seems to us that if the case of *Bishamber Nath* v. *Bhola* (1) was rightly decided, it follows that the lambardar could not even sue a tenant for rent without joining all other co-sharers. There is no special section in the Tenancy Act which provides for a suit by a lambardar as such against a tenant, and yet we know that it is the regular practice in lambardari villages that the lambardars sue the tenants for rents and that it is frequently made a ground for making them liable upon the gross rental that they have neglected to bring such suits. If the lambardar is the agent of the co-sharer to bring a suit for rent, he seems to be equally their agent for the purpose of bringing a suit against co-sharers who hold *sir* and *Khudkasht* in excess and who have refused to allow the *sir* and *Khudkasht* which they hold, to be taken into account." It is well recognised that in an undivided mahal a co-sharer is entitled as against the lambardar to have taken into account the profits of the *sir* and *Khudkasht* land held by the other co-sharers in the village; and if he is so entitled the lambardar ought to have the right to collect such profits as any of his co-sharers may have realised in excess of their share either from the tenants or from the *sir* and *Khudkasht* land in their possession taken together. Section 165 of the Agra Tenancy Act (II of 1901) does not exclude the general authority, which the lambardar possesses to represent his co-sharers in such a litigation.

It is also urged that claim about 1324 Fasli is barred by limitation. The suit was filed on the 30th July, 1920. It ought to have been filed within three years from the date when the right to accounts accrued and the share of the profits became payable. According to the *dastur dehi* the accounts are to be rendered in *Asarh* which ended in that year on the 4th July 1920. The suit for 1324 Fasli was therefore, barred by limitation.

The appeal is, accordingly allowed in so far that the claim for 1324 Fasli will stand dismissed, as for as it affects the surviving defendant appellant, with proportionate costs appertaining thereto. The rest of the decree of the lower appellate court will stand confirmed. The successful defendant appellant will get $\frac{1}{3}$ of his costs from the plaintiff respondent who will get $\frac{2}{3}$ of his costs from the surviving defendant appellant in this Court.

Appeal partly allowed.

(1) (1912) 34 All. 98=12 I C. 920=8 A.I.R. 1243.
(2) (1916) 38 All. 223=33 I.C. 119=14 A.L.J. 252.

* **1924 Allahabad 937.**

MUKERJI AND DALAL, JJ.

Ram Chander and another—Plaintiff-Appellants.

v.

Mt. Bhagwati alias *Bhagwan Dei and another* (*Plaintiff*) *and Lachmi Narain* alias *Lachhman Das and others*—Defts.-Respondents.

F. A. No. 373 of 1921 decided on 8th April, 1924, from the decree of the Subordinate Judge of Aligarh, dated 16th June, 1921.

Transfer of Property Act, S. 55 (1) (j)—Express contract excludes statutory contract.

Where the contract was as follows:

"We our heirs and representatives have no sort of claim or title left to the property sold. If God forbid, any person comes forward as partner or co-sharer and brings a claim or if an encumbrance etc; is found in respect of the whole or part of the property sold and as a result of the claim the property passes out of the possession of the vendees, we, the vendors shall under that circumstance, pay to the vendees aforesaid the consideration of this sale deed to the extent the property sold passes out of their possession together with the costs which may be incurred by them." *Held* there can be no doubt that at the time of the sale contract, the question did arise as to what would happen if a prior encumbrance, not mentioned in the sale deed was discovered. *Held further* the express covenant excluded the statutory covenant and therefore vendees cannot recover the amount paid to discharge a decree on a prior mortgage. [P. 938, C. 1.]

P. L. Banerji—for the Appellants.

N. P. Asthana and *Panna Lal*—for the Respondents.

Mukerji, J.:—The sole question involved in this appeal is the interpretation of a clause of the sale deed.

The facts are these:—The predecessors-in-title of the plaintiffs obtained a sale deed from some of the defendants and the predecessors-in-title of others on 24th January 1907 for a sum of Rs. 6,500. It was stated in the sale deed that the property was subject to only one encumbrance of Rs. 4,000. It was further stated that there was no other encumbrance, and if any party either as a co-sharer or as an encumbrancer laid a claim and if, as the result of such a claim, any portion of the property was lost, the vendors would indemnify the vendees to the extent of the whole of the purchase money in case the whole of the property was lost, or in the case of a partial loss, to the extent of a proportionate amount of the purchase money.

What happened later on was this: A certain lady, Mt. Parbati, brought a suit for the recovery of a large sum of money by sale of the property sold on foot of a mortgage, dated 3rd December, 1882. It is stated in one of the grounds of appeal, and it is not denied by the other side, that the suit was dismissed by the Court of first instance on the ground that this ancient mortgage had been paid off. On appeal, however, this Court held that the mortgage subsisted and a decree was made for sale of the property. The result was that the plaintiffs had to pay a large sum of money amounting to Rs. 13,000 and odd. They, accordingly, instituted the suit out of which this appeal has arisen for the recovery of the amount paid by them with interest and interest *pendente lite*.

For the defendants it was urged in the Court below, and it is urged in this Court, that the vendees took an express contract in place of the statutory contract to be found in section 55 (1) (*g*) of the Transfer of Property Act and that they are not entitled to recover anything.

As we have stated, the sole question for determination is whether the express contract in the sale deed excludes that statutory contract mentioned above.

We have already stated what the contract was. The contract has been translated in the paper book as follows:—

> "We our heirs and representatives
> "have no sort of claim or title left
> "to the property sold. If, God for-
> "bid, any person comes forward as
> "partner or co-sharer and brings a
> "claim, or if an encumbrance, etc.,
> "is found in respect of the whole,
> "or part of the property sold, and
> "as a result of the claim the pro-
> "perty passes out of the possession
> "of the vendees, we, the vendors,
> "shall, under that circumstance,
> "pay to the vendees aforesaid the
> "consideration of this sale-deed to
> "the extent the property sold
> "passes out of their possession,
> "together with the costs which
> "may be incurred by them".

There can be no doubt that at the time of the sale contract, the question did arise as to what would happen if a prior encumbrance, not mentioned in the sale-deed was discovered. There can be no doubt that

the parties tried to solve the question. It was agreed that the vendors would pay a proportionate amount, not exceeding the total sale price, if any portion of the property was lost on account of a claim on a prior encumbrance. It appears to us that this express covenant excluded the statutory covenant already referred to. It has been urged on behalf of the plaintiffs-respondents that the parties really did not contemplate the position which has now arisen, that is to say, they did not contemplate that there would be a decree for sale under a prior encumbrance and the vendees would pay off that mortgage. But in our opinion, this and many other contingencies could have arisen on account of a prior encumbrance. For example, a prior encumbrance might have been by way of conditional sale. It could have been argued with equal force, that such a contingency was not contemplated by the parties. But we have clearly, in the sale-deed, the covenant that in the case of a prior encumbrance being discovered what would happen. The parties substituted a written contract for the statutory contract and in our opinion they cannot throw away the written contract and rely on the statutory contract.

The result is that, in the circumstances that have happened, the plaintiffs are not entitled to any relief at all. No portion of the property has passed out of the hands of the vendees; therefore, the circumstances in which alone they could claim damages have not arisen.

It seems to us that the vendors never contemplated that they would be called upon to pay anything more than the purchase price. This clearly shows they never contemplated that they would be called upon to pay such a large sum as has been claimed.

The result is that we set aside the decree of the Court below and dismiss the suit of the plaintiffs with costs in both Courts. The costs in this Court will include counsel's fees on the higher scale.

Appeal allowed.

1924 Allahabad 938.

KANHAIYA LAL, J.

Mt. Islam Fatima—Defendant-Appellant

v.

Syed Tamiz Ali—Plaintiff Respondent.

S.A. No. 1606 of 1921, 2nd May, 1923, from the District Judge, Bijnore, dated 30th June, 1921.

Transfer of Property Act, S. 55—Registration Act, S. 52—Passing of title—Consideration—Money inflated.

When the consideration money in the sale-deed was a little over-stated, to safeguard the purchaser from pre-emption, with the result that the vendor refused to affix her thumb-impression below the registration endorsement, but the document was presented for registration by the purchaser who had signed below the registration endorsement as required by S. 52, Registration Act, *held*: the document was duly registered and it passed a good title to the purchaser. (23 Bom. 525 30 All. 125 and 36 Mad. 8, *Ref.*). [P. 939, C. 1.]

M. A. Aziz—for the Appellant.

Ibni Ahmad—for the Respondent.

Judgment:—This appeal arises out of a suit brought by the plaintiff-respondent for the possession of certain property said to have been sold by defendant No. 1, through defendant No. 2 who is her husband, to the plaintiff. The sale was effected on the 31st December, 1918. The sale-deed was presented for registration on the 2nd January, 1919. On that date the registering officer went to the house of defendant No. 1 and asked her whether she had executed a sale-deed. She admitted having done so; but when the terms of the sale-deed were read over to her, she said she had agreed to those terms except in so far as the amount of consideration payable to her was over-stated in the sale-deed. The consideration specified in the sale deed was Rs. 1,250 but the lady stated that she had agreed to sell the property in question for Rs. 1,100. The plaintiff asserted that the sale had been settled for Rs. 1,250 and that he had already paid Rs. 150 by executing a promissory note in favour of defendant No. 2.

It appears that the property sold was a share in a certain village, in which the parties were also co-sharers. The courts below found that for fear of pre-emption the plaintiff wanted that the sale consideration should be stated at Rs. 1,250 in the sale-deed while the vendor insisted that the correct amount of the consideration

payable to her should be entered. The result of the dispute between the vendor and vendee at the time of the registration of the sale-deed was that the vendee refused to pay the sale-consideration but the registration of the sale-deed was all the same effected, and the vendor refused to affix her thumb impression below the registration endorsement and to deliver possession over the property in question.

The only question for consideration in this appeal is whether in those circumstances a good title had passed to the plaintiff. The Courts below found that in spite of the question of the consideration money payable to the vendor the plaintiff had acquired a good title to the property conveyed by the sale. On behalf of the defendant-appellant, it was urged that the plaintiff had repudiated the sale in the form in which it was agreed upon and that his only remedy was now to sue for the specific performance of the contract of sale. But as the court below observed though the sale consideration was settled at Rs. 1,100 only and the sale consideration in the sale-deed was inflated, there was no defect in the registration of the transaction and the plaintiff had acquired a good title. There was in fact no repudiation of the sale; the plaintiff agreed to every term mentioned by the vendor; he merely wanted an extra sum of Rs. 150 entered in the sale-deed as a part of the consideration for his protection against any possible claim for pre-emption. Its inclusion did not vitiate the sale. As held in *Sagaji* v. *Namdev* (1) and *Rajnath Singh* v. *Pattu* (2) in a sale of immoveable property mere non-payment of the purchase-money would not prevent the passing of the ownership from the vendor to the purchaser and the purchaser can, notwithstanding such non-payment, maintain a suit for the possession of the property.

In *Subbair* v. *Moniam* (3) where a sale was effected for an ostensible consideration of Rs. 300 but the real consideration for the deed was a promise by the husband of the vendee that he would maintain the vendor for the rest of his life, it was held that the mere fact that the price was not paid in the manner stated in the sale-deed would not prevent the passing of the land by sale from the vendor to the vendee after the sale-deed had been executed and registered. There refusal of the lady to affix the thumb impression below the endorsement after the plaintiff had agreed to pay the purchase money, did not also affect the validity of the registration, because the document was presented for registration by the vendee whose signature below the presentation endorsement was only obtained as required by section 52 of the Indian Registration Act of 1908. In spite of the small difference between the parties as to the amount of sale consideration which was to be entered in the sale-deed the sale was for all intents and purposes complete and effectual.

The appeal, therefore, fails and is dismissed with cost including fees in this Court on the higher scale.

Appeal dismissed

(1) (1899) 23 Bom. 525=1 Bom. L.R. 5.
(2) (1908) 30 All. 125=5 A.L.J. 96=(1908) A.W.N. 38.
(3) (1911) 36 Mad. 8=10 M.L.T. 51=(1911) 2 M.W.N. 6=10 I.C. 546=21 M.L.J. 800.

---

* 1924 Allahabad 939.

MUKERJI AND DALAL, JJ.

(*Shaikh*) *Muhammad Nuh*—Defendant-Appellant

v.

Brij Behari Lal and others—Plaintiffs-Respondents.

F.A. No. 405 of 1921, decided on 16th April, 1924, against the decree of the Officiating Subordinate Judge of Allahabad, dated 29th of September 1921.

(a) *Hindu law—Widow—Alienation—Consent of only male reversioners raises presumption of legal necessity.*

The consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction affords presumptive proof which if not rebutted by contrary proof, will validate the transaction as a right and proper one. Such a presumption does not however arise when the reversioners who joined in the transfer were ladies or life-holders. (14 M.I.A. 176; 5 Bom. 563; 25 Bom. 129; 35 C. 1036, *Foll.*) [P. 941, C. 2.]

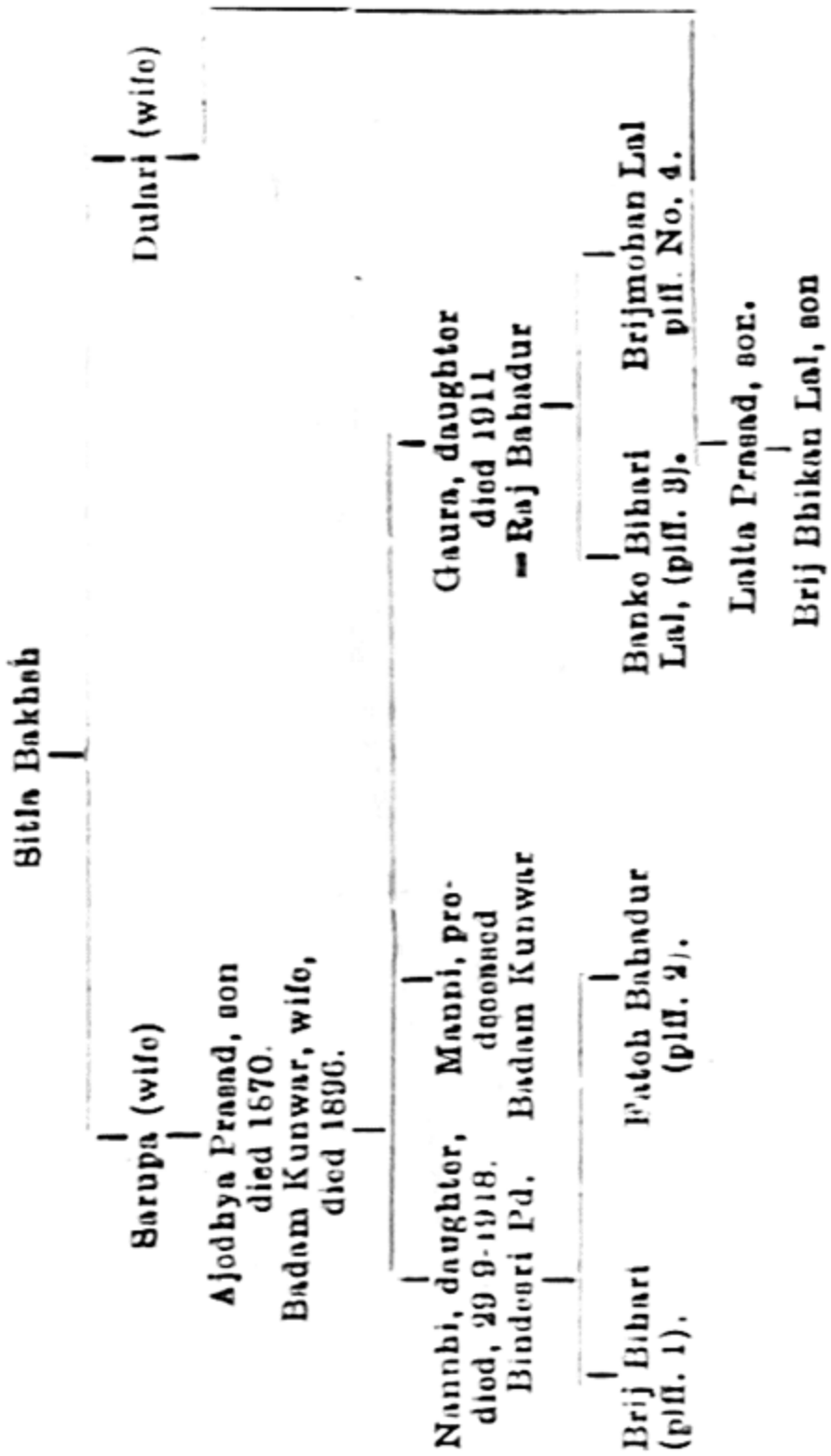
(b) *Hindu law—Alienation—Legal necessity.*

After lapse of many years recital, coupled with circumstances, may be sufficient evidence to support the deed of alienation; therefore inquiry should be made by Court as to the nature of the recitals and the circumstances existing at the time those recitals were made. (44 Cal. 186, *Expl. and Appl.*) [P. 942, C. 2.]

B. E. O'Conor, J. N. Chaudhri, S. N. Sen and *M. A. Aziz*—for the Appellant.

K. N. Kitju and *P. L. Banerji*—for the Respondents.

Mukerji, J :—It will be useful to give below a pedigree showing the relationship of the plaintiffs among themselves and with the transferors of the property in suit which is in dispute in this case :—



The plaintiffs are the sons of two daughters of one Ajodhia Prasad who died in 1870. At the time of his death he left a widow Mussmmat Badam Kunwar and three daughters Mussmmat Nannhi, Mussmmat Manni and Mussmmat Guara. Brij Bihari the eldest of the plaintiffs is a son of Mussmmat Nannhi who died on 28th September, 1918. Plaintiffs sued for the possession of certain properties which were transferred by Mussammat Badam Kunwar on 17th February, 1877, to one Abdul Majid, a Subordinate Judge at the time and his two wives. Abdul Majid and his wives were in possession of the property and the present holder of the property is the defendant Shaikh Muhammad Nuh, son of Abdul Majid. The three daughters and two distant reversioners, Lalta Prasad and his son Brij Bhikan Lal, joined in making the transfer. Lalta Prasad was step-brother of Ajodhia Prasad. The case of the plaintiffs was that Brij Bihari was in existence at the time of the transfer in 1877 and the ladies could only transfer their life interest. On the death of Musammat Badam Kunwar her daughters, Nannhi and Gaura, became entitled to a life interest in the property as Manni had predeceased her mother. Musammat Gaura, died in 1911 and the right of the plaintiffs to sue for possession came into operation on the 28th of September, 1918 on the death of Musammat Nannhi.

The defence was that none of the plaintiffs was born in 1877 when the transfer was made and as the transfer was made by the life-holder and all the then existing immediate and presumptive reversioners the sale was binding on the plaintiffs. There was a further plea that the sale was effected for legal necessity. There were other pleas with which we are not concerned in this appeal. The learned Subordinate Judge, in a judgment of considerable merit, held on all these points in favour of the plaintiffs and decreed their suit.

The points urged here in appeal by Shaikh Muhamad Nuh's learned Counsel were :—

(1) That Brij Bihari was not in existence in the year 1887. (2) That the transfer, having been made by the life-holder with the consent of all the immediate and presumptive reversioners existing at the time, passed a full title to Abdul Majid.

(3) That at this distance of time, the recitals in the deed which went to show legal necessity, should be accepted as good evidence, and the burden lay on the plaintiffs to disprove the existence of legal necessity, and

(4) that legal necessity was proved, having regard to the evidence obtainable after the lapse of so many years.

As regards Brij Bihari's age it is satisfactorily proved that he was in existence in 1877. It is true that his horoscope which was admittedly prepared soon after his birth was not produced but an explanation of the non-production, has been offered by him. When he was entered at school his age on admission in September, 1889 was given as 16. Having regard to the manner in which the age of a person is counted among Indians this would place the birth of Brij Bihari some time in 1874 (Ex. 31. p. 67). The record of his career at the Kayasth Pathshala shows that he

failed in the entrance examination in 1892. He appears to have been a dull boy at school and if his birth is placed after February, 1877, he would be just about 15 years of age at the time of his appearance for his entrance examination. This was not likely to happen except in the case of boys whose career at school has been brilliant. When Brij Bihari Lal took up service the date of his birth was given as 1st November, 1874. In 1877 Musammat Nannhi his mother was 28 years of age according to the registration endorsement on the sale-deed in suit, and as a woman who had borne children, it is not likely that she would be without a child at that age. As regards the oral evidence there is the testimony of a witness for the defence, Ram Sahai, that at the time he gave evidence in 1921 Brij Bihari was 2 or 3 years less than 50. That statement would also fix the year of the plaintiff's birth at 1874. It was argued by the appellant's learned Counsel that the witness made a vague statement in cross-examination. If the cross-examination be read it would be seen that the witness had a very good idea of time. He fixed the death of Ajodhya Prasad at a time 50 years prior to 1921 which would be correct as Ajodhya Prasad, died in 1870. He not only stated that Brij Bihari was 2 or 3 years less than 50 but relatively to the marriage of Gaura Bibi he stated the time when Brij Bihari was born.

On behalf of the plaintiffs, Monmohan Lal, 70 years of age in 1921 and a family friend, deposed that Brij Bihari was born 3 or 3½ years after the death of Ajodhya Prasad, that is, after 1870. Another witness, Shiam Kishore, about 80 years of age, and a relation of the family stated, that Brij Bihari was born 4 or 5 years after Ajodhya Prasad's death. This Shiam Kishore is father of Raj Bahadur who was married to Musammat Gaura. There is no evidence on behalf of the defence in conflict with this overwhelming evidence to prove that Brij Bihari was born in 1874, that is, prior to the execution of the sale-deed in suit.

Next we come to the question of legal necessity and how it is to be considered. It was first argued that there was a presumption of legal necessity as the three daughters of Badam Kunwar and the distant reversioners were parties to the deed. The presumption however is not strong in the present case because Brij Bihari was in existence at the time of the transfer and the daughters of Badam Kunwar were young at the time and capable of bearing children who would ultimately be full owners of the property in suit. The learned Counsel for the appellant relied on the Privy Council case of *Rangasami Gounden* v. *Nachiappa Gounden* (1) where one of the results summarised by their Lordships was "When the alienation of the whole or part of a estate is to be supported on the ground of necessity, then, if such necessity is not proved *aliunde*, and the alienee does not prove enquiry on his part, and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction, will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one."

In the present case the one important person Brij Bihari who was to be expected to be interested to quarrel with the transaction was not a party to it. There are cases of the Bombay and Calcutta High Courts based on the Privy Council ruling in *Kooer Goolab Singh* v. *Rao Kurun Singh* (2) which lay down that such a presumption does not arise when the reversioners who joined in the transfer were ladies or life-holders. The first case which we may refer to is that reported at (*Varjivan Ranki* v. *Ghelji Gokul Das* (3), In this case the widow had made alienation with the consent of her daughter Bai Vakhat, and the Court observed:

"Nor can the mere concurrence of Bai Vakhat although the nearest in succession (having regard to the state of dependence in which all women are supposed by Hindu Law to have their being) be regarded as affording the slightest presumption that the alienation was a justifiable one."

It may be mentioned that in this Bombay case Bai Vakhat would have been full owner of the property on her succeeding thereto. This view was reiterated by the Bombay Court in *Vinayak* v. *Govind* (4) and followed by the Calcutta High Court

(1) (1919) 42 Mad. 513=46 I.A. 72=36 M.L.T. 5=26 M.L.J. 493=17 A.L.J. 536=29 C.L.J. 539=50 I.A. 498=21 Bom. L.R. 610=23 C.W.N. 777=(1919) M.W.N. 262=10 L.W. 105 (P.C.)

(2) (1871-72) 14 M.I.A. 176=10 B.L.R. 1=2 Suther 474=2 Sar. 722 (P.C.)

(3) (1881) 5 Bom. 563.

(4) (1901) 25 Bom. 129=2 Bom. L.R. 820.

in *Benin Behari Kundu* v. *Durga Charan Banerji* (5). In the Calcutta case also the learned Chief Justice referred to the position of dependence of women in India and refused to hold that their joining as reversioners in a transfer by a Hindu widow raised any presumption of the validity thereof. As already pointed out, Lalta Prasad and Brij Bhukan were very distant reversioners with very small hope of reversion, having regard to the youth of the three daughters of Badam Kunwar existing in 1877. On a point of law therefore we are of opinion that there is no presumption of legal necessity in favour of the defendant appellant and the evidence on the record must be examined without any bias in the defendant's favour.

It was pointed out by the appellant's learned Counsel that it was no fault of the defendant that the matter was delayed so long before it was brought to Court. On this ground he desired sympathy of the Court with the position of the defendant who would find considerable difficulty in proving the validity of a transaction nearly 50 years old. At the same time, it may be remarked, that it was not the fault of Brij Bihari that the litigation was delayed. A suit for declaration could be brought by him only before he attained the age of 21 when presumably he would not have sufficient funds to start upon an expensive litigation. If he was not capable of bringing a suit for declaration before he attained the age of 21 he had to wait till the reversion fell to him on the death of the last surviving daughter of Jagdam Kunwar. This happened in September, 1918 and the suit was instituted about two years later in November 1920. The learned Counsel, on account of the great lapse of time since the transaction, submitted that the declaration made in the deed of sale should be accepted by the Court at its face value. Reference was made to the observations of Their Lordships of the Privy Council in *Banga Chandra* v. *Jagat Kishore* (6). At page 196 of the report those remarks are printed:—

"But in such a case as the present their Lordships do not think that these recitals can be disregarded nor, on the other hand can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof the facts."

Then they refer to the lapse of time leading to the disappearance of evidence and proceed to observe :—

"It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that the enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital coupled with such circumstances, would be sufficient evidence to support the deed".

We have therefore to enquire as to the nature of the recitals and the circumstances existing at the time those recitals were made. In the present case when we come to examine the contents of the document we find that the vendee, a man learned in law, has not confined himself to a narration of the actual existing circumstances of the time but has taken pains to stop all possible attack in future on the transfer. First of all the deed starts with a declaration that Musammat Badam Kunwar alone, on purchase of the property *benami* in the name of one Lala Chandi Din became owner of the property. In case this should not prove correct, it is recited that on the death of Ajodhya Prasad Badam Kunwar alone became full owner and not only a life-holder. A third position is then taken up that if Musammat Badam Kunwar was considered to be the life-holder there was the consent of all the near and distant relations to the transfer and so the transfer will enure as of full title. Even if the consent of the reversioners be not sufficient then a detail is given of alleged legal necessities which led to the making of the transfer by a Hindu widow. Obviously the vendee did not believe in all these recitals which were only put in by way of precaution to ward off every possible attack. At the time of the sale there was a mortgage of Rs. 2,000 on the property executed by the *benami* holder Chandi Din. No mention is specifically made in the sale-deed as to why that mortgage had been executed. The amount due at the time of the sale on that mortgage is not stated. The recital

(5) (1908) 35 Cal. 1086=12 C.W.N. 914=8 C.L.J. 120.

(6) (1916) 44 Cal. 186=43 I.A. 249=20 M.L.T. 335=31 M.L.J. 563=24 C.L.J. 487=21 C.W.N. 225=(1916) 2 M.W.N. 336=4 L.W. 458=36 I.C. 420=18 Bom. L.R. 868=14 A.L.J. 1103=1 Pat. L.W. 1=10 Bur. L.T. 177 (P.C.)